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PROCEEDINGS OF THE NINTH COLLOQUY ON EUROPEAN LAW
Complutense University, Madrid 2-4 October 1979

THE LIABILITY OF THE STATE
AND REGIONAL AND LOCAL AUTHORITIES FOR DAMAGE CAUSED BY THEIR AGENTS AND ADMINISTRATIVE SERVICES

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ERRATA

FOREWORD

The fifth paragraph, second sentence should read as follows:

"After a welcoming speech by the Rector of the Complutense University, Professor A VIAN ORTUÑO, ..."

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Please read the title as follows:

"LIABILITY IN SPANISH LAW by Mr Jesus LEGUINA, Faculty of Law, San Sebastian"

THE LIABILITY OF THE STATE

Proceedings of the

Ninth Colloquy on European Law

Complutense University, Madrid

2-4 October 1979

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FOREWORD

The Council of Europe is a privileged forum for the comparative study of legal problems in contemporary European society. In order to investigate in depth the present situation, the trends and public policies with regard to specific questions, the Council of Europe has organised since 1969 a series of Colloquies on European Law, each year in a different country.

The theme of the ninth colloquy, held from 2 to 4 October 1979 at the Faculty of Law of the Complutense University of Madrid was: "The liability of the State and regional and local authorities for damage caused by their agents and administrative services".

The colloquy was chaired by Professor Eduardo GARCIA DE ENTERRIA (Madrid). The vice-chairmen were Mr A BERENSTEIN (Lausanne) and Professor R F V HEUSTON (Dublin).

It was attended by 35 participants designated by the member States and by Finland, the Max-Planck-Institut für auslandisches öffentliches Recht und Völkerrecht (Heidelberg) and the Association Internationale de la Fonction Publique (Avignon), as well as a large number of observers from the host country, Spain. English, French and Spanish were used as working languages.

The opening session on 2 October was presided by the Minister of Justice of Spain, Mr I CAVERO LATAILLADE. After a welcoming speech by the Rector of the Complutense University, Professor E TIERNO GALVAN, the representative of the Council of Europe, Mr F W HONDIUS, read a message to the colloquy from the new Secretary General of the organisation, Mr F KARASEK. He also presented an overview of the Council of Europe's work in the legal field.

At the first working session, Professor E GARCIA DE ENTERRIA outlined the main questions which the colloquy was to consider. While the principle of compensation for damage caused by public authorities was a regular feature of the legal systems of all the member States, there were many differences in their approach to this problem: fault liability vs strict liability, proceedings in civil courts or administrative courts, direct or subsidiary liability of the State, areas immune from any liability, general national régimes vs regional sub-systems, etc.

At the following working sessions, papers were presented by four rapporteurs, each of whom dealt with a topic peculiar to the law of his country. The presentations were followed by comments from the other rapporteurs and the participants and a general debate.

The subjects of the papers were the following:

- The field of application of the liability
  (Rapporteur: Professor Dr B BENDER, Law Faculty of the University of Freiburg i Breisgau)

- The basis of the liability
  (Rapporteur: Professor J LEGUINA, Law Faculty of San Sebastian University)

- The extent of the compensation
  (Rapporteur: Dr H R SCHWARZENBACH, Judge at the Administrative Court of the Canton of Zurich)

- The party responsible
  (Rapporteur: Professor H W R WADE, QC, Master of Gonville and Caius College, Cambridge)

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Additional national reports were submitted by several delegations and information on the just satisfaction system under Article 50 of the European Human Rights Convention was provided by the Secretary General's representative. Reference was also made to the case law in this matter of the European Economic Community.

At the closing session on 4 October, a general report was presented by Mr F SCHOCKWEILER, Government Adviser at the Ministry of Justice of Luxembourg.

During the colloquy, the participants enjoyed the social hospitality of the Minister of Justice, the Diputación of the Province of Madrid, the Mayor of Madrid and the Spanish delegation to the colloquy.

The results of the colloquy have been communicated, through the European Committee on Legal Co-operation (CDCJ), to the Committee of Ministers of the Council of Europe.

At its 316th meeting (10-11 March 1980) the Committee of Ministers decided to authorise the publication of the present volume of proceedings which is meant to serve as a reference document for governments, legislators, legal practitioners and scholars of law.

The Committee of Ministers also decided to include a European activity in this field in the work programme of the Council of Europe. The Committee of Experts on Administrative Law (CJ-DA), charged with drafting the relevant rules for inclusion in an international instrument, began its work on this question in October 1980.

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OPENING SESSION

2 OCTOBER 1979

MESSAGE

from

Mr Franz KARASEK
Secretary General of the Council of Europe

on the occasion of the opening session of the
Ninth Colloquy on European Law
held in Madrid on 2 October 1979

It gives me great pleasure to send you my cordial greetings. I very much wish I could have been with you in person but my presence today in Strasbourg is indispensable since I took up my duties as Secretary General of the Council of Europe only yesterday.

As an Austrian, I am glad to know that it was lawyers from my country who were among those who initially proposed the theme for your colloquy, namely: "Liability of public authorities".

As a European, I am even more glad that you will now look at this question from a European point of view.

Equality of all citizens before the law is an important basic principle in all member States of the Council of Europe. We realise that unfortunately the converse is not always true: the laws in force in Europe do not always afford equal standards of protection to the citizens of our member States.

Your endeavour to identify the underlying principles regarding the liability of public authorities which are or should be common to all European States is, therefore, an essential contribution to the building up of a common legal order of Europe.

I look forward with great interest to the results of your work, for which I wish you every success.

STATEMENT

by Mr Frits HONDIUS

Head of Division in the Directorate of Legal Affairs,
Council of Europe

The Council of Europe, which has convened this colloquy has the task of assisting its 21 member States to achieve greater unity. It does so, inter alia, by concluding international treaties and adopting common policies, in the form of recommendations addressed to member governments, or by other appropriate means, such as conferences of specialised ministers.

In support of these activities it engages in a vast work of documentation, study and appraisal of the underlying facts and phenomena. It is in this context that the Colloquies on European Law are called together, each year in a different country.

By choosing as the theme for this colloquy "the law on the liability of public authorities" we are fulfilling an old promise.

In 1972 the Third Colloquy on European Law at Würzburg dealt with the responsibility of the employer for the acts of his employees. Responsibility of public authorities for acts of public servants was left aside however, since it was felt that this was a subject worthy of a colloquy of its own.

In order to explain the general context in which this colloquy is being held, it is my purpose to make a few remarks on the nature of the Council of Europe's activities with special reference to our organisation's role in the field of law.

The Council of Europe covers a wide range of matters that are of common concern to its member States: law, public administration, social and economic affairs, education, culture, sports, public health, environment, local and regional government and last but not least: human rights.

Law has in fact two functions to perform. On the one hand, the field of law is a subject of European co-operation in its own right. We carry out a programme designed to harmonise the law of our member States on questions of private, criminal and administrative law, and to prepare, where necessary, rules of international law.

On the other hand, activities in other fields, such as medicine, university education, the protection of monuments, and so forth will eventually lead to the adoption by our decision-making body, the Committee of Ministers, of texts of a legal character. The legal aspects of these texts requires the constant attention of lawyers, both those who are members of the Secretariat and those who are designated as experts by our member States.

The most important texts of this kind are contained in the European Treaty Series. Up to now, well over one hundred European treaties, known as "Conventions" have been concluded.

By these treaties, our member States have voluntarily assumed mutual obligations in order to solve certain problems to which no satisfactory solutions could be found within the scope of their domestic law alone. One example is our most recent Convention, on the Protection of Wildlife, which was signed in Berne on 19 September. Obviously, political frontiers have no meaning for migratory birds, or fishes or flowers. Such protection as the domestic law of our States may afford to wildlife can be effective only if it is reinforced and supplemented by rules of international law.

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International treaties are well adapted to subjects on which our member States have a definite opinion. But legal co-operation in the framework of our organisation is also a means of promoting solutions to new problems which confront the member States. Making use of the facilities of our organisation for this purpose is particularly appropriate in three situations.

First, when member States seek to replace outmoded legal forms by more modern ones, responding to the needs and standards of contemporary society. Venerable statutes, unlike old soldiers, do not simply fade away. Inspite of the respect they have commanded from generations of law-abiding citizens and law-enforcing magistrates, a day comes when bringing them up-to-date by patchwork reforms no longer gives satisfaction. The general problem of the "ageing" of codes has recently been discussed at a conference of European Ministers of Justice at Aachen. The Ministers were unanimous in agreeing that any general overhaul of out-dated law would have to be approached from a European viewpoint.

But the Council of Europe is not only involved in modernisation of out-dated law. It is also involved in the opposite situation, where a subject matter is so new that hardly any law exists. Factors such as the advance of science and technology, the industrial way of life and, more generally, the changes in people's moral outlook require the particular attention of law and lawyers. Two recent examples are the question of transplants of human organs, and the growing use of computers. Here again the intervention of a European organisation is essential because it enables our States to pool their information resources, which particularly in the early stages will be relatively scarce, and to avoid unnecessary divergencies between their laws.

In this process of legal innovation, the lawyer plays a role which goes beyond that of the traditional legal adviser whose role is confirming whatever has been decided by others, whether it be in the form of a law, a contract, or a legal opinion. He must be actively associated with the innovative process right from the beginning, and contribute his specific expertise to the solution of the problem under review. He must help to put it into words and give it an appropriate form, suggest appropriate institutional, procedural and decision-making mechanisms and, at the same time, call attention to the competing values of man and society which are at stake.. His task is to introduce the necessary element of stability and security into situations of rapid social change. May I be permitted to cite as an example the admirably active role which lawyers have played in Spain's recent period of transition.

A third situation where it is advisable to involve an international organisation in law reform is when there are human interests and values at stake which should require equal treatment under the law of different States. The Secretary General in the message I have read to you referred to this situation. Even where the law of each State on a particular problem may be up-to-date and adequate in itself, differences between national laws may nevertheless lead to injustice. Take the simple example of a right which under the laws of State A can be exercised by its own nationals only, regardless of residence, whereas the same right in State B can be exercised by its residents only, regardless of nationality. Here each law is completely just and logical in itself and there would be no problem, if both countries shared the law of country A or of country B. But the difference leads to inequality. A national of A resident in B can exercise the relevant right in both countries, whereas the national of B resident in A can exercise it in neither country.

It is in particular the work of legal harmonisation concerning problems of this kind that the Council of Europe's facilities can be invaluable. I should like to state from my experience as a staff member how important it is that legal experts from the member States should participate in the proceedings: not only will they learn from their colleagues working on similar problems in other countries, but Strasbourg will also give them an opportunity of looking at their own problems from a European vantage point and seeing them in a broader perspective. ./.

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The choice of the theme of State liability for this colloquy was motivated by a number of the considerations I have just outlined. First of all, it is a question which has had a slow evolution in legal theory and practice. Faced with this situation countries are looking for new ways and means of giving the relevant law greater cohesion and clarity.

In some countries the relevant law cannot be found in a concise legal text but is made up like a patchwork quilt.

Secondly, with the growth of State responsibility in many fields: energy, tourism, medical care, etc and with the spectacular transformations taking place in those fields, new problems of State liability arise.

In the third place we are struck by certain differences in the pertinent laws of our member States. There is a need to examine whether these are merely differences of form, or also differences of substance.

State liability should also be approached from the point of view of good and effective public administration.

In this connection I should recall that administrative matters are one of the "Seven Pillars of Wisdom" enumerated in Article 1 (b) of the Statute of the Council of Europe. They are important not only in view of their obvious connection with human rights (whose purpose is to protect the individual against public authorities), but also in as much as the Council of Europe, with its numerous governmental committees, is a focal point for dialogue between national administrations and for comparison of administrative methods.

Yet until recently public administration as a subject in its own right has received low-key treatment in our work programme, and this for two reasons. First of all, public administration touches virtually every sector of public affairs. It is not localised but forms part of a multitude of activities. In the second place, public administration is concerned with the internal housekeeping of States with which international law is reluctant to interfere. Numerous are the references in our conventions and resolutions to this principle, which means that States may implement the subject matter in their own way. Here are some examples: "... to take steps in their domestic law"; "... in accordance with their administrative system ..."; "... by a method prescribed by their internal law ..."; "... to take account in their law and administrative practice ..."; and there are many others.

In recent years, however, it has been stressed that public administration is also a matter of European concern and that the Council of Europe, by virtue of its State membership and its statutory mandate is a very suitable intergovernmental organisation to provide co-operation in this field. This is an idea which has gradually ripened and to which an impulse has been given from various sides: the Parliamentary Assembly, the Ministers of Justice, new member States (especially Portugal), the movement for citizens' participation in administration, the reports and decisions of the Human Rights Commission, the judgements of the Human Rights Court.

With regard to compensation for damage suffered by individuals as a result of acts or omissions of public authorities, participants in this colloquy may be interested in a special category of law which is being developed in Strasbourg by the European Court of Human Rights and which is not yet widely known. It concerns Article 50 of the European Human Rights Convention which provides that where the internal law of a Contracting Party allows for only partial reparation to be made for the consequences of a decision taken by a legal authority of a Contracting Party in conflict with the convention, the court shall, if necessary, afford just satisfaction to the injured party.

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On three occasions the Court has considered such reparation:

- In the case of Engel and others, by a judgement of 10 March 1972; it held that the Kingdom of the Netherlands should pay Mr Engel the sum of one hundred Dutch guilders;

- In the Vagrancy cases judgement, also of 10 March 1972; the Court considered claims for damages from the applicants. Although it declared them admissible, it did not uphold them since they were ill-founded;

- By judgement of 22 June 1972, the Court ruled that compensation in the sum of twenty thousand German marks should be paid by the Republic of Austria to the applicant Ringeisen;

  In a further interpretation of the judgement it ruled on 23 June 1973 that this sum should be paid to him in person and free from conditions (his creditors were after the money).

In two other cases, a friendly settlement on damages resulting from violations of the convention was reached before the European Commission of Human Rights. These were the cases of Scheichelbauer/FRG (secret report of 16 December 1970) and the case of Knechtel/United Kingdom (report of 24 March 1972, that took note of an ex gratia payment of £750 to the applicant).

Three more cases concerning Article 50 are pending before the Court, namely the Sunday Times case, the König case (on which a hearing will take place on 23 October next) and the Luedicke, Belkaçem and Koç case.

Article 50 attracted little attention at the time (1950) when the convention was drawn up. The Rapporteur of our Assembly, Paul-Henri Teitgen (today France's judge on the court) even joked about it. He wondered whether the Court might decide to award one franc damages to every Frenchman as compensation for the injury inflicted on the population by a dictator who abolished the freedom of the press.

What matters today is that Article 50 is being applied by the Court. The decisions it has already rendered give useful indications about the principle of the liability of administrative authorities and the degree of adequacy of domestic law. From the European viewpoint, the current search of the Court for principles of compensation which satisfy European criteria can be an interesting source of inspiration to this colloquy.

At the beginning of our colloquy I wish to thank the Chairman and the rapporteurs for bearing the brunt of the preparatory work. I should like to compliment them on the fact that their reports were ready well within the agreed time limits. That not all of your received the reports in time was not our fault, but that of the postal services, which as several rapporteurs have explained, cannot be held liable!

I should also like to take this opportunity for expressing to the Spanish authorities and the Universidad Juan Vivancos Complutense the gratitude of the Council of Europe for this hospitality and generous assistance. And finally, let me wish all our honoured participants a pleasant and successful meeting.

REPORTS

LIABILITY IN GERMAN LAW

by

Dr. Bernd BENDER
Lawyer, Honorary Professor at
the University of Freiburg i Brg
(Federal Republic of Germany)

Introduction

Certain particularities of the present situation of the state liability law in the Federal Republic of Germany require a more detailed introduction.

Contrary to the Anglo-American system, one has to differentiate within the framework of the German legal system between public law and private law. This dichotomy is of essential importance. In borderline cases, it is often difficult, however, to place a legal norm or a legal relationship in one or the other legal sphere or to answer the question whether a certain action, for example the firing of a shot, should be judged for the purposes of determining liability questions according to public or private law. The criteria for making such a classification do not lead to clear results in all cases. This is unfortunate since the result of the classification is important in determining, for example, the types and content of possible claims (damages, restitution or injunction claims, etc) as well as the legal procedure which must be followed when such claims are raised, in particular with regard to access to a certain kind of court. (In the Federal Republic: access to the ordinary courts, the labour courts, the general administrative courts and to the special administrative courts (finance and social courts)).

Accordingly, it is possible that the State ("Bund" = federal government, "Lander" = State governments) or other public bodies (eg boroughs, representatives of the social insurance), ie the so-called "Hoheitsträger" (holders of sovereign power), may be liable under both public law as well as under private law. If the injurious action by the holder of sovereign power has occurred within the scope of private law (eg when a community sells land), then in principle the holder of sovereign power or its agent is subject to the same contract or tort liability as a civil corporation (eg a joint-stock company) or its employees would be. On the other hand, if the injurious act has taken place within the sphere of public law (eg through an order to demolish a building), the the holder of sovereign power is liable according to the special legal maxims of the so-called public "Staatshaftungsrecht" (State liability law). In this case the agents are, in principle, not personally liable to the injured party.

In its broader sense "Staatshaftung" (State liability) is understood to mean the contract or tort liability of the State or other public corporation under the public law and under the private (or civil) law. The following, however, deals mainly with State liability in a more narrow sense, referring only to public law and excluding contractual law. With regard to the conditions for liability, it covers the cases of injurious illegal or injurious illegal - culpable exercise of sovereign power. Under existing law these cases are governed by the legal institutions of the "Enteignungsgleicher Eingriff" (quasi-expropriational infringement) (Section 2 (a), (aa)), the "Aufopferungsgleicher Eingriff" (infringement similar in nature to the special sacrifice situation) (Section 2 (a), (aa)), the "Folgenbeseitigungsanpruch" (claim for restitution) (Section 2 (a), (aa)) as well as the "Amtshaftung" (liability for acts of officials) (Section 2 (a), (bb)). Only the "liability for acts of officials' (violation of official duties) is dependent upon fault.

With regard to the consequences of liability, only the "liability for acts of officials" results in the payment of full compensatory damages (Section 3 (a), (aa)), whereas "quasi-expropriational infringements" and "infringements similar in nature to the special sacrifice situation" result in fair compensation according to public law principles (Section 3 (b)) and only the "claim for restitution" results in restoration (Section 3 (a), (bb)). ./.

Additionally, however, compensation according to public law must also be granted in some cases in which a holder of sovereign power lawfully causes injury to a subject concerned. These are the cases of "Enteignung" (expropriation) (Section 2 (b), (aa)), "Enteignender Eingriff" (expropriational infringement) (Section 2 (b) (aa)) as well as "Aufopferung" (special personal sacrifice) (Section 2 (b), (aa)).

A reform of State liability has been initiated in the Federal Republic since the present, exceedingly complicated law is comprised of legal rules, both written and unwritten, which have come into being in various ways and at various times. As a result, these rules are not co-ordinated with each other and are obscure and incomplete. In May 1978, the Federal Government introduced a State Liability Bill (EStHG) in the Federal Council (in the so-called first round for proposed legislation). This Bill was based upon a draft prepared by an independent commission and first published in October 1973. In September 1978, the Bill was passed on to parliament together with the opinion of the Federal Council. The State Liability Act, the enactment of which requires a change in the Constitution (known as the "Grundgesetz" - Basic Law), will almost certainly be passed in the current parliamentary sessions which ends in 1980. Nevertheless, modifications to the Bill are still to be expected during the legislative deliberations. Its basic ideas, however, will surely be retained. The aims of the reform are to create a new and sensible division between public and private State liability, to improve the rules concerning damage caused during tumults (known as "Tumulschaderecht") as well as to redefine State liability, both in substantive and procedural law, in a modern, ie systematic, way which would satisfy the requirements of the modern constitutional State.

The following refers primarily not to private but rather to public State liability law in the Federal Republic (excluding not only contractual and quasi-contractual liability but also liability for legislative torts); reference will be made at the appropriate points to relevant aspects of the proposed reform law. In addition, those cases will be mentioned in which public compensation is granted for injurious but nevertheless lawful actions of holders of sovereign power.

1. Field of application (liability for injurious actions of the administration)

The scope of the legal maxims referring to public State liability law includes in principle all conceivable types of injurious, unlawful actions by holders of sovereign power. This applies not only to positive action (legal acts, real acts) but also to the non-performance of a required action which results in injury. However, it must always concern sovereign actions or sovereign non-performance, ie an administrative behaviour which can be classified as behaviour within the scope of public law.

a. "Verwaltungsakte" - administrative acts

aa. First of all, public liability can be caused in certain cases by "administrative acts", ie official decisions made for the settlement according to the public law of an individual case and aimed at a direct, external legal effect.

Examples:

Granting of a permit (eg building permit, trade licence, driving licence, sewage disposal permit) withdrawal of such permit, issuance of an order (eg demolition order, tax claim) or issuance of a prohibition (eg trade prohibition).

bb. The legal term of "administrative act" does not include legislative acts nor forms of delegated legislation which have been issued either by governmental administration ("Rechtsverordnungen" - statutory orders) or by self-administrative bodies, for example, local councils ("Satzungen" - by-laws). Nevertheless, under certain circumstances State liability also is taken into consideration for these subordinate legal regulations. This is the situation where these legal regulations do not need to be realised by administrative acts or where an injurious administrative act is based on such legal regulations (which are, for example, unlawful and therefore void).

cc. In certain cases lawful administrative acts may result in the obligation to grant fair compensation if they cause damage to property or personal injury directly by imposing a "Sonderopfer" - special sacrifice on the injured party (Section 3 (b)). These cases, however, are not covered by the term "State liability law"; as mentioned above, the subject of the State liability law is only the injurious unlawful (sovereign) act of the State or other holders of sovereign power.

b. "Realakte" - real acts (positive acts)

Often the action (ie the positive act) of the administration does not have the character of an administrative act, but rather that of a real action, ie one that evokes legal effects not ex voluntate but at the most ex lege.

Examples:

The use of physical force by a police officer, the teaching at State schools, the steering of a tank during a manoeuvre, the construction of a public road, the supply of water from the local waterworks etc.

Injurious real acts of a holder of sovereign power may also cause State liability. This is the case when they are either unlawful (Section 2 (a), (aa)) or unlawful and culpable (Section 2 (a), (bb)). Also with real acts, however, a public law compensation comes into consideration (Section 2 (b)). This occurs when the injury inflicted from the viewpoint of the rule of equality of treatment, has the character of a "Sonderopfer" - special sacrifice.

Real actions are to be judged by public law when they accomplish directly the public duty of a holder of sovereign power (or should serve that purpose) or when they are otherwise directly (internally as well as externally) connected with the accomplishing of such a duty.

Examples

The supplying of water is a public duty of the boroughs. These are authorised, however, to regulate by means of a by-law their legal relation to their customers either under public law or, at their own discretion, under private law. Under existing law, the supplying of non-consumable (eg contaminated or polluted) water results in the first instance in a public liability and in the second instance in private liability of the borough in question. When the reform of the State liability law comes into effect, the consequences of liability in both cases, however, will be governed by private law (para. 17, Sect. 2 EStHG). According to para. 17, Sect. 2 EStHG the same will also be true for other activities of public administration, such as the supplying of electricity, the sewage and refuse disposal, the health services, the conveyance of passengers and goods in land, sea and air traffic.

c. Acts of omission

The non-performance of an act by the holder of sovereign power may also become relevant for liability questions, but naturally only when a legal obligation to act is neglected. In this case as a matter of principle, the legal obligation of the holder of sovereign power must be owed in particular to the injured party (amongst others). Thus, only unlawful non-performance is of importance for liability questions. Even this is only the case when the unlawfulness is directly aimed at the injured party. Expressed in objective terms, liability exists only in cases of violation of those norms which intend, at least amongst others, to protect or benefit the interests of the injured party (so-called "Schutznormen" or "Drittschützende Normen" - protective norms). ./.

(Moreover, the unlawful action of a holder of sovereign power is also characterised by the violation of a legal duty: the legal duty in this case is to abstain from unlawful action).

In this connection, for the State liability law, only legal duties under public law are of importance. They are duties of the holder of sovereign power. As far as they are owed not only to the public in general but also to the individual ("Bürgerschützende Pflichten" - duties protecting the individual), they grant a legal position to the individual under public law. In principle damages may be recovered for breach of public duty only if the act of omission is culpable (Section 2 (a), (bb)).

The general obligation of the owner or possessor of property, for example, to prevent it from being a source of danger to others is normally a legal duty under the private law. As far as such a general obligation does not concern public roads or places, the public administration will be liable according to the proposed reform law (para. 17, Sect. 2 EStHG) without exception under private law.

d. Exemptions from liability (exclusions and exceptions)

According to special rules, certain ways of acting, characterised by objective or subjective features, are excluded from the general norms concerning State liability. Thus, in those situations the general norms do not become effective and do not result in State liability. Often, limitations of liability (Section 3(d)) are provided at the same time. There are other cases in which in spite of injurious sovereign action, neither the State nor another public body is liable but rather a natural person is. In the Federal Republic, the most important cases of such sovereign actions, which are privileged with regard to State liability, are the following:

aa. Postal administration

The main example is the sovereign postal administration. The complicated special law (in particular, the Federal Post Act of 28.7.1969, BGBI, I, p. 1006) that applies to its services, ie mainly the transport of letters, goods, money and passengers as well as the telecommunications services, provides exemptions and limitations of liability that cannot be discussed in detail here. See Loh, Die Haftung im Postbetrieb (the Liability of the Postal Administration), Berlin 1972.

The justification for these privileges concerning liability is the view that otherwise a speedy provision of those mass services would not be possible for acceptable fees. Therefore, the basic concept of the privileged status of the German Federal Post (acting mainly in the sovereign sphere) will also not be changed in the course of the reform of the State liability.

bb. Notary's liability

The notaries in the Federal Republic, who are civil servants only in exceptional cases, carry out sovereign duties especially in the certification of legal acts. Nonetheless, according to the "Bundesnotarordnung" (Federal Notary Code) of 24.2.1961, BGBI. I, p. 98 (which has been amended several times), it is not the State which is liable for mistakes made by the notary who is not in the civil service but rather the notary himself is liable, and this liability is a civil liability. This situation will not be changed so far by the proposed reform of the State liability law.

cc. State liability towards aliens

In certain cases, the "Amtswalter" (office holder) himself (in particular the civil servant or an employee in public service) and not the State (federal government or State governments) is liable for an injurious violation of an official duty (Section 2 (a), (bb)) towards an alien.

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For the State normally only assumes the liability of the "office holder", thus relieving him of liability, when mutuality of treatment is guaranteed by the laws of the foreign country or by international agreement. The regulations of the federal government and the State governments vary on this point in details. As a result of the proposed reform, it is intended that claims under the new State Liability Act shall also apply in principle to aliens. It is intended, however, to authorise the federal government to discourage the prejudicial treatment of Germans in other countries by refusing the state liability claims of those countries and their subjects until an agreement on mutuality has been made (para. 50 EStHG).

dd. Diplomatic service

Furthermore, the federal authorities can decline to assume responsibility for an office holder who has acted contrary to his official duties when the competent governmental body declares that the injurious behaviour of the functionary in the diplomatic service reflected political or international interests. This (questionable) rule is not to be continued in the proposed reform programme.

ee. Accident injuries

Severalstatutes contain exemptions from the liability for acts of officials when an office holder causes an accident injury to another official while on duty, provided that the injury is pensionable.

ff. Liability for tortious acts of the judiciary

This special liability rule will be discussed below (Section 6).

2. Legal basis for liability (conditions of liability)

a. Unlawful actions

The distinction between unlawful and lawful sovereign actions is sometimes difficult because the term "unlawfulness" is a functional one. Accordingly, an action can, for example, be tortious in itself and also result in a tort. This will not be studied here. Discretionary actions are also unlawful when the legal limits of discretion are not respected (as is the case where the discretionary authority is abused or exceeded).

aa. State liability independent of fault

There are isolated special regulations in federal and in State law (for example, in the area of the police law) whereby compensation must be paid for the damage caused by certain unlawful sovereign actions without the necessity of establishing fault. Up until now, however, a general regulation of this kind has not existed.

Nevertheless, the courts have developed legal doctrines which establish a State liability independent of fault which is not derived from the liability of the agent. This original liability of the State or of other holders of sovereign power for sovereign tort is of general importance. These doctrines developed by the courts are the public compensation for "quasi-expropriational" infringement, for "infringements similar in nature to the special personal sacrifice situation" (hereinafter referred to as quasi-"personal sacrifice" infringement), as well as the "claim for restitution".

1. "Quasi-expropriational" and quasi-"personal sacrifice" infringements

According to court decisions (BGHZ 6, p. 270 f; 32, p. 308 f, etc), actions with a considerable effect of injury are "quasi-expropriational" when they directly infringe upon pecuniary legal positions protected under Art. 14 GG. These infringements must

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be caused by the unlawful sovereign action of a holder of sovereign power and can be directed or not directed, culpable or not culpable. They are either legal norms (Section 1 (a), (bb)) or administrative acts (Section 1 (a) (aa)) or real acts (Section 1 (b)).

On the other hand, the infringement is quasi-"personal sacrifice" (BGHZ 9, p.83 f, 60, p. 302 f, etc) when - ceteris paribus - highly personal, non-pecuniary, intangible values protected under Art. 2, Sect. 2 GG are concerned (life, health, physical integrity, personal freedom of movement). The resulting claim has a subsidiary character (compared with special claims, eg the social insurance claim for compensation in the case of suffering an injury by the private helper of the police).

The liability results in the obligations on the part of the public authority having the capacity to be sued (Section 4 (a), (aa)) to grant a fair compensation (Section 3 (b)) for the damage caused; the claim for compensation has to be submitted to the ordinary (civil) courts of law (Section 5 (a), (dd)).

2. "Claim for restitution"

According to court decisions (BVerwGE 28, p. 155 f; 35, p. 268 f; 38, p.336 f. etc) one is entitled to claim the restoration of one's status quo ante (or the restoration of an equivalent status) when one's legally protected interests have been violated by unlawful (or unlawful culpable) sovereign action in the form of an administrative act (Section 1 (a)) or a real act (Section 1 (b)). This claim has to be submitted in principle to the administrative courts of law (Section 5 (a), (cc)). This too is a claim for compensation directed towards natural restitution (Section 3 (a), (bb)) and not merely a negative claim for removal. Where appropriate, it will be granted along with a claim for monetary compensation (claim for damages or for fair compensation).

If an unlawful administrative act is not so wrongful that it must be judged to be null and void and if it is no longer contestable, then the claim for restitution ceases. This claim also ceases when the restoration is actually impossible, when it is legally not allowed or when for public policy reasons such restoration would be unreasonable to demand of the holder of the sovereign power.

3. Reform

According to the proposed State Liability Act, a holder of sovereign power is liable for full damages for the injurious violation of public duties which protect the individual, unless he can successfully exculpate himself (Section 2 (a), (cc)). In addition, the proposed act provides a liability of the State which merely depends upon the unlawfulness of the Act (para. 2, Sect. 2 EStHG). This occurs when the State, through injurious sovereign action has infringed upon legal positions which are protected by the fundamental (civic) rights laid down in the Basic Law. This means that the State is liable not only for "quasi-expropriational" or quasi-"personal sacrifice" infringements as discussed above under Section 2 (a), (aa), (1) but also, for example, for infringements upon the freedom of trade and profession as protected under Art. 12 GG. Moreover, according to para. 3 EStHG, the previously mentioned "claim for restitution" (Section 2 (a), (aa), (2)) is to be maintained when the damage consists of the alteration of an actual condition to the disadvantage of the injured party.

bb. State liability dependent on fault (Amtshaftung - liability for acts of officials)

This liability of the State for acts of officials, the so-called "official liability", is laid down in para. 839 BGB in connection with Art. 34 GG and is, in practice, the most significant form of State liability. It is not connected to the violation of a legal duty by a holder of sovereign power (this means, by a public body). Rather it is attached to the violation of an official duty which concerns the

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"office holder" (Minister, civil servant, employee or worker in the public service etc) and which really is part of the internal relationship between the office holder and the State. This has an historical background. Originally, only the "office holder" himself was liable as a private person; this was even the case when he had acted within the sovereign sphere. Such mistakes were not attributed to the State since they were considered to be contra mandatum. The personal - as such private - liability of the civil servant for tort (para. 839 BGB) was then taken over by the State, thus relieving the civil servant of liability, in as far as the civil servant has acted in the sovereign sphere. This was accomplished initially by individual legal norms and finally in general by a constitutional norm (nowadays under Art. 34 GG). To that extent, State liability in the form of "official liability" is not a direct (original) but an indirect (derived) liability and thus a public law liability. This "out-dated" conception will not be included in the new State Liability Act.

1. Conditions for "official liability"

The conditions for "official liability" which permit the placing of a claim against the State or another holder of sovereign power are as follows:

- violation of an official duty applying to the "office holder" as a result of legal norms, administrative regulations or individual orders (!) by action or omission in the sovereign sphere;

- third party relation of the official duty. This means that according to its subject, the duty must exist not only in relation to the employer (respectively to the public) but, in particular in relation to the injured party and in such a way that the "office holder" has to protect or promote certain interests of this party;

- adequate causality between the violation of the official duty and the injury. This means that the "office holder" is only responsible for a violation of an official duty which as conditio sine qua non was the cause of the injury suffered, provided this violation has increased the likelihood of the occurrence of the actual injury. Only in such a case is the risk of injury taken over by the holder of sovereign power via the assumption of liability (cf BGHZ 18, p. 286 f; etc). The injury to be compensated may consist of damage to property or personal injury, but it may also be a mere pecuniary disadvantage or even a non-pecuniary injury;

- fault - this does not require malice or bad faith, but it means that the "office holder" must have violated his official duty in a blameworthy manner (intentionally or negligently). As a matter of principle the fault does not need to refer to the effect of the tort. The care and attention required is to be measured by the abilities and knowledge of a reasonably prudent "office holder" (development through court decisions of an objective measurement of fault);

- absence of any other way to obtain compensation. This means that if the injured party is entitled to another enforceable claim against a third-party for compensation for the damage caused by the "office holder", the claim of official liability is to this extent eliminated. Therefore, official liability has only a subsidiary character (supplementary liability). This so-called "Verweisungsprivileg", which means "relegation privilege", was originally intended to guarantee that the "office holder" would be sufficiently encouraged to make decisions. Following the statutorily mandated assumption of "official liability" by the State, this privilege lost its original function. It is

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not intended, therefore, to be included in the new State Liability Act. Under existing law the subsidiarity of "official liability" has already been limited by court decisions in certain types of situations. This applies in principle, for example, when the liable third party is also a holder of sovereign power and also for the participation of official vehicles in general road traffic (eg BGHZ 13, p. 88 f; 62, p. 394 f; 68, p. 217 f etc).

2. Effects of violation of official duties on liability

A violation of official duty which meets all the above-mentioned conditions of liability results in the State or another holder of sovereign power, and not the "office holder", having to pay full compensation, as a rule monetary damages (Section 3 (a), (aa)). Within the scope of "official liability", a claim for natural restitution is excluded when the restoration in natura could only be effected by a sovereign act for the "official liability" is only the liability of a private person transferred to the holder of sovereign power (BGHZ 34, p. 99 f). The "claim for restitution" (Section 2 (a) (aa)), which is not a part of "official liability", is not, however, affected by this rule.

cc. Reform

The reform is intended to abolish the institution of "official liability". According to the proposed State Liability Act, an original State liability which will no longer be supplementary, will take its place. It will be established in the Basic Law by the planned amendment of Article 34. According to para. 1 Section 1 EStHG the basic liability norm will be as follows:

"Verletzt die vollziehende oder die rechtsprechende Gewalt eine Pflicht des öffentlichen Rechts, die ihr einem anderen gegenüber obliegt so haftet ihr Träger dem anderen für den daraus entstehenden Schaden nach diesem Gesetz."

This means:

"In the case of violation of a public duty which the executive or judicial power owes to a third party, the holder of sovereign power in the particular case is liable to the third party for the damage caused according to the provisions of this Act."

The above mentioned public duty results from protective rules - written or unwritten - of the public law.

The liability consists of an obligation to pay monetary damages (para. 2, Section 1, sentence 1 EStHG). If the violation of a "public duty" has changed conditions, then there is an obligation to make restitution (para. 3 EStHG). As far as monetary damages are concerned, the following is to apply according to para. 2, Section 1, sentence 2 EStHG.

"Der Geldersatz entfällt wenn die Pflichtverletzung auch bei Beachtung der bei der Ausübung vollziehender oder rechtsprechender Gewalt den Umständen nach gebotenen Sorgfalt nicht hätte vermieden werden können."

This means:

"Damage recovery is excluded, when the violation of duty could not have been avoided even if the diligence demanded by the circumstances had been observed while carrying out the executive or legislative powers".

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If this provision were to take effect as planned, it would create a presumption of fault (reversal of burden of evidence). Various parties are endeavouring to take into consideration not merely "the diligence demanded by the circumstances" but at least a "special diligence demanded by the circumstances". In this case it would be a special type and degree of diligence which would not refer to the person of the office holder but instead would be determined by the respective authority and its function. Then, in truth, "fault" would no longer be at stake; instead, similar to the "faute de service" of the French State Liability Law, another criterion of attribution would be concerned which would be appropriate for the tort liability of the sovereign power (cf. Bender DÖV 1979, p. 109 f).

In this context further guiding principles of the reform are, in particular:

- liability independent of blame for unlawful infringement of basic rights (para. 2, Section 2 EStHG), cf. Section 2 (a), (aa) 3.;

- absolute liability for the failure of technical installations by means of which executive power is exercised in relation to the injured party (para 1, Section 2, EStHG) of Section 2, (b), (cc);

- damage and restitution as equivalent means of reparation and an option for the injured party with regard to these remedies (paras. 2-4 EStHG).

b. Lawful conduct

aa. Expropriation and "expropriational infringement"

1. It is possible to expropriate by means of an administrative act under the authority of a law or directly by means of a law if this is necessary for the public well-being (Article 14, Section 3 GG). The main examples for such an "expropriation" (Enteignung) in its classical technical meaning are the following:

- the ownership of property (in particular, real estate) can be taken away or burdened with a real property right (eg usufruct);

- other rights of property can be taken away or restricted;

- obligatory rights, which entitle the holder to the acquisition, the possession or usufruct of property, can be taken away.

According to Article 14, Section 3 GG, the law authorising the expropriation or actually accomplishing the expropriation must regulate the type and extent of compensation (Section 3 (b), (aa)). The sovereign realisation of the social commitment of property is not an expropriation (Article 14, Section 2 GG), cf. the leading decisions BGHZ 6, p. 270 f; 23, p. 30 f.

2. Other lawful sovereign actions (especially real acts), which directly - no matter if intended or not - infringe upon a pecuniary legal interest protected by Article 14 GG have become known in the court decisions (eg BGHZ 45, p. 150 f; 60, p. 145 f) as so-called "expropriational infringement" (enteignender Eingriff). This covers cases of "special personal sacrifice" (comparable to the "charge spéciale" in French State Liability Law). They also result in liability. This does not apply, however, as far as the realisation of the social commitment of the legal interests affected are concerned: infringements resulting from the social commitment must be tolerated without compensation. The public law claim to compensation for an "expropriational infringement" has been developed through court decisions (judge made law).

bb. Special personal sacrifice (Aufopferung)

A subsidiary, public law claim to compensation (Section 3 (b), (bb)) is the subject of the so-called "Aufopferungsanspruch" (claim based upon special personal sacrifice), which has also been developed by the courts. This claim concerns lawful sovereign actions (especially administrative acts, real acts) which directly affect, intentionally or unintentionally highly personal intangible legal interest that are protected by Article 2, Section 2 GG (life, health, physical integrity, personal freedom of movement). The infringement must impose a special sacrifice on the party involved. The leading decision is BHGZ 9, p.83 f. (Impfschadenfall - a case holding that compensation was required for injury caused by obligatory vaccination).

cc. Absolute liability

A general public liability which is independent of fault (ie intention or negligence) and therefore absolute is unknown in German law (BGHZ 54, p. 332 f.). Accordingly the existing German law does not provide the liability of government (or another public body), if damage is caused for example by the rupture of a water pipe or the failure of a (well-maintained) traffic light. There are, however, special legal rules which impose absolute liability which is not based on unlawfulness but merely as a consequence of the operation of vehicles, vessels and aircraft, the keeping of animals, the ownership of dangerous establishments and facilities, the possession of dangerous materials or the carrying out of dangerous activities. These rules create a special private law, "quasideliktische" - "quasi-tort" liability. The State as holder of sovereign power is also subject to this liability. In these cases, certain legal consequences regarding liability are attached to the "permitted" possession of (typically dangerous) goods or to their permitted (although typically dangerous) use upon the occurrence of injury. As a rule, liability only applies to damage to property and personal injury and not to "mere pecuniary injury". Usually the liability is limited to a certain maximum amount. Often absolute liability does not apply in cases of "force majeure" (acts of God).

According to para. 1, Section 2 EStHG, in the future an absolute public law liability will be imposed where there is a failure of technical installations used in the sovereign sphere. This shall be the case when executive power is exercised by these installations (eg by traffic lights or computers, which produce "administrative acts").

dd. Liability for damage caused by tumults

So-called "Tumultschäden" - "tumult damages" are damages to property, personal injury or loss of life, which result directly from outbreaks of violence in connection with riots or from their suppression. The existing law provides a (subsidiary) equitable liability in order to compensate for these damages. For this liability, it makes no difference if the State has acted lawfully or unlawfully in not preventing the tumult or the damage caused, or with regard to the method chosen for suppressing it. The motivation is that the State has not fulfilled its obligation to be the guarantor of public safety.

Since the existing law concerning tumult damages has considerable shortcomings and is hardly practical any longer, a modernisation of that law is intended along with the reform of the State Liability Law. The conditions of liability will then be reformulated and the effects of liability for personal injury will be laid down according to social-legal principles. This will differ from the prevailing law and will be similar to the compensation for the victims of crimes (cf. next section).

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ee. Compensation for victims of crimes

Crime prevention is a police duty of the State. If the State cannot prevent a certain crime, then this may be the result of an unlawful omission or, however, of completely proper sovereign conduct. In any case, according to the "Bundesgesetz über die Entschädigung für Opfer von Gewalttaten" (Federal Act Concerning Compensation for Victims of Violent Crimes) of 11.5.1976, BGBl, p. 1181, anyone who has suffered personal injury as a result of an unlawful, intentional attack upon himself or another person or as a result of a lawful defence against such attack will be given compensation upon application. The compensation for the injuries to health and economic consequences is not determined by the legal principles relating to damages and restitution (Section 3, (a)) or to fair compensation (Section 3, (b)) but by social-legal principles. Standardised aid, limited both by maximum and minimum amounts, is given. It includes payments in kind (eg treatment) as well as monetary damages (eg lump-sum pensions) to the injured person or to the survivors.

3. Consequences of liability

a. General compensation (full compensation)

aa. Monetary compensation

The extent of the liability for sovereign tort due to blameworthy violations of official duties (Section 2, (a), (bb)) is determined above all by the obligation to pay monetary damages (cf. in particular, paras. 249-253, 842-845 BGB). The same will apply under the proposed State Liability Act (Section 2, (a), (cc)).

1. Due to the principle of total indemnity, it is primarily a matter of compensating the (whole) tangible damage (and that independent of the degree of fault); this means the damage to property (destruction, continuous deprivation, damage), the personal injury (loss of life, injuries to body and health) as well as the "mere" pecuniary damage. In this way the claim for damages is intended in principle to compensate for the diminution of the property sufficiently caused by the injurious conduct. Compensation must be paid for the difference (expressed in monetary terms) between the total assets which the injured person actually has and the total assets that the person would have had if it were not for the injurious event ("Differenzschadenshypothese" - hypothesis of calculation of damage by difference).

In this connection, compensation both for the positive damage (real diminution of property) and for the negative damage (loss of earnings) has to be considered. Following the payment of damages, the injured party shall per saldo not be poorer nor richer than he would have been if the injurious event had not occurred. There are, however, a number of exceptions to these rules. They have been modified, for example by court decisions which have developed a "normativer Schadensbegriff" (normative concept of damage) which in certain cases results in a legally relevant extension or limitation on the "natürlicher Schadensbegriff" (natural concept of damage).

2. For intangible (non-pecuniary) damage a fair compensation has to be paid only in exceptional cases as determined by law (eg according to para. 847 BGB), following an injury to body or health as well as an injury resulting from an unlawful detention; moreover, according to para. 7 EStHG as a result of a serious injury of personality which follows the rule already established through court decisions).

3. The claim for damages must be brought within three years from the time the plaintiff becomes aware of the wrongdoer and the damage, at the most 30 years after the injurious action (para. 852 BGB); the same rule is followed in principle in para. 13, EStHG.

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bb. Restitution

In State Liability Law, restitution is in practice only of importance in connection with a "claim for restitution" (Section 2 (a), (aa)) but not with a claim based upon "official liability" (Section 2, (a), (bb)).

b. Fair compensation (equitable compensation)

The public law claim to fair compensation - in principle lapsing only after 30 years - is to be distinguished from the claim to damages under State Liability Law; both claims can, however, be concurrent.

aa. Compensation following the infringement of tangible protected interests

According to existing law, compensation under the public law is provided, first of all, for the lawful or for the unlawful (even if blameless) deprivation or infringement of tangible interests. The already mentioned legal institutions of expropriation (Section 2, (b), (aa)), "expropriational infringement" (Section2, (b), (aa)) and "quasi-expropriational infringement" (Section 2, (a), (aa)) are concerned here. The aim of the public law compensation is not to assume (or even prevent) the damage but to compensate for the special sacrifice imposed on someone by sovereign power. The sacrifice may be in the form of the loss of a right or the loss of a legal interest. The balance, which has been disturbed by the sovereign infringement, is supposed to be restored by a fair indemnity. The Federal Supreme Court (Bundesgerichtshof) has developed a whole system of legal principles from this basic idea.

Basically the claim to compensation is restricted to the damage caused to the object itself ("Substanzverlust" - loss of substance). Thus, as a rule, for example, a claim for decline in value, but not for compensation for the loss in earnings will come into question.

Nevertheless, the liability for compensation also comprehends - beyond the compensation for loss of substance - as an exception, the compensation for those subsequent disadvantages, which are directly and unavoidably connected with the special sacrifice imposed by the sovereign power (eg the costs for relocating a factory following the expropriation of the plant).

bb. Compensation for the infringement of intangible interests

The "special personal sacrifice" (Section (b), (bb)) or the quasi "personal sacrifice" infringement (Section (a), (aa)) lawfully, respectively unlawfully imposed by sovereign power results in equitable compensation (fair compensation) only for the tangible damage caused by the infringement on the intangible interest.

cc. Reform

In cases in which sovereign action has resulted in liability even though the action itself was blameless (Section (a), (cc)) the proposed reform law (para. 2, Section 3, sentence 2 EStHG) provides that only the positive tangible damage, but not the loss in earnings, will be fully compensated. This is the situation in two cases:

- absolute liability for the failure of technical installations (para, 1, Section 2 EStHG);

- liability for unlawful infringements on basic rights, ie the fundamental civic rights laid down in the Basic Law (para. 2, Section 2 EStHG).

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c. Decreased liability due to joint responsibility of the injured party (especially contributory negligence)

aa. Decrease in liability with regard to monetary damages

According to the existing and the proposed State Liability Law (para. 254 BGB; para. 2, Section 4 EStHG), a decrease in the liability to pay monetary damages comes into consideration when the injured party shares responsibility for the occurrence or for the extent of the damage. If circumstances, for which the injured party is responsible, have contributed to the damage, then the liability of the State to pay damages and the amount thereof also depend upon the extent to which the damage was primarily caused by the injured party or by the holder of sovereign power.

The claim to monetary damages is lost, according to the existing and the proposed State Liability Law (para. 839, Section 3 BGB; para. 6 EStHG) when the injured party blamefully fails to prevent the injury by not taking (out of court) administrative action (for example, by not lodging an objection - "Widerspruch" (Section 5 (a), (aa)) or by not taking legal action (for example, by not filing an action for avoidance of an aggrieving administrative act (Section (a), (bb)).

bb. Decrease in liability with regard to restitution

Under existing law, the "claim for restitution" (Section 2, (a), (aa)) is lost when the injured party bears a sufficiently large share of the responsibility (BVerwG, DOV 1971, p. 857 f).

According to para. 3, Section 3, EStHG, the following will apply in the future:

"Haben Umstände, die der Geschädigte zu vertreten hat, den rechtswidrigen Zustand mitverursacht, so kann der Geschädigte die Folgenbeseitigung nur verlangen, wenn er sich an ihren Kosten entsprechend dem Masse seiner Mitverursachung beteiligt; überwiegt seine Mitverursachung, so entfällt der Anspruch."

This means:

"If circumstances, for which the injured person is responsible, have partly caused the unlawful situation, than he can only claim restitution when he contributes to its cost according to his share of responsibility; the claim is lost if his share of responsibility predominates."

(The last half-sentence may not be justified).

d. Limitations of liability

Within the scope of State liability, limitations can be provided only by law or based upon a law (but, for example, not merely by regulation or by-law).

aa. On the one hand, limitations of liability may be related to the elements of the tort (to the conditions for liability). This is the situation when certain sovereign acts, which under general State Liability Law would obligate the State to pay damages and make natural restitution do not as an exception result in liability either because the acts never will result in liability or because liability only arises when the acts are accompanied by additional circumstances. To this extent, reference should be made to the above-mentioned exemptions from liability (cf. Section 1 (d)).

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bb. On the other hand, limitations of liability may result merely from the moderation of the consequences of liability, as seen from the viewpoint of the liable body (limitations of compensation). For example, in the cases of absolute liability (Section 2 (b), (cc)), the extent of liability to pay damages is normally limited to a certain maximum amount. Also, according to the proposed State Liability Act, in cases involving blameless but unlawful infringements on basic rights (Section 2 (a), (cc)), only the positive damage, and not the loss in earnings nor the intangible damage (para. 2, Section 3, sentence 2 EStHG), must be compensated: The same limitation is intended for the proposed absolute liability for the failure of a technical installation which belongs to the State. Finally, if the injured party does not mitigate damage as far as possible, he will not receive compensation for the avoidable elements in his loss (Section 3, (c), (aa)).

4. Subjects of liability (the party responsible)

a. The State or other public body (corporation, institution) as the subject of liability

aa. Existing law

The legal principles which determine the actual party that has the capacity to be sued are confusing.

1. With regard to liability based upon "official duty" (Section 2 (a), (bb)), the capacity to be sued rests in principle on that holder of sovereign power who has "entrusted" to his agent the individual office, the performance of which led to the wrongful action (BGHZ 2, p. 315 f, etc).

2. In cases of public law compensation following "quasi-expropriational" or quasi-"special sacrifice" (both being unlawful) infringements (Section 2 (a), (aa)), the capacity to be sued according to court decisions (eg BGHZ 11, p. 248 f) always lies with that holder of sovereign power who, as a result of the sovereign action, was "relieved" of one of his obligations and in this way directly "benefited" (as a rule, the federal government, a State government, or a local corporation). According to statutory provisions, a natural person under civil law can also be the holder of liability when lawful infringements have occurred.

3. The "claim for restitution" (Section 2 (a), (aa)) puts the capacity to be sued on that holder of sovereign power who is responsible under administrative law for the unlawful action.

bb. Reform

According to the principles of law just discussed which are at present still valid, the capacity to be sued for one and the same detrimental unlawful action can rest with different holders of sovereign power depending on the consequences of liability (damages, fair compensation, restitution). According to the proposed State Liability Act, however, this capacity will rest with the same holder of sovereign power for all claims under State liability. It will always be the particular holder of sovereign power that is responsible for the unlawful action under administrative law who will also be liable under State Liability Law.

b. The agent as subject of liability

aa. The agent of a holder of sovereign power is, in principle, not personally liable to the injured party to the extent that he acts wrongfully and detrimentally in the sovereign sphere, to the extent therefore that a State liability under the public law is applicable. In cases of gross negligence, he is only liable internally to his employer for recourse. There are only a few breaches of the principle that a public official is personally not liable to a third party for wrongful injury in the sovereign sphere (Section 1 (d)).

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bb. However, as far as the agent of the holder of sovereign power acts for him outside the sovereign sphere, ie in the sphere private law, the agent can become liable himself in tort to the injured party (according to paras. 823 ff. BGB). If the agent is not an organ of the holder of sovereign power (para. 89 BGB) but only an assistant, then the holder of sovereign power can relieve himself of his liability to the injured party, according to para. 831 BGB, by proving that he was not negligent in the selection and supervision of the assistant. This regulation, which is politically unsuitable and which is hardly ever found in foreign legal systems, is to be abolished at least in the public sector through the proposed reform. According to para. 17, Section 4 EStHG, the holder of sovereign power (State, parish, etc) shall be liable under special private law to the extent that he must always assume responsibility for the damage caused by the agent's tort committed when taking part in civil law dealings.

5. Remedies and legal proceedings

a. Existing law

aa. Administrative appeal

Existing law provides as a rule, the so-called "Widerspruch"(objection) as a formal, out of court, administrative appeal against a detrimental administrative act or against the refusal to perform a desired administrative act. It results in a review of the disputed administrative action, in most cases by a superior authority. The review does not just apply to the lawfulness but also - as far as discretionary acts are concerned - to the suitability of the action. This legal remedy has a time limit (limitation of one month).

bb. Legal actions

Usually a legal action against a detrimental administrative act (action for avoidance = Anfechtungsklage) or against the refusal to perform a desired administrative act (action for instructions = Verpflichtungsklage) is only possible according to procedural law after the administrative appeal has been exhausted (within the time limit of one month). Depending on the nature of the administrative act performed or applied for, the legal action has to be taken to:

- the general administrative court (eg following the refusal of a building permit);
- the finance court (eg against a tax claim);
- the social court (eg following the refusal to grant a disability pension).

In addition, "normal" legal actions for performance (eg for payments) as well as declaratory actions can be taken to these courts.

Also the "claims for restitution" have to be submitted to the general, respectively to the special administrative courts.

Actions for performance concerning public law claims for damages or fair compensation, however, have to be submitted to the ordinary courts in accordance with a historic tradition (Article 14, Section 3, sentence 4 and Article 34, sentence 3 GG).

b. Reform

The situation described above where various courts are competent to deal with various types of claims relating to one another is unfavourable for the legal protection of the citizens. Therefore, in the future the same court - normally, a court of the general administrative jurisdiction - shall be competent both for the primary decision about the lawfulness or unlawfulness of the detrimental sovereign

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action and for the decision about the liability. Then, preliminary administrative proceedings in the form of a remedial procedure will be established also with regard to State liability claims; these proceedings would be used before bringing legal actions (paras. 26-36 EStHG).

6. Special principles of law for acts of the judiciary

a. Judgement privilege

Under the proposed law (para. 5 EStHG) - but also in principle already under the existing law (para. 839, Section 2 BGB) - unlawful decisions of the judicial power, which are supposed to terminate legal proceedings with a binding effect are privileged with regard to liability as is also the case with judicial actions from which the decisive factors for the decisions are drawn. In the interest of legal peace, a liability of the State does not occur in these cases unless the infringement of law is a crime and the decision quashing the unlawful judicial act has become final.

b. Measures of criminal prosecution

According to the Bundesgesetz über die Entschädigung für Strafverfolgungsmassnahmen (Federal Act Concerning Compensation for Criminal Prosecution Measures) of 8.3.1971. BGBl I, p. 157 (which has been repeatedly amended), a compensation for tangible damage is granted; in the case of detention based upon a judicial decision, compensation is also given for intangible damage. In particular, compensation is granted if a person has suffered injury:

- as a result of a criminal sentence which has later been annulled or reduce;

- as a result of the application of investigatory detention measures or other measures of criminal prosecution (eg temporary arrest, confiscation of goods, temporary "Berufsverbot" which means interdiction against carrying out one's profession) when the person concerned was subsequently acquitted or released from prosecution or when the proceedings were subsequently discontinued.

An equitable compensation can be granted when the proceedings are discontinued at the discretion of the court or the public prosecutor.

c. Other judicial acts

According to the substantive State Liability Law, there are no special rules applicable to other judicial acts. With regard to procedure, however, one must bear in mind that the ordinary courts do not only decide about possible claims for damages or compensation (including claims for restitution) but as a rule primarily also about the lawfulness of acts performed by the administration of justice; this concerns, in particular, the orders of the administration of justice, as far as they serve the settlement of individual matters, in the field of civil law (including the procedural law of civil action) and of criminal law. To this extent the responsibility of the ordinary courts will not be affected by the proposed State Liability Act.

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LIST OF ABBREVIATIONS

BGB	Bürgerliches Gesetzbuch (Civil Code) from 18.8.1896 (amended numerous times)
BGBl.I	Bundesgesetzblatt Teil I (Federal Legislative Record, Part I)
BGH	Bundesgerichtshof (Federal Supreme Court)
BGHZ	Entscheidungen des BGH in Zivilsachen (Amtliche Sammlung) (Decisions of the Federal Supreme Court for Civil Matters, Official Reports)
BVerwG	Bundesverwaltungsgericht (Federal Supreme Court for Administrative Matters)
BVerwGE	Entscheidungen des BVerwG (Amtliche Sammlung) (Decisions of the Federal Supreme Court for Administrative Matters, Official Reports)
DÖV	Die Öffentliche Verwaltung (Fachzeitschrift) (The Public Administration) (specialised periodical)
EStHG	Regierungsentwurf eines Staatshaftungsgesetzes, Deutscher Bundestag, Drucksache 8/2079 (Governmental draft proposal for a new State Liability Law, German Parliament, publication 8/2079)
GG	Grundgesetz für die Bundesrepublik Deutschland (Basic Law - Constitution - of the Federal Republic of Germany) from 23.5.1949 (amended numerous times)

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LIABILITY IN SPANISH LAW

by

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I. INTRODUCTION

Until 1954, when the present Expropriation Act (LEF) was promulgated, there was no general principle in Spanish law regarding the State's civil liability for damage caused to private persons. Twenty-five years have now elapsed since the introduction of this principle belatedly filled one of the most flagrant gaps in the Spanish legal system, which was at the basis of the most criticised privilege in relations between the authorities and the public: administrative immunity. Although the introduction of this principle is still quite recent, it has been sufficiently frequently applied over the last quarter of a century to make an objective appraisal of its value and any imperfections from the point of view of comparative European law. First, however, a brief idea must be given of the system of public liability that applied before LEF.

1. The pre-LEF system of public liability

Despite a few exceptions under special acts providing for State liability in particular areas and specific instances (eg railways, non-execution of decisions by administrative courts, death or injury caused by military or police forces etc), a State obligation to compensate damage to third parties was unknown in either legislation of court practice in the XIXth century.

The principle was first referred to in the 1889 Civil Code (CC), but in such specific terms that in practice it made no difference to the previous situation of non-liability. Article 1902 states the obligation of any person to make good the damage caused to others by his acts or omissions (1), while Article 1903 extends this personal liability to include liability for damage caused by others, including, in paragraph 5 (e), State liability, defined as follows:

> "The State shall be liable in this regard (for the acts of others and not for its own acts) when it acts through a special agent (agente special), but not when the damage is caused by the official nor normally empowered to act, in which case the previous article shall apply."

In point of fact, both doctrine and practice agreed that this principle confirmed the privilege of State non-liability towards private persons and exacted compensation only from State servants causing damage by acting improperly. The State itself was not involved except when acting through a special agent, that is to say through a person completely foreign to the administrative organisation, which in practice never occurred. In this way, the State remained safe from any claim for damage cuased to private persons by its authorities, officials or servants. The Act of 5 April 1904, was passed to deal with the latter's liability, but so limited the genuine possibilities of obtaining compensation from the authorities and public servants (in practice the private person was required to have made a written demand in advance for compliance with the rules, subsequent failure to observe which then gave rise to the obligation to compensate) that in fact the public were helpless to obtain redress for damage caused by State action.

Thus, the simultaneous and combined application of the Civil Code - which, according to the predominant interpretation, provided legal backing for the State's non-liability - and the 1904 Act - which sanctioned the de facto non-liability of authorities and officials - scarcely left members of the public any means of successfully pursuing their just claims for compensation from the public authorities.

The Republican Constitution of 9 December 1931 sought to remedy this situation by instituting, in Article 41 - 3, subsidiary liability of the administration for damage caused to third parties by its officials ("Where a public official, in the performance of his duties, fails to comply with his obligations to the detriment of a third party, the State or authority to which he belongs shall be subsidiarily liable for subsequent damage, as provided for by law"), a constitutional rule which was extended and at the same time broadened, with regard to local government, by Article 209 of the Municipalities Act of 31 October 1935, whereby "The municipal authorities shall be liable in civil law for damage caused to the rights of private persons by the acts of their controlling bodies or officials in the exercise of their respective powers, either directly or subsidiarily, as the case may be".

This Act and the 1931 Constitution itself ceased to apply at the end of the civil war in 1939, but indicated the course which was to be followed subsequently. Accordingly, Article 405 of the Local Government Act of 16 December 1950 (LRL) broadly follows the provisions of the Municipalities Act of 1935, extending them to all local government authorities. It provides for direct liability, "where the damage is caused in connection with the operation of public services or the exercise of the powers of the local public authority, in the absence of any faults or serious negligence personally attributable to its officials or servants" (Article 406); liability is subsidiary, on the other hand, "where the damage is caused by fault or serious negligence personally attributable to its officials or servants in the performance of their duties" (Article 409).

The safeguards provided for private persons against damaging acts by public authorities thus remained confined to the narrow framework of local government. The previous situation of non-liability of the State (and its emanations: independent agencies, public corporations etc ...) was maintained, which was clearly quite unwarranted.

2. The system in force since the 1954 Expropriation Act (LEF)

The situation changed rapidly as from 1954, when the Expropriation Act was passed. The Act defined expropriation as "the basic legal status of all forms of administrative action involving an individual claim upon the economic content of the rights of a private person on grounds of the general interest" (as stated in the explanatory memorandum). This was to afford the legislator an "ideal opportunity" to draw the "logical consequences" from this principle in order to set right "one of the most serious deficiencies in our legal system", namely "the unjustified privilege of non-liability", which the State still enjoyed for damage other than that caused by expropriation.

There is no denying that the Spanish legislator took full advantage of this opportunity by, at the same time as prescribing detailed regulations for expropriation, laying down a general principle of non-contractual liability on the part of all public authorities for damage caused to private persons by government activity unconnected with expropriation. This principle is stated in Article 121 LEF as follows:

> "Compensation shall also be payable according to an identical procedure in respect of any loss suffered by private persons to the possessions or rights to which this Act refers, where such loss is the consequence of the normal or abnormal operation of public services or the adoption of discretionary measures not open to scrutiny by means of litigation, without prejudice to the responsibilities to which the administration may hold its officials on the same grounds".

The Expropriation Regulations of 26 April 1957 (REF), which elaborate on the rules laid down by LEF, sought to dispel two doubts which might arise from the interpretation of the above text. The first concerned the category of possessions and rights to which administrative liability might apply (the Act speaks of possessions and rights "to which this Act refers", that is to say,

possessions and rights susceptible of expropriation, apparently excluding any compensation for physical injury and non-material damage). The REF clarify the position in that they explicitly acknowledge, in Article 133.1, that the obligation to provide compensation extends to "any damage suffered by private persons to their possessions or rights, provided that these shall be capable of economic assessment". The second doubt concerned whether or not the new system of direct administrative liability of public authorities vis-à-vis third parties applied to all administrations, including the local administrations which already had a liability system of their own, in some cases direct, in others subsidiary. On this point also the REF give a positive reply, indicating in Article 133.2 that local authorities and public agencies are subject to the general principle of direct non-contractual liability, as introduced into Spanish law by Article 121 LEF, which must be considered as superseding the provisions of the LRL.

The next stage in the assertion of the new general principle of providing the public with safeguards against administrative acts was the State Administration (Legal Provisions) Act of 26 July 1957 (LRJAE), whose Article 40.1 reproduces the general liability clause of Article 121 LEF, but in purer form. It reads as follows:

> "Private persons shall be entitled to receive compensation from the State for any harm suffered to any of their possessions or rights, except in the case of vis major, where such harm is due to the normal or abnormal operation of public services or the adoption of measures not capable of being tested by litigation" (2).

The process was completed with the recent Constitution of 26 December 1978 which stated at the highest standard-setting level (thus following the tradition timidly initiated by the 1931 Constitution) the principle of safeguards for the public against damaging acts by the administration, further improving, in Article 106.2, the positive formulation of the principle:

> "Private individuals shall, under the terms established by law, be entitled to compensation for any loss that they may suffer to their property or rights, except in cases of force majeure, whenever such loss is the result of the operating of public services."

That, briefly, is the present situation regarding the civil liability of public authorities in Spanish law. Its positive definition, as may be seen from the quoted texts, is extraordinarily broad: it is normally sufficient that the damage arise out of the operation of public services in order for the victim to be entitled to compensation by the administration.

But before embarking upon a detailed analysis of all the elements which go to determine the technical conditions for compensation in public law, the main features of the system need to be recapitulated concisely. They are as follows:

1. Civil liability differs from expropriation in the way in which administrative activity affects the possessions of private persons. Where appropriation is concerned, the immediate purpose of the administrative activitiy is to deprive a private person of a possession or a right which belongs to him; the effect of dispossession is directly sought by the administration and, as such, is subject to a rigorous administrative procedure in which prior determination of the amount of compensation is essential. In liability, on the other hand, the basic purpose of the administrative activity is not to inflict any loss on particular individuals, but rather to satisfy public needs, which may sometimes, incidentally or involuntarily, cause damage to private interests; accordingly, the issue is one of defining the criteria whereby, ex post factum, the administration is required to provide compensation for the damage caused.

2. The administration's liability for damage due to the operation of public services is always direct. The public authority controlling the service or activity giving rise to the damage must answer for it directly to the victim, without there being any need for the latter previously to identify the particular official or public servant whose improper conduct actually caused the damage. The direct safeguards enjoyed by the public vis-à-vis the administration consequently cover both damage caused by administrative actions attributable to specific public servants and harm caused by the impersonal, institutional or anonymous operation of administrative machinery.

3. The administration's liability is absolute and is independent of any notion of fault in the cause of the damage. Personal culpability on the part of the official or public servant as an individual may render him personally liable vis-à-vis the victim or the administration; but the obligation to provide compensation which rests on the administration is not necessarily linked to culpable behaviour on the part of its servants and may arise out of the mere operation of public services, whether or not any fault is committed in causing the damage.

4. The general direct, absolute liability clause applies to all public administrations. The texts quoted above (Article 106 of the Constitution, Article 121 LEF, 133 REF and Article 40 LRJAE) and other similar provisions which we shall deal with below, constitute a uniform set of rules which protect members of the public, whatever the public authority (State administration, regional administration, local administration, public corporations) whose activity caused the damage.

II. FIELD OF APPLICATION

1. The operation of public services

The general rule of direct, absolute administrative liability towards the public applies in Spanish law to all damage arising out of "the operation of public services". Doctrine and court practice have given this term a very broad interpretation, requiring only the presence of two elements in order that the principle may apply: firstly, the cause of damage must occur in the course of activities attributable to a public authority or, which amounts to the same thing, the damage must occur inside an administrative organisation; and, secondly, the activity causing damage must be subject to the rules proper and specific to public administrations, that is to say to administrative law.

Court practice in this respect has been consistent:

- "The term public services is used to designate the action or proceedings of the administration engaging in an act of public administration and covers any activity of the administration which may be so described, in connection with which unwarranted damage may be suffered by a private person, giving rise to an obligation of compensation" (Supreme Court, STS 2 February 1968).

- The expression "operation of public services" is equivalent to "administrative management in general" or "habitual activity of the public administration as such" (STS 14 September 1969), "administrative operation or activity" or "de facto administrative situation" (STS 28 January 1972) or "administrative action" in general (STS 9 April 1977).

- The general principle of the administration's liability requires "that the situation in which the relevant facts occur must fall within the province of administrative law" (STS 7 June 1967).

"The operation of public services" accordingly embraces any activity which is conducted by an administrative authority, and is governed by administrative law. The administration cannot be held liable, if it does not itself perform or control the activity causing the damage, as in the case of "concessionnaires, persons entrusted with execution of public works and, in general, professional persons independent of the administration who privately exercise public functions", for whom, "since they do not belong to the public service, the administration cannot be held liable" (3). The case of concessionnaires is specifically excluded by Article 121.2 LEF, which provides that "in public services operated under a concession, liability for compensation shall rest with the concessionnaire, unless the damage arises out of a clause imposed on the concessionnaire by the administration and he had no means of refraining from putting it into effect".

Similarly, because of the administrative-law requirement, damage caused to private persons in the course of operations subject to private law fall outside the scope of the general direct, absolute liability clause. In such cases, the administration will not escape any obligation to compensate, but its liability will be governed by the ordinary principles of private law (usually involving the principle of fault) and will have to be established (in the manner described below) before the ordinary courts (4). In order that the general principle of administrative liability may be rejected, it is essential, as the Supreme Court has ruled, "that the administration shall have acted as a private legal person, like any individual, without having availed itself, in the course of its activity, of the prerogatives or powers of public authority" (STS 7 April 1967), a condition which is generally held to be fulfilled only in the case of industrial and commercial operations carried out by public bodies in private forms (eg public corporations carrying on business in the same way as joint-stock companies) and in the management of the administration's own property (5).

2. Activities subject to the general principle: establishment of rules, individual decisions, acts and omissions

Bearing in mind the exceptions mentioned, the general liability clause applies to all non-contractual activities involving the administration. Liability for the operation of public services thus applies to the establishment of legal rules and administrative regulations, and to non-prescriptive legal acts or administrative acts in the strict sense, including both positive actions and omissions.

The operation of public services includes, firstly, damage caused by prescriptive acts or regulations (6), "considering that the administration may direct its services not only by means of individual acts, but also by administrative acts in the strict sense" (Opinion of the Council of State, DCE 9 November 1967).

It should be mentioned that it will not be easy to obtain an order against the administration to pay compensation in such cases, especially in the case of administrative regulations governing economic activities by private persons, for two reasons: (1) because, if the regulation is lawful it will be held to legitimate administrative intervention and to justify any impairment of the operation of market forces which may benefit some economic groups and harm others; (2) because, as a general rule, the link of cause and effect between the prescriptive provision and the economic harm suffered by some individuals could not be established, since the differences found between the expectations or prospects of private groups and the performance achieved in compliance with economic controls would be attributable to themselves (as would also any benefits, according to the principle of commercial risk) and not to the administration.

"To agree to any other course - according to the Council of State - would be equivalent to nationalising commercial risk, causing it to be borne by the State, since, by making a general rule of granting the deductions requested (depreciation of stocks of oil following a price reduction authorised by the administration), the State would not only have to take responsibility for domestic trade but also would have to bear the commercial losses arising out of changes in customs duties, variations in bank rates and, in general, any administrative intervention in the economy" (DCE 9 November 1967).

Individual acts (administrative decisions or edicts in the strict sense) may also give rise to liability. However, Article 40.2 LRJAE provides that "the simple annulment of administrative decisions in administrative or judicial proceedings does not in itself imply any right to compensation". The purpose of this legal precaution is not purely and simply to rule out any obligation to compensate when damage is caused by an administrative act, but to avoid any cancellation of illegal administrative acts automatically entailing payment of compensation by the administration, whether or not any damage had been caused to private persons. The obligation to compensate arises out of a damage-causing act attributable to the administration (as described below), so that it matters little whether the act forms part of material operations or individual legal acts.

However, despite some hesitancy due to the wording of Article 40.2 LRJAE, the case-law of the Supreme Court runs in this direction and court practice consistently recognises individual's rights to compensation for damage arising out of administrati acts which have been declared unlawful. Recent examples have included: withdrawal or refusal of building permits; orders to close commercial establishments; prohibition from engaging in industrial or commercial activities; orders to suspend construction work; orders to supply food-stuffs to certain industries; eviction from protected housing; orders to evacuate buildings declared unfit etc.

However, the "natural" field of application of the general principle of liability remains material acts or operations by the administration, insofar as that is where administrative activity most frequently, according to the explanatory memorandum to the LEF, entails "inevitable exposure to accidental consequences giving rise to damage and a continual source of risk" to the public. However, as we have seen, the natural field is not the only field in which the principle applies: the fact that most damage or the greatest hazards to members of the public, are due to purely material actions does not exclude other possibilities, such as have already been dealt with.

Among material acts, a distinction may be made between, on the one hand, simple technical or material operations in the functioning of a public service, which form a normal part of every such service; and, on the other hand, material acts in the enforcement of previous administrative decisions which the administration may perform without intervention by the courts, in the exercise of its powers to act ex officio. In the latter case, if the administrative decision which is executed by force is declared unlawful, the administration must make good the damage unlawfully caused to the person concerned (7).

However, the Spanish courts are reluctant to introduce a general principle of a civil safeguard covering the forcible execution of administrative acts, owing to the timorous behaviour to which it might give rise on the part of the administration, with a risk of jeopardising the public interests for which it is responsible. This fear does not seem genuinely justified, since it is not a question of casting doubt on the administration's power to act ex officio, but rather of attributing to it any damage which might arise out of hasty and rash enforcement of unlawful decisions. A few isolated decisions already indicate a trend in this direction; they have included decisions ordering the administration to pay compensation for damage caused by the demolition of a building improperly declared a ruin (STS 23 November 1966: "the compensation claimed by the applicant is the consequence of action by the municipality which, having improperly declared

the building of which it is the owner a ruin, ordered demolition thereof to the prejudice of the applicant, who cannot be required to bear such loss"), the occupation of beach sites, preventing the exercise of rights granted to third parties (STS 3 June 1976: in this case, occupation was not even based on a specific decision, which led the Supreme Court to consider it as an act of violence); the same applies to the confiscation of a badly parked vehicle, improperly impounded by the municipal traffic department (STS 27 April 1976).

There has been no such reluctance regarding administrative liability arising out of the physical operation of public services. This appears to be the area where the courts, after at first adopting a reserved attitude, have gradually shown themselves more open to a firm application of the new system of public authority liability, so that a technically clear interpretative doctrine may be observed, which has contributed decisively to firmly consolidating the practice which applies in the system introduced by the 1954 LEF. A number of recent examples give an idea of how the obligation to provide compensation for the administration's physical activities has been extended: traffic accidents due to the poor condition or absence of road signs (8); burst water mains (9); explosion of gas mains (10); military manoeuvres (11); collapse of a municipal wash-house causing several deaths (12); flooding of crops following work on a river bed, blockage of a public drain, bridge construction (13); pollution of a water course due to the discharge of untreated sewage, leading to the closing-down of a laundry (14); public road works causing damage to neighbouring properties, preventing access to industrial premises, or preventing business from being carried on (15); misappropriation of money deposited with a court (16); television broadcasting of defamatory remarks about a foreign Head of State leading to the imposition of fines on a group of Spanish residents (17); death and injuries caused by police officers (19); death of a passer-by caused by a mental patient throwing himself from the window of a public hospital (20) etc.

The legal expression "operation of public services" even covers the administration's omissions. If the administration fails to act when it ought to do so or if it acts with obvious delay, causing damage to private persons, the administration will be obliged to compensate the damage caused, as in the case of positive acts. Consequently, the obligation to pay compensation concerns all cases "in which the administration is required to act in a particular manner or to effect action which it has failed to carry out" (STS 9 June 1976) and all cases in which the damage is due "to failure to exercise the diligence which may normally be expected of the administration", and "the slowness or laxity shown in the action it is required to perform" or "serious negligence in the performance of its obligations" (STS 29 January 1974) (21).

In some public services, the administration's failure to act physically may be a potential source of hazard to the public, much more dangerous than the damage that may be caused by positive acts. This applies, for example, to the growing number of traffic accidents due to the poor state of repair of public roads. The administration cannot excuse its failure to act on grounds of insufficient financial resources, or by alleging negligence on the part of the victims. The Supreme Court is increasingly demanding in this respect, as is the Council of State, whose doctrine on this point may readily be transposed to other administrative services: "The administration has an absolute duty to keep roads open to public traffic in such a state that the safety of persons using them is reasonable guaranteed. This obligation on the administration gives rise to a link of cause and effect between the activity or non-activity of the administration and the injurious consequences of purely fortuitous occurrences ... For the administration, the alternative is clear; either provide the conditions guaranteeing safety, bearing in mind the technically foreseeable occurrences ... even though this may be very expensive, or close the road and re-route the traffic" (DCE 29 May 1970).

3. Exclusions and exceptions

In Spanish law, no administrative activity or service is automatically excluded from the general rule of liability. The general clause in Articles 121 LEF, 40 LRJAE and 106 of the Constitution provides for no exception and it must therefore be considered that all previous rules making exceptions for particular services, are thereby annulled. This applies, for instance, to the telegraphic service, for which the Regulation of 29 November 1900 (Article 441) completely exempted the State from civil liability.

As regards the postal services, the Post Ordinance of 19 May 1960 provides that, where ordinary correspondence is concerned, "the post administration shall incur no liability for correspondence entrusted to it" (Article 16.2) but doctrine holds that "this assertion must not be understood as a genuine exemption from liability ... but rather as a consequence of the material impossibility of establishing damage, without which no compensation can be granted" (22).

III. THE LEGAL BASIS OF LIABILITY

1. Meaning and purpose of the administration's civil liability

The basis of the Spanish system of administrative liability resides not so much in culpable conduct which needs to be punished as in injury which needs to be made good. The legislator's attention had accordingly shifted from the person or behaviour causing the damage to the victim of the injury. It is more important to satisfy the injured person's right to compensation (Article 106 of the Constitution: "Private individuals shall be entitled to compensation for any loss that they may suffer ...") than to punish a culpable action or omission on the part of the administration. By taking this approach, the Spanish legislator has clearly emphasised the specific purpose of civil liability, which is not (as in the case of criminal or disciplinary liability) to efface a fault, but to transfer the loss suffered by one person to another - ie the administration, according to precise legal criteria (23).

As a result, the administration's liability may be regarded as absolute; fault has ceased to be the basis of the system of compensation and is now only one of the legal criteria for establishing the extent of the administration's liability. The Spanish legal rules "apply a virtually absolute criterion, disregarding whether there has been fault or negligence on the part of the administration ... and requiring the administration to pay compensation for damage caused as a result of lawful administrative activity" (STS 9 June 1974). Liability, "being rooted in a principle of solidarity" (STS 16 November 1974), has been turned into an objective device for compensating for damage, aimed primarily at "covering all risks which may arise for private persons out of the activity of the State" (STS 28 January 1972).

In this sense, the administrative courts have not hesitated to term the new system a "great conquest for our administrative system" (STS 20 March 1973), believing quite rightly that its positive formulation is "in keeping with the most fundamental principles of justice, when it provides that damage caused to private persons by the operation of public services which are for the benefit of the community as a whole, are not to be borne individually by those they affect, but by the public as a whole through the administration itself" (STS 2 December 1974), not forgetting, moreover, that, as stated in the explanatory memorandum to the LRJAE, "everything that fortifies the principle of liability contributes to consolidating the prestige and efficiency of the administration and the fair-minded support of the public".

2. Type of damage eligible for compensation

A. Absence of legal obligation to support the damage

Not all types of damage and harm caused to members of the public by the administration meet the conditions laid down for compensation. To qualify for compensation the damage suffered by a private person must meet certain requirements. The first condition is that there must be no legal obligation upon the public to suffer the loss involved.

In Spanish law, the only damage which may be attributed to the administration - and hence which may qualify for compensation - is damage for which there is no legal foundation, that is to say, not damage which the administration causes unlawfully, but rather damage which the victim is not legally obliged to suffer. Damage not imposed by the law - damnum non iure datum - is accordingly an objective element in the damage qualifying for compensation and is not derived from a subjective assessment of the behaviour giving rise to the damage. It follows that, if, in relation to a given activity causing damage, the private person is not legally obliged to suffer the consequences, the loss need not in law be borne by him and must be attributed to the administration, even where the administrative activity causing damage has been perfectly lawful (24). Conversely, if any rule of law specifically authorises the administration to infringe upon a right or possession, that implies that the victim must bear the consequences, the damage is not without legal foundation and accordingly the administration is not required to make it good.

The damage is therefore unlawful if the law does not require the victim to bear the consequences of a particular administrative act or, in other words, if such administrative action does not specifically involve any cause provided for by a rule of law to justify the damage. In the absence of any such legal provision, the administrative action concerned (whether or not improper) will not enjoy the legitimacy, which - as the Supreme Court states - legally justifies the burden or damage imposed upon the member of the public: in this case "we are faced with unjustified damage which, for that very reason, must be compensated for, on the basis of the general principle of compensation, as sanctified by the law" (STS 4 October 1978).

B. Actual damage capable of individual identification and economic evaluation

Apart from the absence of any legal obligation to bear it, the law requires that to qualify for compensation damage must be actual, must be capable of economic assessment and such that the individual person or persons suffering it can be determined (Articles 122.1 LEF and 40.2 LRJAE).

Actual damage means real and certain damage. The victim must show that the administration's action or failure to act has caused him actual loss; it does not apply to possible, potential or future damage. The Council of State has ruled in this respect that "Expectations, in which there is no certainty that damage will result but at the most unverified conjecture, amount to possible or eventual damage, which lie outside the substantive field of application of administrative liability, which is strictly confined by legislation to actual damage" (DCE 6 November 1969). Similarly, the Supreme Court denies the right to compensation for speculative, doubtful or future damage based on "mere speculation" or assumed on the basis of a "calculation of probabilities" (STS 12 March 1973, 16 May 1977, 26 January 1978).

The purpose of economic assessment of the damage is to exclude mere inconvenience or subjective damage involving no appreciable loss, but not non-material damage, to which the principle of compensation also applies if it causes the victim harm (25). Owing to the virtually insurmountable difficulty of precise evaluation, the courts have refused compensation for exclusively non-material damages, which is in keeping with the old principle whereby pretium doloris is not

subject to compensation. In line with the recent trend in civil law, however, some recent decisions have sought to widen the concept for damage by taking purely non-material damage into account for compensation purposes, but without assessing it separately from the material loss caused by the administration. This is the course adopted by the National Court (Audiencia Nacional) in a case involving physical injury inflicted on a member of the public by police officers, where after ordering the administration to compensate for all the material damage, the court declared that "it is not possible to ignore damage such as physical pain, loss of faculties and mental disturbances which, although lying outside the narrow concept of damage to possessions ... are subject to compensation, which must be full and complete" (National Court, SAN 12 July 1978). This is a new departure which is to be welcomed and which is to be given a sound legal foundation in the new text of the Constitution, which protects the integrity of citizens' moral and physical integrity as well as their possessions (26).

The requirement of individual identification of the damage refers to damage to particular, specific possessions, ruling out compensation either for mere inconvenience or unpleasantness caused by the operation of public services or general burdens inherent in community life which the administration imposes in the course of organising public works and services.

The main problems which occur in technically defining what is meant by individual damage arise in connection with the work carried out by the administratio on the public highways and which affect neighbouring properties, and industrial or commercial establishments. As a general rule, the Council of State has maintained that "the contiguity of a building with a public highway does not engender any right but constitutes merely a facility which derives from the general possibility of public utilisation of the highways, involving no element of possession" (DCE 23 April 1970), meaning that changes in the general conditions of use of public highways are mere general constraints "which are inherent in the legal status of citizens" (DCE 23 April 1970). However, this judgement which prevents compensation being awarded for lack of the possibility of establishing individual damage, has been toned down by the Supreme Court, which has for several years recognised the right of the owners of neighbouring property to receive compensation when alterations to public highways cause them losses substantially in excess of the general burdens which have to be borne by everyone. This applies for example, to the removal of direct access to a commercial establishment, loss of clientèle, closing down or transfer of business etc (STS 16 March 1972, 2 April 1974, 18 March 1976).

3. Cause and effect

In order to qualify for compensation, the damage caused by the administration must "be the consequence of the normal or abnormal operation of public services" that is to say there must be a relationship of cause and effect between the administrative activity and the damage suffered by a member of the public. Where this relationship cannot be shown, it will not be possible to attribute the damage to the administration.

In theory, the position is quite clear, but specific instances may give rise to extraordinary difficulties. In fact, causality is an elusive concept which lends itself better to pragmatic definitions in terms of actual cases of damage, rather than to theoretical definitions which apply in all circumstances. Even in the field of criminal law, where causality plays a predominant part and where greater efforts have been made to define it, the results have not been entirely satisfactory. It can hardly be found surprising therefore that, where the civil liability of the administration is concerned, the courts themselves are normally not very explicit in referring to this or that theoretical definition of cause and effect (equivalence of conditions, adequate causality, immediate causality etc), using flexible terms which enable the specific features of each concrete case to be judged and solved without closing the way to suitable solutions in cases which may arise in the future (27). This flexibility is all the more necessary because, as a general rule, damage does not in practice arise from a single cause, but from the

conjunction of separate or interdependent causes which may be equally to blame for the ultimate harm done to the victim's rights.

In such cases, bearing in mind the civil guarantee enjoyed by the victim, the "key" to the idea of cause and effect, according to what we have already said elsewhere, lies in "eliminating the facts which have clearly had no decisive role in producing the ultimate damage" (28), the remaining factors being included among the causes and attributed to their respective originators.

Broadly speaking, Spanish court practice of recent years has been based on two interpretations of cause and effect: the one is restrictive and refuses to allow damages against the administration where there have been other contributory causes: the other, broader interpretation, allows such damages where, despite the presence of other decisive factors, such as the behaviour of the victim or of a third party, the activity of the administration has contributed or aggravated the ultimate damage.

According to the first approach, the allowance of damages against the administration requires that the relationship of cause and effect between the administration's action or failure to act and the civil damage must be direct, immediate and exclusive, which rules out the co-existence of outside interference from third parties or the victim himself (STS 28 January 1972; 9 February 1977; 26 January 1978). Applying this interpretation, the Supreme Court refused compensation for the demolition ordered by a municipality of a construction which did not comply with the building permit, arguing that, "while the municipal services did not function as they should have ..., that is due to the behaviour of the claimant himself" (STS 6 March 1978); similarly, it also refused compensation claimed for an unlawful building permit, originally issued because of an error on the part of the claimant, on the grounds that "while it is perfectly understandable and just - states the Supreme Court - that the municipal administration should compensate a private person when he suffers certain damage as a result of the improper issue of a permit, this must strictly apply to an error on the part of the authority, not to an error ... caused by the applicant himself" (STS 14 February 1975). Lastly, in a case where it was even clearer that the behaviour of the administration was improper, the Supreme Court refused to grant compensation to a tradesman who had been expelled and deprived of his place in a public market and had asked for the expulsion order to be ruled unlawful; the court held that the anti-social conduct of the tradesman was not "entirely unrelated" to the unlawful administrative sanction, which, in the judgement of the court, implied "interference in the exclusive nature attaching to the relationship of cause and effect as a condition of compensation" (STS 26 March 1973).

Whether or not the application of this criterion enabled the cases mentioned to be resolved satisfactorily, it is certain that the second case-law tendency in favour of allowing contributory causes lends itself better, in a great number of cases, to the effective application of the general principle of administrative liability. This second line of interpretation runs in three directions.

1. Administrative causality need not be exclusive; participation on the part of the victim or of a third party in causing the damage even where they are at fault - need not invalidate the responsibility of the administration. Acting on this criterion, the National Court did not hesitate to order the administration to compensate the serious physical injury caused by police officers to a member of the public whom they were trying to arrest, having confused him with an alleged terrorist: the court considered in this case that "the defensive reaction of the victim" had not severed the relationship of cause and effect (the mistake by the police, accompanied by aggression, blows and a gunshot) since, in view of the circumstances in which the police action occurred, the victim had behaved reasonably: "in view of that, it was reasonable to assume that he was being attacked by persons unconnected with the police security services" (SAN 12 July 1978). Similarly, in a case where the victim was also partly at fault, the Supreme Court found that the blame attaching to the victim could not rule out the administration's liability, but at most diminish the amound of compensation (STS 8 March 1967).

2. The original or first cause of the damage may lie outside the administration and subsequent action by the administration may yet give rise to a relationship of cause and effect. This was so in a case dealt with in STS 21 April 1977, in which the administration was ordered to pay compensation for deaths and damage caused in the course of a fire in which the fire brigade was at fault.

3. For a relationship of cause and effect to be established, it is sufficient that the administrative activity, together with other factors, contribute to aggravating the ultimate damage. Among other court decisions, mention may be made of STS 2 October 1975, ordering compensation to be paid for damage caused to a private person by the pollution of a watercourse, ruling that: "the failure of a public sewer no doubt contributed to the pollution, with the discharge from private drains and malfunctioning of this service hence also constitutes an at least partial but inseparable cause of the damage".

So far, the court decision falling most clearly within this trend in interpretation is STS 16 November 1974. This is a very interesting judgement both because of the facts involved and the amount of the compensation awarded and because of the firmness and rigour with which the Supreme Court supports the argument in favour of concurrent causes. The claimants were various Spanish companies and individuals resident in the Republic of Equatorial Guinea, who had been fined by the authorities of that country following a Spanish television broadcast which was considered defamatory and insulting towards the Guinean Head of State. The Supreme Court allowed the claim and ordered the administration to pay compensation of over 66 million pesetas on the grounds that:

i. the causes of the damage, in addition to the immediate cause constituted by the unlawful reprisals exacted by the Guinean Government, included an action and an omission by the Spanish administration: the television broadcast and the failure to provide effective diplomatic protection;

ii. although the damage caused to the Spanish companies and citizens, "was primarily attributable to unwarranted reprisals", the contributory effect of the two administrative factors justified its being attributed to the operation of public services (29).

4. Criteria for attributing the cause of damage to the administration

In accordance with the objective foundation of the principle, the basic condition for attributing the cause of damage is that the administration shall control the service or organisation in which the cause of damage occurred. If it is shown that the unlawful damage occurred in connection with an activity under the control of a public body, the latter will normally be obliged to make good such damage. Otherwise, there will be no liability on the part of the administration.

Bearing in mind this basic requirement, the attributability of the cause of damage to the administration may be established in practice by reference to two legal criteria, both contained within the legal formula "normal or abnormal operation of public services": the criterion of fault and the criterion of risk.

A. Abnormal functioning of public services: fault

As a criterion for attributing the cause of damage to the administration, the abnormal functioning of administrative activity embraces both personal actions by public servants who, through their unlawful or improper conduct cause unlawful damage, and impersonal or anonymous, unlawful or illegal actions, which may be attributed to the administration as such.

In the former case, the fault of the individual public servant causing the damage directly involves the responsibility of the public authority to which he belongs and which covers him vis-à-vis third parties in the execution of his duties, except - as is logical - for damage caused by his strictly private activity unrelated to his duties. In the latter case, the criterion of fault is applied to the operation of the public service as such, independently of any unlawful conduct by individual persons. It is a question of an objective fault in this service, which may occur both where the service has functioned improperly or has functioned defectively, below the average level which may be expected of such a service, or where it has not functioned at all but is required by law to do so.

B. Normal functioning of public services: risk

Apart from faulty behaviour, whether subjective (fraud or negligence by an official) or objective (unlawful act committed by the service), the administration is also answerable for damage caused by the normal operation of public services, that is to say damage caused accidentally or incidentally by the administration's lawful acts. This is covered by the criterion of risk arising out of the activity of the administration as a potential source of damage to third parties (cuius commoda eius et incommoda).

This was so, for instance, in the case leading to the above-mentioned STS of 16 November 1974, in which the court found that the television broadcast which prompted the reprisals against Spanish residents in the Republic of Equatorial Guinea, "although it did not constitute abnormal, still less unlawful conduct on the part of the Spanish administration, was nonetheless to be included among activities which warranted compensation for the consequences ... of the operation of public services".

The law excludes only damage caused by vis major (Article 40 LRJAE) and the criterion of normal operation or risk operation implicitly includes all cases of fortuitous damage. The Supreme Court's doctrine distinguishes between two types of case according to whether the cause of the damage is deemed to be external or internal. Vis major is not only that which cannot be defined but, especially, an external cause or cause totally foreign to the operation of the service: "an external unexpected, unforeseeable or irresistible event" (STS 16 November 1974, 3 November 1975); "that which can be attributed only to external forces or to tragic events" (STS 15 February 1968); "that event which falls outside the normal course of events, which could not be foreseen and which, had it been foreseen, could not have been avoided, such as wars, earthquakes etc ..." (STS 23 October 1969, 2 December 1974). On the other hand, fortuitous damage is due to causes which could not be foreseen or which cannot be determined, but are internal to the operation of the service, linked to its structural elements: "this covers internal events, related to the operation of public services, resulting from the very nature and content of those services, their impairment due to unknown causes" (STS 15 February 1968, 2 December 1974); occurrences "which do not prevent declaration of liability even though they be independent of the activities of the administrative body and comprise inevitable damaging effects, even where the greatest care is taken" (STS 9 May 1978).

It should be mentioned, however, that despite the very broad scope of the criterion of risk, which enables the administration to be held liable for all accidental damage caused by its normal or lawful operation, the courts generally adopt a very reserved attitude to its application in practice.

The courts keep to a large extent to the traditional criterion of fault, which makes them instinctively reluctant to award damages for the strictly normal operation of public services. In some cases, they go so far as purely and simply to reject the criterion of risk and to replace it by the criterion of fault, even where the damage originated in an event which, though unforeseeable, was inherent in the service itself: this applied, for example, to a theft of jewelry deposited with a court, where the owner was refused compensation because, according to the

Supreme Court, no fault or negligence could be shown against the court officials; "there is no basis on which to apply the rule contained in Article 40 LRJAE", the very rule which, it should be remembered, rightly states the principle of risk. In other cases, the assessment of fortuitous damages is reinforced by the assessment of elements of fault in the actions of the administration, which seems to provide a better and more natural justification for the obligation to compensate. For example, in the case of the collapse of a public washhouse causing several deaths, the Supreme Court awarded compensation against the administration because "even though it is not necessary to show contributory fault or negligence, it was the municipal architect himself who reported the structural defect in the wall ...; the mayor was also guilty of negligence in failing to have the necessary repairs carried out" (STS 9 June 1976).

IV. THE EXTENT OF COMPENSATION

1. The general principle of full compensation

Spanish legal texts contain no principle governing the calculation of compensation, except for Article 134.3 REF, which states that the assessment criteria provided for in the case of expropriation must be taken into account "as far as possible". The question has thus been left entirely to the discretion of the courts, which has generally (with some recent, isolated exceptions) produced highly unsatisfactory results as regards the amount of compensation awarded. This is probably the aspect of the system most open to criticism, due less to the wishes of the legislator than to the courts themselves, the amounts awarded against the administration being generally manifestly insufficient, particularly in cases of compensation for death or physical injury. A very recent example confirms this: STS 9 May 1978 ordered the State to compensate for the damage caused by the death of a person during a 1969 police action, but the amount of compensation awarded to the widow, once allowance had been made for the victim's age, annual income, occupational prospects and family responsibilities, amounted to a mere 1.2 million pesetas.

Despite this, the general principle of liability requires full compensation, completely restoring the position enjoyed by the victim before the unlawful damage occurred. That is what compensation means: leaving the victim unharmed, making good the economic damage by restoring his possessions in their entirety.

2. Means of compensation

Spanish law provides specifically only for economic compensation, that is to say compensation in money. But this does not rule out the possibility of compensation in kind in some cases: specifically in all cases of damage consisting in unlawful deprivation by the administration of a specific occupational position (eg suspension of a civil servant, closing of a commercial establishment etc). In such cases, compensation primarily involves re-establishing the previous situation (reinstatement, re-opening of the establishment etc) in addition to the economic compensation of other damage resulting from the unjust situation brought about by the administration.

The Supreme Court also accepts compensation in kind offered or conceded by the administration to make good the damage caused. This was so in the case dealt with in STS 18 November 1976, in which the administration was ordered to compensate a private person who had been unlawfully deprived of the benefit of protected housing, deducting from the compensation the value of the housing he had already been given in exchange before the court ruling.

3. Extent of compensation

The existence of the damage and the value to be placed upon it must be shown by the claimant (Article 134.3 REF), who must indicate the amount of compensation claimed "or, at least, the basis or elements according to which the amount thereof may be determined" (STS 19 May 1970), it being possible to defer valuation until

proceedings for execution of the award (Article 14.C of the Administrative Courts Act). The Supreme Court has ruled that, in the absence of a compulsory rule governing determination of the amount, the courts may freely revise the estimates submitted to them, since ultimately "the sole criterion for calculation is that which emerges from the practice of the courts" (STS 26 September 1977).

From the exercise of the court's discretion, a number of principles have emerged which may be summarised as follows:

a. Immediate material damage (dammum emergens) is to be compensated in the same way as loss of earnings (lucrum cessans), duly assessed to arrive at "genuine compensation" (STS 18 November 1976, SAN 12 July 1978), but at the same time avoiding unjust or excessive enrichment (STS 31 January 1968, 3 May 1977).

b. Improper conduct on the part of the administration (objective fault) or of a public servant (subjective fault by fraud or negligence) may increase the amount of compensation (STS 9 June 1976).

c. Contributory liability: improper conduct on the part of the victim may reduce the amount of compensation (STS 8 March 1967, 9 June 1976).

d. In the case of damage resulting from death, use is made of the elements of calculation employed by the civil, criminal and industrial courts in the case of fatal accidents (STS 9 June 1976, 26 September 1977), with the aim of preserving the household's income (S 16 November 1974), which may be obtained by capitalising, at the official rate of interest, the annual difference between the wage of the deceased head of family and the pension granted to his widow by the Social Security (STS 28 January 1971).

e. In the case of damage due to physical injury, similar criteria are applied, but there has been a recent tendency (modifying previous court practice) to increase the amount of compensation considerably, so as to match the actual damage suffered by the victim. For instance, an important award by the National Court, dated 12 July 1978, ordered the administration to pay 6.7 million pesetas for physical injury suffered by a person, rendering him unfit to work. The figure was arrived at by taking into account the differences in earnings between the victim's previous and present occupational position, his age and the years yet to elapse before his retirement, representing a sum which, if invested by the victim at the normal interest rate on the financial market (not at the much lower official rate of interest), would provide him with an income equal to the loss of earnings caused by the administration.

f. The compensation payable by the administration does not constitute a debt in current coin, but a debt of specified value, which entails taking into account monetary depreciation between the time when the cause of damage occurred and the time when compensation is paid. "Payment cannot be made - states the Supreme Court - by applying a nominal criterion of the value of money, but a criterion in constant pesetas, according to the official indices of the purchasing power of the national currency" (STS 18 November 1976). This doctrine has two important consequences, viz: (1) The material time for assessment of the damage is not the time at which the cause of damage occurred, but the time when the compensation order is made; (2) The administration is obliged to pay interest if it delays paying the compensation; in some cases, it has been held that this interest should be limited to the official 4 per cent mentioned in Article 1.108 of the Civil Code (STS 3 November 1975, 3 May 1977), but the National Court judgement of

12 July 1978 referred to above raises this to the basic interest rate or official lending rate of the Bank of Spain (currently 8 per cent), if the delay in payment does not exceed three months from the notification of the judgement (as provided for in Articles 45 and 36-2 of the General Budget Act) and the market interest rate, allowing for monetary depreciation, if the delay exceeeds six months (30).

4. Limits to compensation

There are two instances of non-contractual damages in which the amount of compensation is limited by law: damage caused by the postal service and damage arising out of nuclear accidents. In the first case, the 1960 Post Ordinance provides for lump-sum compensation for each item sent by registered mail; this limit may be explained by the impossibility of establishing the actual amount of the damage. In the second case, the 1964 Nuclear Energy Act lays down a ceiling of 300 million pesetas, increased to 350 million by the Decree of 7 November 1968.

V. THE PARTY RESPONSIBLE

1. The administration

As we have already pointed out, administrative liability applies to all public administrations of whatever kind. It covers all public law bodies without exception State administration, local administrations, regional administrations and public corporations. This single system of liability has been confirmed in the recent Constitution, particularly in Article 9, which states the principle of the liability of public authorities; Article 106, which as we have seen gives constitutional sanction to the attributability to the administration in general of damage caused by the operation of public services; and Article 149 which, in the new context of the regional organisation of political power, gives the State exclusive competence to regulate "the system of liability of all public administrations".

With regard to the pre-autonomous regional administrations, set up in anticipation of approval of the new Constitution, over the period between September 1977 and October 1978, their inclusion in the general system of liability was specifically regulated by the various texts successively adopted to arrange the transfer of powers, functions and services. For instance, the first of these texts - the Royal Decree of 23 June 1978, transferring to the province of Catalonia the powers of the State Agricultural Administration - already contains an article in which it is stated that "the provincial authority shall be liable in the same cases and forms as provided for in the legislation on the State administration and on expropriation" (Article 8.3), a rule which is found in all the provisions so far published for the purpose of the relevant transfers.

2. Public servants

The occasioning of damage by public servants by their acts or omissions gives rise, as we have seen, to direct liability on the part of the administration. However, this does not mean that the individual public servant who has materially caused the damage, is automatically exempt from any obligation to pay compensation. On the contrary, he will be so obliged if he has committed fraud or serious negligence in causing the damage. In this case, action may be taken against the public servant, who is jointly responsible with the administration (Article 135.3 REF) in two ways:

a. The victim may bring a civil action for damages against the person responsible (Article 43 LRJAE: "Private persons may also bring actions against the authorities and civil servants, whatever their grade or category, for compensation for damages and harm caused to their possessions or their rights by fault or serious negligence in the performance of their duties").

b. The administration may reclaim the compensation it has paid the victims from the civil servant responsible (Article 121.1 LEF, 135.1 REF 42 LRJAE). It may do this by means of an administrative procedure which involves hearing the civil servant at fault and producing all evidence for calculating the extent of his liability (Article 135.2 REF).

3. Appeals

A. Administrative proceedings and proceedings before the administrative courts

a. Applications to the administration

Before bringing an action before the administrative courts, the victim must make a complaint to the administration itself. His complaint must be addressed "to the minister or to the president of the local authority or establishment to whom the service or official causing the damage is responsible" (Article 134.1 REF), and must specify "the circumstances in which the damage occurred, showing such evidence as (the claimant) sees fit to produce to justify his claim and the amount thereof". If the claim is made against the State administration, it will be examined by the Council of State, whose opinion is not binding on the minister.

The time limit for claims is one year from the occurrence of the damage. According to the LEF (Article 122.2), "claims are barred one year after the act in respect of which they are made" and this time limit is generally accepted by theorists and in the practice of the Supreme Court as a limitation, even though the later LRJAE (1957) speaks of preclusion (Article 41.2: "the right to claim shall be subject to a preclusive time limit of one year from the act in respect of which it is made"). The main effects of the interpretation of the time limit as a limitation lie not only in the possibility of allowing suspensions as a result of the institution of court proceedings (eg pending criminal proceedings, STS 17 November 1977) or non-judicial proceedings (eg the administration itself asking the victim for information or evidence, STS 8 February 1978), but also, more generally, in the fact that the period may be calculated flexibly, so as to avoid "results contrary to justice and equity" (STS 2 November 1965) and, in doubtful cases, enables the fundamental interest of the victim seeking compensation to be safeguarded (STS 2 December 1974, 17 November 1977, 10 March 1978).

b. Proceedings before the administrative courts

If the claim to the administration is totally or partially rejected, either explicitly or implicitly, the victim may bring an action in the administrative courts. By this means, he may request the annulment of the explicity or tacit decision rejecting his claim and seek an order against the administration for compensation, the amount of which the court may specify, unless deferring the fixing of the amount until the time when the decision is executed (31).

Execution of the award will lie with the administration "in the form and limits authorised by the budgets and the provisions governing the payment of debts and obligations of the State, the province or the municipality", it being understood that, "if payment requires an appropriation, an additional appropriation or an extraordinary budget, the relevant procedure shall be instituted in the month following notification of the decision, subject to no deferment for any reason whatsoever" (32). The Council of Ministers is authorised to lay down payment arrangements less detrimental to the public treasury if it considers that strict execution of the award would be seriously damaging to public finances (33), but this eventuality is quite exceptional and has never occurred in practice.

c. Claims for damages caused by an administrative act

The general claims system described above can be modified in the case of damages caused by administrative acts; this is intended to widen the possible ways of applying for compensation. In such cases, three possibilities are open to the victim, viz:

1. To attack the act through administrative channels, accompanying the application for annulment with a request for compensation.

2. To attack the act through administrative channels, without claiming compensation and, if this application is rejected, to bring proceedings in the administrative courts, at the same time also, if he so wishes, seeking a compensation order against the administration.

3. To attack the act only (initially through administrative channels and subsequently through the courts), without accompanying the application for annulment with any request for compensation and, once the court decision annulling the unlawful act has been obtained bring a separate action for compensation, before the administrative court itself. In this case, the one-year time-limit is measured "from the date on which the annulment decision (annulling the unlawful act causing the damage) becomes final" (Article 136 REF, 40 LRJAE and 79.3 of the Administrative Courts Act).

B. Proceedings before the ordinary courts

Both the LEF, the REF and, especially, the Administrative Courts Act give general jurisdiction to the administrative courts in litigation concerning the civil liability of the administration, whatever the origin or circumstances in which the cause of damage occurred (34).

The LJRAE ended this unity of jurisdiction as regards the liability of the State administration, since Article 41 provides that, where the damage arises while the State is acting according to the rules of private law, liability must be proved in the ordinary courts. According to a similar criterion, Article 79 of the State Public Corporations Act also seems to favour duality of jurisdiction as regards damage caused by independent bodies belonging to the State administration. Accordingly, the exclusive jurisdiction of the administrative courts now applies only to damage caused by local administrations.

This duality of jurisdiction over compensation proceedings has been very unfavourably received by legal authors because, in view of the very vagueness of the term "(non-contractual) relations in private law", it introduces an element of insecurity into the system, which works to the disadvantage of the victim, obliging him to find the competent court (there has even been talk of "doing the rounds of the courts"), which may result in his not being able to obtain compensation, or in an extraordinary delay in obtaining satisfaction, if he makes the wrong choice of - administrative or civil - court. In practice, however, each court normally asserts its own jurisdiction with regard to compensation claims brought before it, without bothering too much beforehand about whether the situation in which the cause of damage occurred belongs to private or public law, which in my opinion affords further proof, were it necessary, of the lack of justification for the system of dual jurisdiction.

4. Special rules governing the acts of judicial services and authorities

Article 121 of the 1979 Constitution states that "damages caused by judicial errors as well as those arising from irregularities in the administration of justice, shall be subject to compensation by the State, in accordance with the law". This fulfils an old aspiration - direct civil liability of the State for damage caused

by judicial bodies - which had found its way into case-law only in rare instances. The new constitutional formula covers all damage caused to members of the public not only by judicial errors, but also by all acts of negligence or malice by the judicial authorities.

So far, the administrative courts have applied the general system of administrative liability only to damage caused by the non-judicial activities of the judicial services. This was so in the case dealt with in STS 15 December 1976, ordering the State to compensate members of the public who had deposited sums of money with a municipal court, which were misappropriated by the Secretary to the Court. The Supreme Court held that the public administration should be held responsible for the misappropriation of these sums by the judicial official because it was a question of "the activity of an auxiliary of justice and not of a judicial official proper, as a member of the public service organised by the administration as an activity incidental to the exercise of jurisdiction".

Similarly, Article 138 of the Public Prosecution Regulations of 27 February 1967 extends the State's direct liability to damage caused to members of the public by officials of the Department of Public Prosecution "where, in the performance of their duties, they offend against the law by negligence or inexcusable ignorance".

Lastly, with regard to the judicial function in the strict sense, Spanish law provides for the State's direct civil liability only in criminal matters when a person convicted as a result of judicial error is subsequently found innocent upon appeal against conviction. In this case, Article 960 of the Criminal Procedure Act states that "the persons concerned or their heirs shall be entitled to civil compensation in accordance with the ordinary law, payable by the State, without prejudice to the right of the latter to claim against the judge or court which delivered the judgement out of which liability arose". In the field of civil law, on the other hand, provision is made only for personal liability on the part of the judges (Articles 903 ff of the Civil Procedure Act), which, in the opinion of some authors, in the event of these being insolvent, does not prevent subsidiary application of the general State liability clause contained in Articles 121 LEF and 40 LRJAE (35). However, the question has ultimately been settled by Article 121 of the Constitution, which specifies that the State has a direct obligation to make good damage caused by erroneous or unjust decisions by any official body whatsoever.

NOTES

1. Article 1902 CC: "Whosoever by act or omission causes damage to another, whether by fault of negligence, shall be required to make good the damage caused".

2. The new wording is an improvement on the LEF text on two points: (1) it includes vis major as an external cause giving exemption from liability; (2) it deletes the reference to discretionary acts, which are now subject to judicial scrutiny under the Administrative Courts Act of 26 December 1956.

3. GARCIA DE ENTERRIA y FERNANDEZ RODRIGUEZ, Curso de Derecho administrativo, II, Madrid, 1977, p. 330

4. Article 41 LRJAE: "When the State acts under private law, it shall be directly answerable for damage caused by its authorities or servants, their actions being deemed to be the acts of the administration itself. Liability actions shall in such cases be brought before the ordinary courts".

5. V MARTIN REBOLLO, La responsibilidad patrimonial de la Administración en la Jurisprudencia, Madrid, 1977, p. 176; GARCIA DE ENTERRIA y FERNANDEZ RODRIGUEZ, op. cit., p. 357.

6. On this point, see SALAS, Ordenación de precios y responsabilidad administrativa, in Revista Española de Derecho administrativo 2, 1974.

7. In the opinion of GARCIA DE ENTERRIA y FERNANDEZ RODRIGUEZ, op. cit., p. 324, in this case the obligation to provide compensation is "an inexcusable counterpart of the great privilege of ex officio action enjoyed by the administration, without which this privilege would not be what it is or may be, an arbitrary imposition, a definite breach of legality".

8. STS 28 January 1972; 8 February 1973; 16 November 1974; 3 March 1977; 26 September 1977; 10 March 1978; 9 May 1978.

9. STS 28 January 1976.

10. STS 11 December 1974.

11. STS 3 October 1977.

12. STS 9 June 1976.

13. STS 13 December 1975; 12 February 1973; 16 May 1977.

14. STS 11 October 1975.

15. STS 3 November 1975; 2 January 1976; 18 March 1976; 21 July 1977.

16. STS 15 December 1976.

17. STS 16 November 1974.

18. STS 21 April 1977.

19. SAN 12 July 1978; STS 4 October 1978,

20. STS 12 March 1975.

21. An instance of damage through delayed functioning is examined in STS 5 June 1972, in which the administration is ordered to compensate an official whose reinstatement was ordered but who was not notified until 5 years later. The Supreme Court condemns the administration on the grounds that "it is obvious that the emoluments which the person concerned ceased to receive during the years when he was not employed in the administration, owing to failure to reinstate him in good time, constitute a loss, which must be made good by the payment of the salary corresponding to the period which elapsed between the reinstatement order and the date when such was notified and produced effect".

22. GARCIA DE ENTERRIA y FERNANDEZ RODRIGUEZ, op. cit., p. 352.

23. LEGUINA, La responsibilidad civil de la Administración publica, Madrid, 1970, p. 98 et s.

24. DCS 23 April 1970: "The legal concept of injury implies that an activity produces an effect, to bear the consequences of which there is no corresponding legal obligation. The activity concerned may be entirely in keeping with the law and fully lawful (this is the case with 'normal operation of public services') and yet cause a loss which the law does not require others to bear (injury in the technical sense). This is compensatable injury".

25. STS 26 September 1977: "The obligation to compensate applies to all damage which can be evaluated, suffered by the victim to his possessions and rights, that is to say both direct and indirect, material and non-material damage".

26. See MARTIN REBOLLO, La responsibilidad patrimonial de la Administracion en la jurisprudencia, pp. 76 f., the review of this publication by Javier SALAS in Revista de Administración Pública, No. 86, 1978, pp. 624-627.

27. V. LEGUINA, op. cit., p. 278; GARCIA DE ENTERRIA y FERNANDEZ RODRIGUEZ, op. cit. p. 282.

28. LEGUINA, op. cit., p. 282.

29. An analysis of this judgement may be found in NIETO, La relación de causalidad en la responsibilidad del Estado, Revista Española de Derecho Administrativo (REDA) No. 4, 1975, pp. 90-95, et Efectos procesales del silencio negativo de la Administración, REDA No. 5, pp. 256-259; MUÑOZ MACHADO, Protección diplomática y jurisdicción contencioso-administrativa, REDA No. 6, 1975, pp. 401-425.

30. The time limit of 6 months stated by the Supreme Court for the application of real interest has its legal foundation in Article 110 of the Administrative Courts Act, read in conjunction with Article 106 of the same Act.

31. Articles 79-3 and 84.C of the Administrative Courts Act.

32. Article 108, dittto.

33. Article 105.3, ditto.

34. Article 3°.

35. V GARCIA DE ENTERRIA y FERNANDEZ RODRIGUEZ, op. cit., p. 326.

LIABILITY IN SWISS LAW

by

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Introduction to Swiss legislation

A. Historical development

The modern conception of the liability of civil servants evolved during the first half of the last century under the influence of liberalism. The personal liability of the civil servant was embodied at that time both in the Federal Constitution of 1848 and in the majority of canton constitutions. The first Federal Act on liability dates from 1850 and several cantons enacted legislation on liability during the same period.

If the civil servant was not solvent, the injured party was unable to recover damages. For this reason, it was felt that the State should assume joint or accessory liability together with its employee. By the beginning of this century, a trend became apparent towards the assumption of primary liability by the State. Hence, State liability may derive from a fault committed by one of its officials or from the original (direct) liability of the State, without its being necessary, in each case of violation of a principle of justice by the authorities or civil servants, to establish a fault in what may be defined as the "external" relationship between State and injured party. The official's liability thus forms part of an "internal" State/civil servant relationship, in which the latter cannot be prosecuted by the State, unless he has acted intentionally or displayed gross negligence; on the other hand, the civil servant cannot be sued by the complainant. State liability arising from lawful acts, incurred by the Confederation and cantons, has only a slender legal foundation.

The Committee of experts responsible for carrying out a thorough revision of the Federal Constitution has incorporated in its 1977 draft the doctrine of original liability independent of fault by the Confederation for damage caused in breach of a principle of justice, and liability based on equity for certain cases of damage caused in the course of lawful action. The relevant provision is as follows:

"Article 6: Compensation for damage

1. The State shall assume liability for damage unlawfully caused by its organs.

2. It shall also assume liability for damage caused by its organs in the lawful pursuit of their duties, if private individuals thereby suffer serious prejudice, which they cannot be expected to assume alone".

It is not likely that this draft constitution will one day have force of law. Nevertheless, Article 6 quoted above has barely attracted any open criticism.

B. The doctrines of civil liability of public law bodies

The obligation for the State to compensate third parties for damage illegally inflicted upon them by civil servants is founded on the doctrines of the protection of property and the equality of law. In constitutional States, both are guaranteed by statutory provisions. For this reason, there can be no compensation

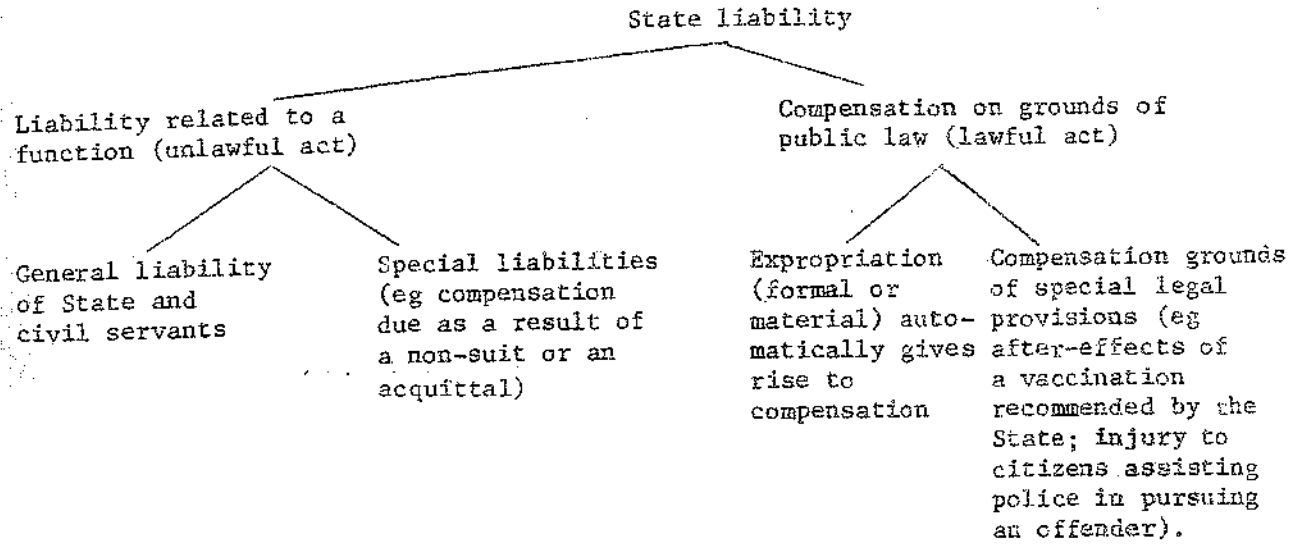
for damage, unless so provided under the law (principle of legality). Swiss courts have hitherto refused to infer directly from the Federal Constitution the liability of the State to meet such claims. Like constitutional jurisdiction, administrative jurisdiction, the referendum system or the election of administrative authorities by parliament, the civil liability of public bodies is an institution designed to exercise control over the authorities which has its basis in the separation of powers.

But the liability of State and civil servants is also a part of the general doctrine of liability in the sense of being responsible for one's acts. Swiss doctrine distinguishes between "unwritten" legal liability, such as liability before God or political liability and "written" legal liabilities, such as those relating to criminal convictions, property rights and disciplinary provisions.

C. State liability according to Swiss case law

At every level (Confederation, cantons, local authorities), the public authorities are liable under Swiss civil law. This applies not only to their activities unrelated to their statutory sovereignty, but also to their landed properties and their building possessions, inasmuch as these are regarded as financial assets or administrative assets (objects in common use).

In public law liability, the following distinctions are made, for example:



These categories are not exhaustive and have been simplified for ease of demonstration. The system proposed also shows formal weaknesses. For instance, an act by the State may be lawful at the time of its execution, but prove unlawful upon subsequent examination, in particular when the act entails the violation of a legal property for which no sanction is provided in the legal system (by way of example: a customs officer mistakes a deaf-mute, who is quite innocently gathering wild fruit, for a smuggler and kills him).

D. Federal law and canton law

The law of State liability and the State's obligation under public law to provide compensation are embodied in the laws of the Confederation and the 26 cantons and half-cantons. This situation makes it all the more difficult to obtain an overall picture.

At the turn of the century, legislation was enacted defining the liability of Swiss cantons and canton officials, as the existing regulations were inadequate.

Many of these regulations are still in force today.

It should also be borne in mind that the Confederation assumes certain forms of liability which result either from general international law or from individual international treaties.

1. The field of application

a. Administrative decisions

As a general rule, the laws of the Confederation and cantons make no mention of wrongful acts performed by the State and involving its liability; rather do these laws provide a functional definition of the factors constituting liability. All types of injuries and wrongful behaviour come into this category.

Example: "The Confederation is liable for damage unjustly caused to a third party by an official in the exercise of his duties, irrespective of whether the latter is at fault".

This applies both to the acts of the administration and to those of the judiciary, that is both legal acts and material acts. A legal act is understood as being a State activity which determines, compulsorily and in writing, a legal relationship. This may refer both to court decisions and to administrative acts.

In the Confederation and in all cantons where causal liability is accepted, there can be no liability for legal acts, owing to the very fact that the legitimacy of formally enforceable decisions or judgments cannot be the subject of revision in liability proceedings. This determines the relationship between the law of State liability and procedural practice, as derived from the principle of the "oneness" of legal proceedings. If a person loses a case before a court of last instance, he cannot bring a new action for damages before the court of first instance competent for State liability, on the grounds that the decision of the court of last instance is illegal.

In liability proceedings, on the other hand, one can claim damages resulting from the excessive length of the procedure. For example, a building permit has been refused for three years by the local authorities, but is finally granted by a higher authority. This is a case of damage caused by delay in procedural matters.

b. Positive acts

The actual work of administrative authorities mainly consists in providing services in the public interest: eg - education, health care, supply and distribution of drinking water, electricity and gas, road works and planning.

The effects of the administration's activity are known as positive acts. If such acts are unlawful and have caused injury, they give rise to compensation.

The legality or illegality of an act normally depends on an accurate technical evaluation. If mistakes are made the result is an unlawful act involving liability.

Account must also be taken of mechanised activities performed by the administration, such as the mechanical or electronic operation of road traffic signals. In cases of damage resulting from defects in such systems, compensation is automatically due in respect of causal liability; in the case of liability for wrongful damage done to property, it would be necessary for the injured party to prove faulty construction or maintenance.

c. Acts of omission

Here, omission is regarded as the cause of damage. In causal liability, one speaks of unlawful omission; in the case of liability through fault, one speaks of unlawful and faulty omission. As in the law of civil liability, this definition assumes that there is an obligation to perform a duty and that the authority (agent or servant) aware of the fact ought to have taken the corresponding action. When such an obligation to act exists, the liability of the State is established under public law.

In civil law, the fundamental principle prevails that there is always an obligation to apply safety measures when one creates or maintains a state of danger. The same principle follows, in public law, from the principle of the equality of rights and obligations, which accordingly also applies in the law of State liability. The legal obligation to act is founded in this case on an action preceding the danger, creating it or increasing it. This principle applies first and foremost to the law concerning public property, for the public authority is responsible by virtue of the private law of the Confederation.

The unlawfulness of an act may also result from a wrong assessment of the legal consequences of a state of affairs (example: threats against an individual were not taken seriously by the police, although the circumstances made it advisable to do so).

d. Exclusions and exceptions

aa. Principle of legality of the administration.

The principle of legality (the obligation for the administration to comply with the law) compels the authorities to avoid applying restrictions to freedom or property which are more severe than those already expressly provided by the law. This same principle also guarantees citizens the right to claim benefits from the State, such as social insurance benefits.

A State benefit consisting in compensation for damage may also be regarded as a positive service rendered by the public authority. Compensation due in respect of a State activity must be based on a statutory obligation. When considering whether an obligation to pay compensation exists, what sum is due and how it should be paid, so many factors are involved that the decision should not be left to the sole judgement of the administration of the courts. Thus several decades of case law have held that liability by a public law body exists only in as far as provided expressly by a written enactment in federal or cantonal law; failing such provision, liability does not exist.

There is much support for the doctrine that the right to damages resulting from the application of the principle of legality should be directly inferred from the Constitution. In the light of current legal thinking, these tendencies are partially justified; this would be particularly true of compensation for unlawful acts committed in the performance of duties. In accordance with the principle of equality of responsibilities (legal equality), it would be difficult

to draw the frontier between cases where indemnification is required and those where it is not. There would be no alternative to trying to reach a just settlement case by case, which is impossible for normative legislation because it deals with generalities. Provision for such measured and equitable solutions is embodied in Article 6 of the above-mentioned draft constituion and is also made in the new legislation of the canton of Valais (Article 12 of the Liability Act of 10 May 1978):

"When a third party suffers damage resulting from the application of police regulations which the public authority was obliged to take, the latter body assumes liability to the extent justified by equity. The same applies when, following action by the public authority, a third party or limited number of individuals suffer disproportionately serious injury".

bb. Exclusion of supervisory functions

In two cantons, no liability can be attributed to the State on account of its supervision of local authorities, foundations or persons exercising a profession subject to official authorisation (eg the occupation of chimney-sweep).

cc. Immunity

In the Confederation and in several cantons, members of parliament and of the government cannot be held liable for the opinions expressed in parliament or parliamentary committees. The public authority should not however be held liable towards third parties except in cases of causal liability, for example, in cases of defamation of third parties in parliament.

dd. Preliminary administrative procedure

In certain cantons, liability proceedings against a civil servant are only possible by means of a preliminary administrative procedure. If such proceedings have not been instituted, the public authority is held to be directly liable.

2. The legal basis of liability

The public authority is liable only if the injured party can provide proof of the following:

- existence of damage (damage)
- injury caused in breach of a statutory regulation (breach of a statutory regulation)
- harmful act which can be imputed to the activity of the State (imputation)
- existence of adequate causation between the harmful activity of the State and the injury suffered (causation)
- harmful activity of the State due to the fault of its agent (fault)

In the system of causal liability, proof of the civil servant's fault does not need to be supplied. In public law, it is not necessary in cases of lawful acts to prove either illegality or fault. Once the facts have been established, liability is automatically assumed. In such cases, compensation for a lawful act provided under public law theoretically resembles a benefit similar to financial benefits granted to citizens by the administration in given circumstances (social insurance).

a. Unlawful action

In administrative law, an unauthorised act is always regarded as illegal, since all written and unwritten legal norms should be considered as equivalent at all levels to laws in the positive sense. To establish whether illegality exists, account must be taken of the legal provisions of the Confederation and the cantons both with regard to public law and to private law. The non-performance of duties may also be regarded as an unlawful act.

In addition, errors of judgment (too wide or too narrow an interpretation, wrongly applied interpretation) are unlawful insofar as they constitute a breach of the principle of equality embodied in the Federal Constitution. Hence, the lodging of a complaint and the institution of proceedings by a department or authority which proves to be illfounded is not enough to establish liability, unless it can be proved that the said department or authority has exceeded or otherwise abused its powers of discretion. The Federal Court has not given a final ruling on the question of whether, as a general rule, the acts of a government characterised by wide discretionary powers are exempt from liability.

A decision is also regarded as illegal if it cannot be justified by a law in the positive sense, which, for its part, complies with the Constitution. The fact of basing one decision upon another decision, a budgetary decision or on the commentary to an Act (statement, explanatory report etc) would be regarded as illegal. An authority which has issued legal instructions - for example, orders - must therefore comply with their wording as long as they remain in force.

There are only a few exceptions to the principle of legality which have been accepted by the Federal Court. The general police rule ("clause générale de police"), for example, may in special cases be taken as a legal justification. The Federal Court also accepts that there can be exceptions outside the scope of the law ("réserve de la loi") in the administration's particular legal relations and in public affairs. According to case law, however, the mere illegality of an act by the State is not enough to justify a claim for damages. According to the consistent practice of the Federal Court and the objective theory acknowledged in doctrine, an act can only be regarded as illegal, in the sense necessary to justify a claim for compensation if it constitutes a breach of the legal system in contradiction to orders and prohibitions serving to protect the legal right violated. If the laws contravened were not specifically enacted to protect the injured party, there is a defect in the causal liability establishing a link between the illegal act and the damage. We shall return to this problem under item 2c below.

aa. Causal liability

The Confederation and almost one third of the cantons assume liability for illegal acts independent of fault. This being so, the injured party does not need to indicate the person or persons to whom he attributes the wrongful behaviour; it is enough to know which department or authority is responsible for the act or omission regarded as unlawful. In different cantons which have introduced causal liability, certain cases are still regarded as exceptions to liability based on a fault.

Examples:

- When a decision is subsequently altered by a higher authority (damage in the course of procedure), the public authority is liable only if the previous court has shown particularly objectionable intentions (eg: in 1975, A buys a piece of land; a building permit is refused by the local authority in 1975; in 1977, the canton government endorses the refusal to issue a building permit; in 1978, the canton administrative court grants authorisation). The proof of a particularly deliberate intention is clearly demonstrated.

- In the case of damages caused by wrong information, the public authority is liable only if the department having supplied the information has acted intentionally or through gross negligence.

- For damage caused by treatment dispensed in a hospital, the public authority is liable only if it fails to prove that its medical and nursing staff acted correctly.

  In the case of compensation for moral injury due to a death or physical injuries, the judge may, after having evaluated the particular circumstances, grant the injured party or a relative of the deceased person a sum representing fair compensation for moral suffering, provided that the civil servant has committed a fault.

- Compensation for moral suffering in cases where personal interests have been harmed, is justified in the case of a particularly serious breach due to an error by a civil servant.

- Past experience in the application of causal liability (which entered into force in the Confederation on 1 January 1959) may be regarded as satisfactory. While the individual citizen's position has been fundamentally improved, the establishment of causal liability has led to only a slight increase in claims for damages.

bb. Liability in respect of fault

The principle

Ten cantons recognise the principle of liability in respect of any fault, including slight negligence, seven cantons recognise liability only if it is the result of intentional action or gross negligence. In all cantons, liability relates to intentional injury (intent, malicious intent) and gross negligence (culpa levis, "Wie hät mer auch chöne" - one ought absolutely to have done ...); in seven cantons however, it is based on slight negligence (culpa levis, "Me hät halt sölle" - one ought to have done ...). In the latter case, the idea is to leave the official some freedom to exercise his power of decision.

Degree of care which must be observed

In private law, a fault is regarded as "human behaviour which constitutes the cause of an injury and which is blameworthy in as much as the author of the injury should be held responsible". It is not a case of assessing lack of volition but behaviour comprising lack of volition and an average degree of attention and application, together with an average amount of moral, intellectual and physical qualities and professional and technical skills. This notion of objective fault is also applied in the law of State liability. In this case, the measure is objectivised according to the function and the amount of care or lack of care giving rise to liability is graded. Hence, the judge is also required to measure the objective fault.

Measuring the objective fault implies observing the law applicable in the particular case. An evaluation in compliance with the law or the application of a vague legal concept cannot contribute to the fault within the framework laid down by the law.

An objective measurement of fault nevertheless makes it possible to decide within this framework what degree of care may be expected in the circumstances. Account must be taken of the official's experience, of the importance and difficulty of the duties attaching to the function and of the danger factor. The non-performance of an act to prevent an injury in a moment of danger, which has proved right after a due lapse of time and thoroguh examination, must be regarded as excusable

With regard to the question of fault, I reproduce below the grounds given in three judgments by the Federal Court:

ATF 79 II 424:

Manifest lack of intention in examining of the evidence submitted to the judge and in establishing the circumstances underlying his judgment.

A citizen had requested the registration of a legal mortgage. This had been refused by the judge within the legal time-limit and on inexcusable grounds, with the result that the citizen had no pledged claim when the proprietor went bankrupt and thus obtained nothing. The canton concerned had to pay damages:

"The judge therefore assumes liability on principle for any fault due to negligence, however slight. Notwithstanding and considering the position and duties of a judge, the frequent complexity of the questions raised during proceedings and the great difficulties often encountered in establishing the facts, one should be extremely demanding as regards proof of fault or negligence. It is of paramount importance to distinguish between cases where the judge is guilty through negligence of a flagrant breach of clear and compulsory legal provisions and the essential duties of his charge, and those where he merely makes an error of interpretation or evaluation. In matters where a personal assessment is called for, in particular, there cannot be fault unless the judge has manifestly overstepped his powers."

ATF 89 I 494:

A civil servant (veterinary surgeon) had discovered that an illness dangerous to human beings (brucellosis) had broken out in a herd of sheep.

"The veterinary surgeon was conscious of this danger, since he decided to inform the veterinary services of the other cantons to which sheep or goats were transferred. But instead of doing so in writing, or at least by contacting his colleagues personally by telephone, and making sure that he had been properly understood and that the necessary measures would effectively be taken, he merely instructed a subordinate to phone. In the case of the veterinary service in Neuchâtel, the message was also received by a subordinate official. In so far as they did not perform their duty to the full by informing the Neuchâtel authorities, the officials of the canton of Vaud were guilty of unlawful negligence."

ATF 92 I 525:

Kohler, born in 1937, caused a serious road accident in 1961, in which four people were killed, six seriously injured and sever others slightly injured. Kohler's civil liability insurance offered the victim and his survivors a total sum of SF 676,847.65 and instituted liability proceedings against the canton of Bern to recover the amount concerned. The Federal Court rejected the claim on the grounds that the causal relationship between the delays in payment of the insurance premium and the injurious act was much more close and direct than the connection which might exist between the omission of the Bern canton authorities and the accident, with the result that this latter relation of cause and effect becomes secondary and proves inadequate in comparison with the damage.

Regarding the various omissions of which the Bern canton authorities were guilty, the Federal Court considered that:

- the State is not responsible for the perfection of its administration, but, on the other hand, for seeing that legal obligations are met;

- the police records department of the canton had informed the competent department issuing the driving licence that Kohler had a clean record, although in fact two previous convictions were recorded and not yet deleted;

- the police authorities had been informed on two occasions that Kohler was driving his vehicle with a learner's licence, without being accompanied by a responsible person as required by the law:

  "On learning this information, the police saw fit merely to order that Kohler be supervised. This attitude is incomprehensible and contrary to their duty. On two occasions, the police had been informed by a third party - whose declarations could certainly be regarded as trustworthy - that Kohler was not merely occasionally, but consistently contravening road traffic regulations ...";

- on two occasions, the police caught Kohler driving without being accompanied by a responsible person. He was reprimanded, but his licence was not withdrawn;

  "The conditions justifying the withdrawal of his licence had nevertheless been fully met. It is just that this provision, which allows the authorities certain discretionary powers, should leave a certain margin of flexibility. It follows, however, that the gravity or frequency of the offence justifies the conclusion that the safety of traffic was jeopardised by allowing an offending driver to retain his driving licence; therefore, had the authorities correctly assessed their duty, the driving licence should have been withdrawn."

cc. Hybrid forms

As we have already shown, causal liability has not been introduced as a matter of course, either in the Confederation or in the cantons, partly because the exceptions to causal liability have been provided for in certain fields, and partly because liability in respect of fault has subsequently been interpreted in a similar way to causal liability, as we shall try to illustrate in the following examples:

- Reversal of the burden of proof.
  The State is liable when it cannot prove that its agent is at fault. The injured party merely has to notify that a fault has taken place.

- Joint liability for officials incapable of discernment. State liability for fault is derived from a public body or civil servant. An official cannot commit a fault if he is incapable of discernment (eg an assistant physician under the influence of a narcotic) and there would be no liability of the State.

dd. Difference between causal liability and liability in respect of fault

- with causal liability, the fault of the official has no influence in determining the amount of compensation;

- causal liability also covers the case of officials incapable of discernment;

- and the case of fortuitous liability.

b. Lawful acts

It is a principle that, in cases of lawful activity by the State, damages cannot generally be claimed. Such lawful activity by the State may for example constitute the levying or receipt of taxes, the designation of landed property as building land, formal and material expropriation. If a citizen suffers damage as a result of lawful activity by the State, he cannot claim compensation unless there is legislation to that effect. With the exception of material expropriation, for which there is an obligation to compensate arising out of the constitutional

guarantee of property rights, this is the prevailing legal situation in Switzerland. There has however, been no lack of attempts to establish the right to compensation, in certain particular cases, on the strength of the general principle of equality embodied in the Constitution, which principle prohibits the use of unfair treatment; or to establish a general constitutional obligation to pay damages, based on the concept of justice, or again to interpret the principle of legality as implying compensation in application of public law.

Some cantons admit liability for injuries caused in compliance with the law in the following cases:

- liability for police measures taken in a state of emergency;
- exceptional damage caused by lawful police measures;
- injury or death of a person caused by police measures;
- exercise of State power in the public interest (in the case of a commensurate application of the right of expropriation);
- liability for damage caused through the action or omission of the State, without there being any breach of the regulations, when the State has caused one or more individuals to suffer exceptional, disproportionate and intolerable injury which cannot be attributed to the person concerned (reference to the German doctrine of sacrifice "Aufopferung");
- damage suffered by private individuals while assisting in a police search;
- damage caused by vaccinations recommended by the authorities;
- cancellation in the public interest of a decision by the administrative authorities which has already come into force as a positive law (eg withdrawal of a building permit during the construction of a house because the authority which has granted the permit had overlooked that the landed property concerned had been earmarked for road building).

c. Unlawful acts in compliance with official duties

These are acts which, despite the lawful exercise of official duties, are regarded as unjustified by the injured party. Authorised behaviour may sometimes lead to unintentional results, such as the case in which bystanders not involved in a demonstration become victims of the police measures applied to maintain law and order.

Another similar case is where the behaviour of the authorities at the time of a particular act is lawful, but later proves to be unjustified (eg the correctly performed arrest of an innocent person). An examination of the case law of the Federal Court regarding questions of legality or illegality produces the following table:

	Infringement of a rule	Violation of property	
Obligation to compensate founded on State liability: yes	X	X	yes
Unlawful act			no

	Infringement of a rule	Violation of property	
Obligation to compensate founded on State liability: no			yes
Lawful act (taxation)	X	X	no

Obligation to compensate founded on State liability: no		X	yes
Unlawful act complying with official duties (case of berry picker)	X		no

Obligation to compensate founded on State liability: no	X		yes
		X	no

It has long been proposed by legal theorists that, in order to establish State liability for an unlawful act carried out in compliance with official duties, the unlawfulness of the act should be established not by proving it to be unjust nor in demonstrating the unlawfulness of a rule, but by proving the violation of a legal possession. We hold the same view, for a violation of the physical integrity of a citizen always constitutes the violation of a legal possession, which enjoys absolute legal protection, irrespective of whether the State has acted in compliance with its official duties.

3. The extent of compensation

The concept of damage where State liability is concerned follows the same principles as in private law. Damage means the unintentional reduction in the value of property. It may consist in a reduction of credit, an increase in debit or a loss of earnings; it is generally held to correspond to the difference between the present state of the injured party's assets and the state they would have been in, had the injurious event not taken place.

a. Monetary and other forms of compensation

A useful distinction may be made between damage caused to persons, to things and other damage. Damage to persons consists in the death or physical injury of a human being; damage to things consists in material destruction, deterioration or loss; other damage covers all further forms of injury, such as harm to personal interests (honour) etc.

Legislation appears to refer to "accepting liability for damage", "compensating for damage", expressions which only concern monetary compensation. In the case of damage caused by a physical act, the contrary act does not always make it possible to remove the cause of damage. This does appear possible, on the other hand, for legal acts, so that damage limited in time would appear to be the only form for which monetary compensation can be given. Some theorists hold that the administration is free to refrain from performing unlawful administrative acts, despite the principle of the enforceability of these acts, for, in a constitutional State, an unlawful administrative act never serves the public interest. Hence, there is no need to discuss whether the court dealing with applications based on State liability can force the State or the civil servant to annul or alter an administrative act considered to be lawful. This would be unacceptable with respect to State liability, which is basically related to the concept of the separation of powers. This does not, however, prevent the State from annulling or altering an unlawful administrative act while the case is pending.

b. Full compensation

In assessing the amount of compensation in cases of causal liability, it is not a matter of correcting the official's fault; it is the principle of full compensation which applies.

In settlements compensating for the fault, the amount of damages awarded depends on the seriousness of the official's fault. In the case of a minor fault, the injured party is compensated only in part; in cases where the official is incapable of discernment, the claimant receives no compensation at all, which is undoubtedly unsatisfactory. For this reason, one canton allows for liability based on equity, when incapacity of discernment is subsequently established. Another canton which recognises liability in respect of damage to property also accepts full responsibility for officials incapable of discernment.

The injured party has to prove the amount of damage; it is for the judge to assess the amount of compensation.

c. Equitable compensation

The regulations providing for compensation for certain injuries caused in compliance with the law as, for example, when there is liability in respect of regular police measures, do not automatically provide for full compensation. Of the 7 cantons which acknowledge such liability, 5 guarantee full compensation while 3 recognise liability based on equity. The compensation itself may range from 0 to 100% of the damage. It is for the judge to establish a just solution corresponding to each individual case.

d. Contributory negligence

Negligence on the part of the injured party leads to a reduction in compensation in accordance with the degree of contribution towards the damage. If the injured party's own share of fault is very great, this may cancel out the cause and effect relationship; the injured party's contributory negligence then becomes the sole cause of damage. Physical predisposition is also regarded as a ground for reduction with respect to State liability.

Contributory negligence may also reside in the fact that the injured party has been instrumental in prolonging the authorisation procedure by requests for proof or other time-consuming procedures. There is therefore no claim to compensation for damage if an applicant has by his own fault appreciably prolonged or slowed down the procedure. A person who insists that official controls be carried out as quickly as possible, under summary procedure, cannot subsequently claim State liability on account of such control having been inadequate.

Certain factors causing reduction applicable in Swiss civil law on liability cannot be invoked where State liability is concerned. Original liability by the State implies that no account can be taken of possible financial embarrassment to the State resulting from the payment of compensation or, conversely, of the exceptionally high income of the injured party. On the other hand, certain grounds for reduction do not apply in civil law. For example, the injured party must draw the attention of the authority concerned to its fault by instituting proceedings, or require that the lawful situation be restored through the available legal remedies. This applies in the case of unlimited liability for fault and, with respect to causal liability, only insofar as the unlawful acts may be investigated generally in the liability proceedings.

With causal liability, there is also the question as to whether a fault committed by the State in this context can offset the injured party's own share of fault. Example: injured party's fault - two-thirds, official's fault - one third.

Possible solutions:

	Solution a	Solution b
State liability founded on causal liability	100%	100%
+ fault by the State	-	33.3%
Intermediate total	100%	133.3%
- Own fault	66.6%	66.6%
Compensation	33.3%	66.6%

I believe that, in accordance with the regulations of the Confederation and the cantons having acknowledged causal liability, it is solution "a" which should apply. Solution "b" should, from the point of view of the principle of legality, be expressly provided for by the law.

e. Should account be taken of social insurance?

Should the State accept responsibility, with respect to its liability, for the death or disablement of an individual? If so, a way must be found of ensuring compatibility between these claims and those based on social insurance and, where applicable, of private pension schemes (in Switzerland, the social provident system). Under the State system of old age and survivors insurance, disablement insurance and accident insurance, the claims of the insured party vis-à-vis the responsible authority are assumed by the insurance, in application of the law and to an amount equivalent to his benefits (it should be noted that the insured person ma also claim benefits from the public authority on the basis of State liability). The right of the social insurance to claim damages from the responsible authority is based on the system of subrogation ("cessio legis"). This implies that the right of appeal is indirectly dependent on the social insurance. The amount of the claim is reduced in accordance with the difference between the social insurance benefit and the full damage suffered by the injured party at the liability of the State. The injured party can no longer have this difference taken into account with respect to the subject of the State's liability.

As a guarantee of the injured person's rights, the claims of the insured person and his survivors are transferred to the social insurance only if their benefits combined with the compensation due by the third party exceed the value of the damage. The claims are not taken over the insurance unless the benefits are of the same kind. This is the case, for example, with widows' and orphans' pensions. The principle involved is that of identical categories of damage.

4. The party responsible

a. The State and other public authorities

With one exception, the public authority takes liability for damage caused to citizens, both in the Confederation and the cantons. In some cantons, the plaintiff may, and in certain cases he must, sue the civil servant at fault (the State is jointly and severally liable). If, according to these regulations, the State takes responsibility for the damage by virtue of causal liability alone, then there is no need to sue the civil servant. His liability has been transferred in the context of internal relations. The State may take action against him, when it has had to compensate a third party in respect of State liability.

The Confederation is not liable for the unlawful actions of the cantons, in particular when they fail to enforce federal law. Similarly, the cantons are not liable for local authorities, even when the latter apply federal or cantonal law. The parties responsible are the Confederation, the cantons and the municipalities. Associations of cantons ("concordats") or local authorities may be subject to liability.

Frequently, private organisations are empowered to carry out tasks coming under public law on behalf of the Confederation or the cantons.

As regards the Confederation, the matter is settled in the 1958 Federal Act on the liability of the Confederation, its agents and its servants: for damage to a third party, the private organisation is liable vis-à-vis the injured party (causal liability); insofar as this private organisation is unable to compensate for the damage, the Confederation assumes subsidiary liability (for the deficit). In several cantons, the legislation on liability is based on a more technical concept of the civil servant, defined in such a way as to include the administration as such.

b. The civil servant

Where there is liability with fault, only one canton prescribes the personal liability of the civil servant towards the injured party. In other cantons, the civil servant may be sued, but if he proves insolvent, the injured party must apply to the public authority (subsidiary liability of the State).

In the case of primary liability of the State, the injured party cannot sue the official, the public authority alone can institute proceedings against him to recover damages, provided that the official has acted with intent or gross negligence.

In one canton, the capital sum which can be reclaimed from an official is limited to six months' salary. It is nevertheless rare for the Confederation and the cantons to institute such proceedings against an official for the total amount of damages. In the case of a minor fault, they may for example reclaim 10 per cent of the compensation due.

5. Legal procedures and remedies

Confederation

Applications for compensation must be lodged with the Federal Department of Finance and Customs. The Confederation's liability ceases if the injured party has not deposited his application for compensation within a year from the date on which he became aware of the damage, and at all events within ten years from the date of the injurious act by the civil servant. This constitutes the time-limit in the technical sense of the term. If the Confederation contests the claim or if the applicant has received no notification within three months, the latter must then register a complaint within six months, after which time-limit his claim is no longer valid.

The complaint must be lodged directly with the Federal Court. Such applications are a matter of administrative law in which the public authority and the injured party are on an equal footing.

Cantons

Like the Confederation, some cantons have introduced a preliminary administrative procedure. This preliminary procedure does not give the administration a privileged position. When the administration, within a given period, has taken a negative, or partly negative decision, or no decision at all on an application for compensation submitted by the injured party, the latter may institute direct proceedings before a court.

In almost all cantons, claims entailing State or civil servant liability are dealt with by the civil courts. There are historical grounds for this. In this connection, the principle which applies is not the "maxime d'office" (ie the judge actively directs the proceedings) but rather the "principe du dispositif" (ie each party is required to provide evidence in support of its version of the case, depending on the allocation of the burden of proof). Only one canton has given its administrative court jurisdiction for complaints concerning State liability. As a general rule, on the other hand, the cantonal administrative courts are available for appeals by the community against members of the public authority or civil servants who are responsible for damage to third parties.

The federal legislature long ago acknowledged the competence of the Federal Court in judging disputes between private individuals and a canton; this was to enable the former to appeal directly to the Federal Court in matters which sometimes entailed State liability. Consequently, these extremely delicate proceedings are rarely part of the canton routine and are referred to the Federal Court, which is an intelligent solution in a Federal State.

It seems to be acceptable to conclude an agreement ("convention") between the injured party and the administration in cases of disputed claims entailing State liability. By virtue of its subject matter, such agreements come under public law.

The agreement is designed to settle the amount of compensation, without full and detailed clarification of the facts and legal issues. Both parties desire to put an end to the state of uncertainty and are aware that their representations of the facts and the law would probably not stand up to a thorough investigation. This part of the agreement, known as the "caput controversum", cannot be the subject of subsequent contestation on account of error. Such contestation is possible on the other hand when the error concerns a material fact assumed by both parties on conclusion of the agreement. This is known as a "caput non controversum".

Prosecution

One cannot institute legal proceedings against the Confederation. It might be possible, on the other hand, to address a payment order to a canton, for example, in order to circumvent the rule of statutory limitation. Canton property cannot however be seized.

By way of contrast, it is possible to sue a municipality for debt in cases of seizure. Proceedings against a municipality may however be suspended, when the canton government ensures that, for example by issuing a promissary note guaranteed by the canton, the creditor's situation will not deteriorate.

6. Special rules for judicial errors and criminal investigations

In both the Confederation and the cantons, compensation is due in cases of suspension of criminal investigations, unjustified arrest or acquittal after reconsideration of a sentence. Generally speaking, full compensation is not guaranteed, but rather fair compensation.

I am aware of no special rule concerning criminal investigations by the police. But normally, the criminal investigation department of the police forms part of the federal and canton administrations.

LIABILITY IN ENGLISH LAW

by

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Introduction

1. This paper is concerned with the principles of English law which govern the liability of the State and public authorities for damage caused by the acts and decisions of themselves and their officials. Although I speak of "English" law, the same general principles apply in the whole of Great Britain. The law of Scotland is different from the law of England in a number of important ways, but in the sphere of public law the differences are less important, at least for the present purpose. But for the sake of accuracy, I refer to English law only.

2. In general, English law has been much more concerned with the control of the action of public authorities than with awarding damages in money against them on account of unlawful acts or decisions. It has concentrated on prevention rather than on compensation. In the former field administrative law has now become a highly developed science, with very effective remedies for annulling or forbidding unlawful action. Especially during the last fifteen or twenty years the courts have been enterprising and progressive, though they have been applying and developing principles having three hundred years or so of history behind them. The principal grounds of judicial control may be grouped under two heads: excess or abuse of power; and unfair procedure. In a series of important decisions in recent years the courts have condemned actions by ministers, local authorities and others on the ground that they were unreasonable or otherwise involved some abuse of power. On the procedural side, the courts have vigorously applied the principles of natural justice, which correspond in a general way to the "droits de la défense" in French law and "due process of law" in the constitution of the United States of America. A great deal has been done to strengthen the basic principles of administrative law and to develop the whole subject as a coherent system.

3. There have also been remarkable developments in the area of liability for damage caused by administrative action. But, in contrast to the area of judicial control, it cannot be said that a coherent system has yet emerged. There is a shortage of case law on some important questions, which can only be answered tentatively by collecting miscellaneous decisions from distant quarters of the British Commonwealth. As has been remarked in a case in the House of Lords, English law has shown some reluctance to award money damages against the government and public authorities in certain respects (1). But in other respects there are very extensive grounds of liability which are now established. And others are developing. There can be little doubt that the subject of liability in damages will make progress during the next few years. There is a general recognition that this is the area in which there is the greatest need to fill gaps in the law. So the study commissioned by the Council of Europe is particularly opportune.

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(1) Hoffman - La Roche & Co. v. Secretary of State for Trade and Industry (1975) A.C. 295 at 358.

4. In English law it has always been a fundamental rule that an official or agent of the State, or of a public authority, is fully responsible as an individual under the ordinary law. If he is the instrument of an unlawful governmental act he is personally liable. In other words, the orders of a superior, even if that superior is the Crown itself, are no defence to him in law. This doctrine played a large part in the establishment of the classical rule of law which was established in England after the Revolution of 1688. The Crown itself could not be sued ("the King can do no wrong"), but its servants could always be sued and made to pay damages to a citizen injured by any unlawful act. When the government sent its agents to make an unlawful search of the house of John Wilkes, he was able to recover large damages against the individual King's messengers by bringing an ordinary action of trespass against them in the court of King's Bench (1). In this way the Crown was forced, in practice, to satisfy judgments given against its servants acting under its orders. But it was not until 1947 that the Crown's position was put on a proper basis by the Crown Proceedings Act 1947. The principle of that Act is that the Crown is now made subject to the same general liabilities in tort (that is to say, in liability for wrongful injury) as an ordinary private person. Consequently it is the ordinary private law of tort which now in general governs legal liability for wrongful administrative action, whether by the Crown or any other public authority.

5. Very little distinction need now be made, accordingly, between different classes of public authorities. In fact, almost all the powers which are of importance in administrative law are conferred by Act of Parliament not upon the Crown but upon the individual ministers. Ministers individually enjoy no privilege or immunity of any kind, consequently they are fully liable to the compulsory processes of the law. For example, if a minister refuses to perform a public duty imposed upon him by Act of Parliament, an order of mandamus or an injunction may be granted against him, and if he disobeys the order he becomes liable to imprisonment or fine for contempt of court. This has not in fact happened yet in the case of any minister, but members of local authorities have several times found themselves in prison for disobedience of court orders (2).

6. An example of the way in which other public authorities are subjected to the ordinary law may be taken from a famous case of 1863 (3). A local authority was empowered by Act of Parliament to pull down any building if the builder had not given them seven days' previous notice of his intention to erect it. The local authority demolished a building, of which no notice had been given; but they omitted to give the owner any opportunity to explain himself and make his defence, thus violating the principles of natural justice. Consequently their action was unauthorised by law, and the owner recovered money damages in an ordinary action of trespass, just as if any private person had come and damaged his building. Since then many public authorities, including the Crown since 1947, have been held liable in ordinary actions for negligence, for example where drivers of their vehicles have caused injury, or where they have failed to maintain buildings, such as schools, in a safe condition. There is no kind of "sovereign immunity" such as has proved such an obstacle to justice in the law of the United States, which in some mysterious way developed this doctrine without inheriting it from England.

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(1) Entick v. Carrington (1765) 19 St. Tr. 1030.

(2) Wade, Administrative Law, 4th ed, 527, 598.

(3) Cooper v. Wandsworth Board of Works (1863) 14 C.B. (N.S.) 180.

7. The details and illustrations which follow are arranged according to the order of subject-matter prescribed for the Council of Europe's conference. This is not the order which would naturally be adopted in an English exposition, and it is not always easy to fit the English system into the various categories. But, since all the democratic countries are facing essentially similar problems in the field of administrative law, it will be easy to identify the principal heads of liability.

Subject No. 1 The Field of Application

A. Decisions and adjudications

8. By a "decision or adjudication" is meant a decision of an administrative authority or tribunal, taken under powers granted by Act of Parliament, and having some legal effect on the rights or liberties of some citizen. Examples are the decision of a local planning authority (or, on appeal, the minister) refusing permission for the erection of a building: a decision of a national insurance local tribunal refusing national insurance benefit: and a decision of a minister cancelling a radio or television licence. Although we have many cases in which decisions of this kind have been quashed (annulled) for excess or abuse of power, there have been remarkably few cases in which money damages have been claimed. This is perhaps because public authorities bear the same legal responsibilities as private individuals, and the familiar categories of the law of tort (civil injury) do not include governmental activities such as refusing or revoking licences. Another factor is that the decisions in question are almost always decisions made in good faith, and the persons affected by them are content to have them quashed, so that the deciding authority must then reconsider the case and decide it correctly. It is possible to collect only a handful of cases dealing with claims for money damages, and it is not at all easy to draw confident conclusions from them.

9. Probably it is safe to say that damages may be recovered for a wrong administrative decision which is actuated by malice. Malice means personal spite or hostility, and includes a deliberate desire to cause injury or to abuse legal power. This basis of liability was confirmed by a decision of the Privy Council given in 1963 on an appeal from Ceylon (1). A claim for damages was made by the owner of a cinema on account of the wrongful and malicious refusal of a licence by the local authority. The Privy Council decided, on a preliminary question of law, that there was no reason why damages should not be awarded if the necessary facts could be proved. The Privy Council refused to follow an earlier English decision to the effect that the only remedy in such cases was to have the decision quashed and obtain a consequential order of mandamus for having it made correctly. So the door has been opened to actions for damages for malicious administrative decisions.

10. To the same effect is a famous Canadian case of 1959, in which damages of more than $30,000 were awarded against the Prime Minister of Quebec personally (2). He had given directions to the Liquor Commission to cancel the liquor licence of the owner of a restaurant because the licensee provided bail on many occasions for members of the sect of Jehovah's Witnesses, which at that time was giving trouble to the authorities in the Province. Although the Prime Minister had no legal power to interfere with the Commission's discretion, the Commission cancelled the licence at

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(1) David v. Abdul Cader (1963) 1.W.L.R. 834.

(2) Roncarelli v. Duplessis (1959) 16 D.L.R. (2d) 689.

his request, so doing much damage to the licensee's business. The grounds on which the cancellation was made were so flagrantly improper that the Supreme Court of Canada treated the case as one of malice. The licensee had done what he had a perfect legal right to do, but the authorities had arbitrarily punished him for it. Probably the Commission would have been liable also, but the proceedings were brought against the Prime Minister. A comparable case occurred in Australia where a licensing inspector and a police officer ordered a hotel keeper to close his hotel and cease supplying liquor, so that he suffered loss (1). In fact they had no legal power to do this, as they knew very well. It was therefore a deliberate abuse of power, described by the court as "misfeasance in public office", for which damages were recoverable. To this may be added a decision of the English House of Lords in 1956, holding that a landowner might sue for damages where, as she alleged, her land had been expropriated by a public authority wrongfully and in bad faith (2). The action was brought against the clerk of the local authority personally, since he was alleged to be responsible. But it came to nothing, since the allegations were not proved.

11. The best known English case goes back to 1703, when a number of voters at a parliamentary election were wrongfully disqualified by local constables and refused permission to vote (3). In one sense, this was merely a wrongful act rather than a decision: but in another sense, it involved a decision that the voters should be disqualified. The House of Lords allowed them to recover substantial damages. The case has always been treated as one in which malice was proved.

12. Professional disciplinary bodies, which have statutory powers and duties but are not strictly governmental bodies, are subject to the same rules. In one case a dentist was removed from the register without being given a fair hearing, but without malice (4). Because of the violation of natural justice he procured his restoration to the register by an order of mandamus. But his action for damages failed, since he was unable to show malice.

13. One or two cases go even further, and suggest that there may be liability in damages even in the absence of malice. In 1915 the Supreme Court of Canada held that the holder of a sea pilot's licence could recover damages for its wrongful cancellation by the port authority (5). The authority had deliberately cancelled the licence because of charges of neglect and incompetence against the pilot. They were acting outside their powers, and in breach of natural justice, but not with malice. There was also an English case in 1957 where there had been a case of typhoid fever on a farm and the local authority ordered the farmer to stop selling milk, so that much milk had to be thrown away (6). The local authority had no power to make this order, but they were acting in good faith, as they thought was in the public interest. Unfortunately there is only a newspaper report of this case, which might be of great importance for developing this branch of the law. It was not

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(1) Farrington v. Thomson (1959) V.R. 286.

(2) Smith v. East Elloe Rural District Council (1956) A.C. 736.

(3) Ashby v. White (1703) 2 Ld Raym. 938, 3 Ld Raym. 320.

(4) Partridge v. General Medical Council (1890) 25 Q.B.D. 90.

(5) McGillivray v. Kimber (1915) 26 D.L.R. 164.

(6) Wood v. Blair, The Times, 3, 4, 5 July 1957.

followed by the Supreme Court of New Zealand in a case where a minister had refused permission for the sale of shares in a hotel to a Japanese company (1). It had already been decided that the refusal was made on improper grounds, so that it had been quashed. But, on a preliminary point of law, it was held that a subsequent action for damages could succeed only if malice were shown, even though the refusal might have been unreasonable. The judge said that although he sympathised with persons aggrieved by decisions of public officials, it was necessary that public officials should be able to make bona fide decisions without the anxiety of being sued for damages for misuse of their powers. But this decision is under appeal.

14. There remains the question of decisions taken in good faith but negligently, that is to say, without reasonable care. Negligence is a general basis of liability in English law, provided that the situation is one in which a duty of care arises between the parties. It is plain that an administrative decision ought to be taken with proper care, and that the administrative authority ought to have a duty of care towards the person concerned. Nevertheless, it is very doubtful whether there is any legal liability in such cases, except where the negligence is extreme. In an Australian case a trader applied for an import licence for certain goods, but his application was negligently lost by the customs authorities, and when after a long delay the licence was granted the importer found that he had to pay a higher rate of import duty (2). Nevertheless his action for damages failed. In Canada, where a local authority had made a byelaw so carelessly that it was invalid for procedural reasons, no damages were recoverable by a builder who had expended money in reliance on the byelaw and suffered loss (3).

15. In England the House of Lords has indicated that there is no right to sue for mere errors of judgment made in the course of the exercise of discretionary powers; but that damages may be available where the discretion is exercised so carelessly or unreasonably that there has been no real exercise of the discretion at all - in other words, where there is a definite excess or abuse of power (4). In a later case the House of Lords confirmed this doctrine, in relation to the discretionary power of a local authority to inspect the foundations of a building which was under construction (5). It was held that they were under a duty to give proper consideration to the question whether they should inspect or not, and that their immunity from attack, if they decided not to inspect, "though great is not absolute". If they consider the question responsibly and in good faith, they are immune. But if they proceed so carelessly or improperly that they are not really exercising their discretion as intended by the Act, an action for damages may lie.

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(1) Takaro Properties Ltd. v. Rowling (1976) 2 NZLR 657.

(2) Revesz v. Commonwealth of Australia (1951) 51 S.R. (N.S.W.) 63.

(3) Welbridge Holdings Ltd. v. Greater Winnipeg (1970) 22 D.L.R. (3d) 470.

(4) Dorset Yacht Co. Ltd. v. Home Office (1970) A.C. 1004.

(5) Anns v. Merton London Borough Council (1978) A.C. 728. See below, para 21.

16. Where the decision to be taken is of a less discretionary and more "operational" character, the degree of liability is greater. In the last mentioned case the House of Lords held that the actual inspection of the foundations of the building, as opposed to the initial decision whether to inspect or not, must be carried out with reasonable care, and that (again on a preliminary question of law) damages could be recovered if negligent inspection were proved. In other words, the decision whether the foundations were or were not to be approved was one which, if made negligently by the inspector, would render the local authority liable in damages to any later owner or occupier if and when damage occurred. Two Australian decisions may be added, which show the same principle at work in the area of the control of the use of land. In both of them local planning authorities had granted planning permission on the faith of which the citizens concerned had taken decisions and invested money. But the planning authorities had carelessly overlooked the fact that they had no power to grant these permissions in the circumstances. Since they ought to have known this, and their culpable ignorance had caused loss, they were held liable in damages (1).

17. It will be evident that the law relating to liability in damages for discretionary decisions of administrative authorities is at present in the early stages of its evolution. So far it has been a slow evolution, since there have not been enough cases to put pressure on the courts to construct a comprehensive set of rules. But the pressure is likely to increase sharply in the next few years, and it seems certain that there will be important developments.

B. Positive acts

18. Public authorities, including the Crown and its ministers, are subject to the ordinary law of tort. This means that they are liable in damages if they commit any of the wrongs for which ordinary persons are also liable, or if such wrongs are committed by their servants or agents acting on their behalf (see below, para. 32). They may have to pay damages for trespass, nuisance, false imprisonment, or defamation, if they commit any of those wrongs, which are among the recognised torts. They are immune only if they can show that they have acted within the powers conferred upon them by Act of Parliament. They may purport to be acting within those powers, but they may nevertheless be acting improperly; for example, by acting on wrong motives, unreasonably or in breach of the principles of natural justice. In any such case the act will be ultra vires and unjustified in law, and can be quashed in the ordinary way. At the same time, there will be liability for any incidental act which also amounts to a tort (2). The principle of ultra vires therefore governs liability in damages as well as liability to have the act quashed.

19. A public authority is not allowed to commit torts unless its statutory powers or duties make this inevitable. For example, if a railway company is authorised to build a railway along a precisely prescribed line, neighbours injured by the noise and vibration cannot bring actions for damages, since this is the inevitable result of what the legislature has authorised the railway company to do (3). Compensation is payable only if an Act of Parliament provides for it. An English court cannot give compensation for action permitted by statute, as the French Conseil d'Etat has done in cases such as La Fleurette and Bovero (4). But if a public health authority is given power to establish a hospital for infectious diseases, it may not do so in

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(1) Hull v. Canterbury Municipal Council (1974) 1 N.S.W.L.R. 300; Knight (G J) Holdings Pty Ltd v. Warringah Shire Council (1975) 2 N.S.W.L.R. 796.

(2) As in Cooper v. Wandsworth Board of Works, above, note 4.

(3) Hammersmith Rly Co v. Brand (1869) L.R. 4 H.L. 171.

(4) C.E. 14 janv. 1938, Société La Fleurette, Rec. 25: C.E, 23 janv. 1963, Bovero.

a residential area where it is a danger and a nuisance to the neighbours (1). The court will always look carefully at the Act of Parliament to see what discretion it intends to allow, but if possible the Act will be interpreted so as not to authorise the infringement of the rights of individuals. Local authorities have extensive statutory powers to provide sewage systems, but that does not entitle them to discharge sewage into a river so as to pollute it and cause damage (2).

20. Negligence, in particular, is a tort of very wide application, involving liability wherever a person causes damage by acting carelessly in a situation where it it reasonable to expect him to take care for the safety of his neighbours. Under this head a great many actions for damages are brought against public authorities, for example on account of traffic accidents caused by their vehicles. To give a few examples from a great multitude of cases, damages were awarded where: doctors in a state hospital treated a patient's hand so badly as to render it useless (3); post office workmen left a manhole open in a street and a lamp burning near it which a child knocked into the hole, causing an explosion which injured him (4); a small boy was allowed to run out from a local authority's school on to the road, and a lorry driver, swerving to avoid him, was killed (5); a water board, supplying water through old lead pipes, neglected to warn consumers who suffered lead poisoning (6). All these cases illustrate the general principles that, where statutory powers were conferred upon public authorities, they must be exercised with reasonable care according to the same standards which govern the conduct of citizens generally.

21. Liability for negligence has been extended into the sphere of administrative law in one or two special ways, where the action of the public authorities is not comparable to that of ordinary citizens. One such case is the liability which has now been established for the negligent custody of prisoners. The House of Lords has held the Crown liable for damage done by boys from a penal training school who were taken out on a training exercise where they were not kept under careful custody, so that some of them escaped and damaged a yacht (7). There was no precedent for such a liability and the Crown contended that it should not be responsible for the acts of persons other than its own servants or agents. But it was held that the custody of dangerous boys imposed a duty to take reasonable care that they should not injure the public. Even more unusual, perhaps, was the case (mentioned above (8)) in which a local authority was held liable for the negligence of its inspector who passed the foundations of a building without examining them properly. The owner of the building let it to tenants some of whom assigned their tenancies to other people: and those people recovered damages from the local authority when the house subsided badly. There have now been two of these cases, and the House of Lords has approved this novel doctrine of liability. It is notable that damages were awarded merely for the loss in value of the house, ie for purely economic loss as opposed to personal injury. When a similar case arose in the German courts, it was held that the local authority's powers of inspection imposed a duty to take care for personal health and safety only, and not to insure builders and occupiers of houses against loss which was merely financial (9).

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(1) Metropolitan Asylum District v. Hill (1881) 6 App. Cas. 193.

(2) Pride of Derby and Derbyshire Angling Association Ltd. v. British Celanese Ltd. (1953) Ch. 149.

(3) Cassidy v. Ministry of Health (1951) 2 K.B. 343.

(4) Hughes v. Lord Advocate (1963) A.C. 837.

(5) Carmarthenshire County Council v. Lewis (1955) A.C. 549.

(6) Barnes v. Irwell Valley Water Board (1938) 1 K.B. 21.

(7) Dorset Yacht Co. Ltd. v. Home Office (1970) A.C. 1004.

(8) Note 5, p. 72.

(9) BGH 39, 358 (Third Civil Senate, Judgment of 27 May 1963).

22. There may be liability for negligence in administrative office work. In one case a clerk of a local authority negligently overlooked a certain entry in the register of local land charges (1). The local authority were responsible for keeping the register and for answering enquiries about charges. They failed to warn a purchaser who asked for information, so that he was not bound by a certain charge and a government department was unable to recover the money from him. The government department sued the local authority successfully for damages. It is possible that in future this case will be classified as one of negligent misstatement, since that category of tort is now being developed by the courts (2). A Canadian example is a case in which a local authority was held liable for the negligence of its inspector who recommended a dealer in motor cars to rent a site from which he was compelled to move because its use for that business was forbidden by local byelaws (3).

23. Unless the case can be brought within the new doctrine of negligent misstatement, public authorities are under no liability for misleading statements made by their officials. If, accordingly, a landowner goes to the local planning office and asks whether he needs planning permission for erecting a certain building on his land, and is told by an official that he does not need permission, he cannot recover damages against the local authority if he later discovers that he does need permission, permission is refused, and he suffers financial loss (4). This is a defect in English law. In French law, as I understand, the Conseil d'Etat will treat the giving of misleading advice as faute de service, and will award damages against the administration (5). In England the Parliamentary Commissioner for Administration (Ombudsman) has succeeded in obtaining compensation for complainants in a number of such cases (6), but the courts of law cannot help them.

C. Acts of ommission

24. The omissions of public authorities may involve liability where they fail to perform their duties. Nearly all their duties are imposed upon them by Act of Parliament, and if they neglect them the normal remedy is to obtain an order of mandamus by which the court orders the defaulting public authority to make good the default. But actions for damages may also lie. It is a general principle that damages may be recovered for neglect of a public duty, even without malice or negligence. Actions have accordingly succeeded where: a customs officer wrongly refused to clear goods; a postmaster failed to deliver letters for ten days; an official in charge of an election failed to provide proper ballot papers; and a local authority failed to mark the site of a fire plug accurately, so that when it could not be found the building was destroyed by fire (7). In a recent case the Court of Appeal held that damages might be awarded against a local authority which failed to provide accommodation for a homeless person, contrary to its duty under an Act of 1977 (8). In some of these cases negligence was an alternative ground of decision. But in principle, breach of duty, without negligence, is sufficient by itself. It is always possible that the court may hold that, on a true interpretation, the Act of Parliament in question does not intend to allow actions for damages in the case of breach of duty. But in general the presumption is that if the Act does not provide for other penalties or methods of enforcement, an action for damages will lie.

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(1) Ministry of Housing and Local Government v. Sharp (1970) 2 QB 223

(2) Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd (1964) AC 465

(3) Windsor Motors Ltd v. District of Powell River (1969) 4 DLR (3d) 155.

(4) Southend-on-Sea Corporation v. Hodgson (Wickford) Ltd (1962) 1 QB 416

(5) Wade (as note 2, p. 69), 331

(6) Wade (as note 2, p. 69), 86

(7) Wade (as note 2, p. 69), 633

(8) Thornton v Kirklees Metropolitan District Council (not yet reported)

D. Exclusions and exceptions

25. It is not clear how far administrative authorities who have to take decisions of a judicial character are entitled to judicial immunity in law. In the past, judges of the superior courts were completely immune from liability, even though they acted with malice; but judges of inferior courts were personally liable in damages, even though they acted without malice, if they were acting outside their jurisdiction. But the Court of Appeal recently swept away this old distinction, holding that there is now one single rule for judges of all kinds - "from the highest to the lowest" (1). The new rule is that judges are immune from liability if they are acting in good faith and in an honest belief that they are within their jurisdiction. But it has not been decided whether this doctrine applies to members of the numerous administrative tribunals, such as national insurance tribunals (deciding claims to social security benefit) and industrial tribunals (deciding many cases on the rights of employees). In principle such tribunals ought to be treated as courts for this purpose, since they have to find facts and apply law in the same way as a court of law. On the other hand, the immunity ought not to extend to officials who have discretionary powers of decision such as licensing authorities, or to inspectors who make recommendations to ministers after holding inquiries into compulsory purchase of land, planning appeals, etc.

26. There are also a few special statutory exemptions. The most important of these is in favour of the Post Office, which enjoys very wide immunities under the Post Office Act, now the Act of 1969. This provides that neither the Post Office nor any of its officers shall be liable in tort for anything that happens in the post or any failure, mistake or delay in the telecommunications service. This is a breach of the principle that a public official is personally liable for wrongful injury. A person who delivers a parcel to the Post Office and sees it damaged or destroyed before his eyes has, it seems, no civil remedy. But wrongful interference with the mails, and wilful or even negligent damage to postal packets, is a criminal offence. Since the Act of 1969 the Post Office has become a statutory public corporation and has ceased to be a government department. The legal privileges which have been given to it are altogether excessive and out of keeping with modern administrative law (2).

27. A more reasonable exemption is contained in the Mental Health Act 1959, which protects members of mental health review tribunals, and other persons performing their duties under the Act, provided that they act in good faith and with reasonable care. The Crown Proceedings Act 1947 also contains an exemption in favour of the Crown and members of the armed forces, where one member of the forces injures another while on duty. But the exemption applies only where the injury is pensionable, so this is merely a provision against duplication of the indemnity, once by way of damages and once by way of pension.

28. Certain other exceptions are to be found. Damage caused by atomic energy plants is subject to a special scheme for compensation under the Nuclear Installations Acts 1965 and 1969. These Acts impose special duties on the Atomic Energy Authority and other managers of atomic plants, nuclear fuel, etc. Damage resulting from breach of these duties must be compensated in accordance with the Act, and the fund from which compensation is paid is covered by a government guarantee.

29. Acts of policy committed by the Crown (ie the government) in foreign territory or on the high seas are exempt from liability to some extent under the doctrine of act of state (3). But that lies beyond the scope of this paper.

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(1) Sirros v. Moore (1975) Q.B. 118 at 132.
(2) Wade (as note 2, p. 69), 150
(3) Wade (as note 2, p. 69), 646

Subject No. 2 The Legal Basis of Liability

A. Unlawful action

30. The fundamental doctrine of English administrative law is the principle of ultra vires. The powers and duties of administrative authorities derive from Acts of Parliament; and every Act of Parliament is an act of sovereign legislation which can effect anything it likes, without any sort of constitutional restriction. Consequently judges must find limits to the powers which Parliament gives by assuming that Parliament intended them to be restricted. It is in this way that the basic rules of judicial review are enforced. If a minister abuses his power by acting arbitrarily and unreasonably, or ignores the procedure required by the principles of natural justice, his action is condemned because the court assumes that these restrictions and conditions are impliedly required by Parliament, without the need to say so expressly. English judges are therefore willing to find a great deal more in an Act of Parliament than is in fact expressed in it, and thus they can compensate for the absence of a written constitution. Administrative law, accordingly, may be regarded as a collection of rules for the interpretation of Acts of Parliament, embodying all the restrictions and qualifications which the judges think it right to imply. A violation of any of these implied restrictions will render the act or decision ultra vires, with the effect that it is then unauthorised in law and null and void. This is the basic principle which enables the court to quash (annul) or declare unlawful the acts of public authorities. It is therefore a very wide and flexible principle. When the courts invent new categories of judicial review, they accommodate them within the principle by stretching it further.

31. Actions for damages against public authorities rest on the same general basis. Examples have been given in the previous section to show how statutory power conferred on a public authority is interpreted restrictively, so as not to allow it to infringe private rights unless that is inevitable. The commonest ground of liability, negligence, is never inevitable, since it must of course be assumed that public powers are to be exercised with proper care.

32. Liability for negligence depends upon the ordinary rules which govern this tort in private law. In most cases the public authority will act through its servants or agents. And here also the rules of private law are followed. The principle is that the employer is liable for torts committed by his servants if they are acting in the course of their employment and not merely on their own account. In private law there is a great deal of case-law about this, and the tendency has been for the courts to enlarge the area of "course of employment". But very little of this case-law concerns public officials. If one looks at the textbooks on the law of tort, one finds that their discussions of this subject cite no cases where the defendant is a public authority. One can say only that the ordinary rules will be followed. For example, a government driver who is ordered to drive to a certain place by a particular route will remain in the course of his employment if he goes to that place by a different route, but will go outside the course of his employment if he makes a journey for private purposes to some quite different place.

33. English law makes no formal distinction between degrees of negligence comparable to the distinction made in French law between "faute simple" and "faute lourde". A doctor or other professional person is expected to exercise the standard of care appropriate in his profession for the business in hand. The state will not be liable for any mere errors of judgment which he may make, but it will be liable if he causes damage by falling below the standard of care which is reasonably to be expected of someone in his position. This is really the opposite of the French principle, which appears to impose liability only for gross negligence where the necessary standard of professional skill is particularly high. Under the English rule, the standard of professional skill required rises in step with the difficulty of the operation. The

same may be said of other cases where "faute lourde" is required in French law, for example action taken for the maintenance of public order and the action of inspectors or controlling bodies. In English law the question is always: what standard of care is it reasonable to expect in the circumstances?

34. The general principle of liability, as explained in Part 1, is that a public authority is liable to actions for damages in exactly the same way as a private person, unless it can show that it has statutory authority and is acting properly and within its powers. The foundation of this basic liability is the ordinary common law, as extended also to the Crown by the Crown Proceedings Act 1947.

B. Lawful action

35. "No fault liability" has not yet been introduced by legislation in England. The subject was studied by a Royal Commission, which in 1978 recommended a scheme dealing with traffic accidents only (1). But nothing has yet been done to enact it.

36. The common law contains one doctrine of liability without fault, universally known from a famous case as the rule in Rylands v. Fletcher (2). This imposes strict liability, irrespective of negligence, on anyone who for his own purposes "brings on his lands and collects and keeps there anything likely to do mischief if it escapes", provided that some abnormal risk is created. This doctrine has many times been applied in cases where damage has been done by such things as fire, electricity and chemicals. But, once again, few such claims have been made against public authorities. In one case, where a gas pipe had broken and caused an explosion without any fault on the part of the Gas Board (a public corporation), the Court of Appeal held that the Board was not liable because it did not supply gas "for its own purposes" (3). But this decision is strongly criticised, and may be regarded as wrong, since it is obviously more equitable for the cost of such accidents to be charged to the public corporation, and so spread over the whole body of consumers through their charges, than for it to be thrown onto the single individual who suffers the loss from the explosion. Furthermore, the decision is contrary to the general principle that public authorities ought to bear the same legal liabilities as ordinary citizens. The Crown is subject to this doctrine of strict liability under the terms of the Crown Proceedings Act 1947. The law ought to be the same for all public authorities. It might well adopt from the French Conseil d'Etat the doctrine of equal sharing of public liabilities, in addition to the principle of risk which is already contained in the common law.

37. The common law doctrine is however a narrow one, covering only dangerous things, animals, etc, which may escape from land. It has no application, for example, to accidents caused by the use of firearms, or of fast cars, by the police. The only other trace of a doctrine of liability without fault in the common law was discovered by the House of Lords as a result of the second world war. It was held that an oil company, which on the instructions of the military commander in Malaya destroyed its installations to prevent them falling into the hands of the Japanese, was entitled to claim compensation from the state (4). But no sooner had this been decided than the government procured the passage of an Act of Parliament depriving the company of the benefit of this judgement retrospectively and altering the law for the future (5).

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(1) Report of the Royal Commission on Civil Liability and Compensation for Personal Injury, 1978, Cmnd. 7054.
(2) Rylands v. Fletcher (1868) I.R. 3 H.L. 330.
(3) Dunne v. North Western Gas Board (1964) 2 Q.B. 806
(4) Burmah Oil Co. v. Lord Advocate (1965) A.C. 75
(5) War Damage Act 1965.

38. Naturally there are many cases where compensation is provided by Act of Parliament. The most obvious of these is compensation for the expropriation of land for public purposes. There are also a number of cases in planning law where compensation is payable if permission to build or develop land is refused, though these cases are now rather exceptional. Compensation is available for damage caused by riots and also for personal injury suffered as a result of crimes of violence, including injury to policemen and those who assist them in arresting violent criminals. The former case is covered by an Act of Parliament (1), but the latter is merely an administrative scheme for which Parliament votes the money every year (2).

39. In 1973 an Act of Parliament made provision for the compensation of loss caused by public works such as motorways and airports, thus remedying a long-standing injustice (3). Formerly compensation was paid only to persons from whom some land was taken, and in that case the compensation included the loss of value to any other land which they retained nearby. But if no land was taken from them, they received no compensation, even though the value of their land might be very greatly reduced by the proximity of a new motorway, airport or some other injurious public works. Here was an obvious case for the principle of "equal sharing of public liabilities". The Act is very complicated, and in some respects restrictive, but it also provides additional compensation for people who have to move their homes or businesses as the result of expropriation. So here at last is recognition of the principle that the true social cost of public works and developments ought to be borne on the broad shoulders of the whole community.

Subject No. 3. The Extent of Compensation

A. General compensation

1. Monetary compensation

40. Monetary compensation follows the ordinary principles of private law. It aims at full compensation, which is always given by way of the award of a capital sum. In the case of infants, this sum may be administered by the court in the infant's interest until he is of full age.

41. Damages are recoverable for economic loss as well as for personal injury. This is illustrated by the examples given in Part 1 relating to negligent inspection of the foundations of houses and to negligent search of a local authority's register of land charges (4).

42. The effects of inflation have been recognised, and damages are assessed as at the time when the judgment is given. In the case of compulsory purchase, which is always under the authority of statute, the House of Lords was able to take account of inflation by deciding that compensation should be assessed as at the time when the land was actually taken by the expropriating authority (5). Previously it had been assessed as at the time when the notice of acquisition was given.

2. Specific performance and restitution

43. The court may make an order of specific performance or of restitution against a public authority in exactly the same way as against a private individual. Against the Crown itself, however, the court cannot make a compulsory order. Under the Crown Proceedings Act 1947 the court may only make an order declaratory of the rights of the plaintiff; but this will always be respected.

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(1) Under the Riot (Damages) Act 1886 damages are recoverable from the local police authority.
(2) Wade (as note 2, p. 69, 540
(3) Land Compensation Act 1973
(4) Above, notes 5, p. 72, (1) p.75.
(5) West Midland Baptist Association v. Birmingham Corporation (1970) A.C. 874.

B. Equitable compensation

44. No doctrine of English law appears to correspond with this title. But here it may be suitable to mention exemplary damages. Exemplary damages are damages which exceed the amount of loss actually suffered and express the principle that some damages ought also to be awarded for the plaintiff's sense of outrage at some particularly shocking injury. Exemplary damages may also be awarded in order to deprive a wrongdoer of the profits of his wrong. One particular category where exemplary damages are allowed is where there has been oppressive or unconstitutional action by the government or its agents (1). This is a case where the law is more severe with the government than with the ordinary citizen.

45. It should perhaps also be mentioned here that, apart from the Crown, public authorities of all kinds are subject to compulsory orders of the court, such as injunctions and orders of mandamus. As already mentioned, disobedience of such orders is punishable with fine or imprisonment as for contempt of court.

C. Contributory negligence

46. The rules here are those which govern contributory negligence in the ordinary law of tort. It used to be the case at common law that any degree of negligence on the part of the injured party prevented him from recovering any damages, though various doctrines for mitigating this injustice were invented. The law was changed in 1945, when it was provided by Act of Parliament that where any person suffered damage as the result partly of his own fault and partly of the fault of any other person, his claim should not be defeated merely because he had been at fault himself; but that he should recover only such damages as the court thought just and equitable, having regard to his own share of the responsibility (2). The court therefore now has a free hand in apportioning the damages according to the respective degrees of fault. Difficult questions of causation must still be solved, and in particular the earlier doctrine of "the last opportunity" or "last clear chance" may be applied where the acts of negligence were successive in such a way that the first of them did not really cause the injury at all. But these are the ordinary problems of private law.

D. Limitations of compensation

47. It is a general rule that a plaintiff must if possible mitigate damage. That is to say, he must do whatever he reasonably can to minimise the loss which he suffers. If he fails to do this, he will not receive compensation for the avoidable element in his loss.

48. Taxation is also taken into account in assessing the capital sum payable as compensation for loss of income, for example in cases of personal injury and death. Where the income and the rate of tax are high, the damages may therefore be greatly reduced. To some extent, also, damages are reduced where the plaintiff is entitled to social security payments. An Act of 1948 required a deduction of one half of the value of sickness benefit, industrial injury benefit and industrial disablement benefit available during five years (3). If the plaintiff was in receipt of unemployment benefit, this is deducted in assessing the income for which he can claim compensation. As mentioned above (4) there is also a special rule in the Crown Proceedings Act 1947 limiting damages where one member of the armed forces injures another and the injury is pensionable.

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(1) Rookes v. Barnard (1964) A.C. 1129 at 1226
(2) Law Reform (Contributory Negligence) Act 1945.
(3) Law Reform (Personal Injuries) Act 1948
(4) Para. 27.

Subject No. 4 The Party Responsible

49. Historically, as already explained, the basis of the citizen's rights has always been that he can sue the individual agent of any public authority which acts against him unlawfully. The agent is not allowed to plead superior orders as a defence, nor has he any defence of public policy or State necessity. When the law was extended to make employers responsible for wrongs committed by their servants and agents, the employing authority and its servants became jointly and severally liable: that is to say, the injured party could sue either or both of them, but could recover damages only once. If one of them was at fault but not the other, the innocent party could claim indemnity from the party at fault. It could occasionally happen that a wrong could be committed by the employer, but not by the servant, for example if the employer failed to maintain a reasonably safe system of work in a factory. But for the vast majority of wrongs committed by employees both employees and employers were equally liable.

50. This was the ordinary private law, and it was applied without discrimination to all public authorities except the Crown. A local authority or statutory corporation could accordingly be sued for illegal acts of its servants committed in the course of their employment. If it should happen that only the employee was sued, as might occur where a statutory duty was imposed upon him by virtue of his office and not upon the employing public authority, the public authority would in practice stand behind its employee and pay any damages for which he was held liable in their employment.

51. In the days before the Crown Proceedings Act 1947 the Crown used likewise to stand behind its servants, so that proceedings were brought against the servant personally and the government would conduct his defence and in fact pay the damages. Now, under the Act, proceedings against the Crown for tort, breach of contract, or restitution of property are brought against the relevant government department (Treasury, Foreign Office, etc) or, if there is no suitable department, against the Attorney-General. All civil servants (ie all employees of the central government) are equally servants of the Crown and not of one another, so that any action for an ordinary wrong committed by one of them is brought under this procedure. Normally only the department will be sued and not the individual servant, though in law the individual servant remains equally liable and can be sued if desired.

52. In the case of public corporations, of which there are many, a distinction has to be made between those which are fully under the control of the central government and those which are not. The various corporate bodies which administer the National Health Service, for example, were held to be merely part of the central government's services, so that wrongs committed by their employees were the liability of the central government (1) - though this was modified by an Act of 1973, which makes them carry their own responsibilities independently (2). Corporations which enjoy substantial independence, such as the British Broadcasting Corporation, do not count as servants of the Crown, since they are not under the central government's control (3). They therefore bear their own responsibilities. The corporations which have been put in charge of nationalised industries, such as the railways, airlines, coal, gas and electricity, are in fact subject to a good deal of central government control, since the government has statutory power to give them "directions of a general character". But this has been held insufficient to make them servants of the Crown for legal purposes (4). Consequently they are sued in their own names as independent bodies.

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(1) Pfizer Corporation v. Ministry of Health (1965) A.C. 512.
(2) National Health Service Reorganisation Act 1973, 1st sched., para. 15.
(3) British Broadcasting Corporation v. Johns (1965) Ch. 32
(4) Tamlin v. Hannford (1950) 1 K.B. 18.

53. Where there is liability for breach of a statutory duty, as mentioned in para. 24 above, damages can be claimed only against the public authority itself, and not its servants. This is because it is only on the public authority that the statutory duty is imposed. Unless a statute provides to the contrary, servants or agents will themselves personally be under no duty.

Subject No. 5 Procedure and Remedies

54. The rules about procedure and remedies, so far as they affect actions for damages, have been described in the preceding section. Against all public authorities except the Crown, the ordinary procedure of private law is employed. Against the Crown the procedure is as prescribed by the Crown Proceedings Act 1947, explained already.

55. Proceedings are brought in the High Court or in the County Court, according to the ordinary rules governing their jurisdiction. There are no separate administrative courts with general jurisdiction over the administration.

Subject No. 6 Special Rules for Judicial Functions

56. The recent change in the law about judicial immunity has been explained already in para. 25.

Supplementary Note

57. Although this paper deals only with legal liability, it must be remembered that an important new remedy for wrongs done in the course of public administration has been provided in the person of the Ombudsman, known in Britain as the Parliamentary Commissioner for Administration, established by the Parliamentary Commissioner Act 1967 (1). That Act affected only the central government. But the ombudsman system was extended to local government by the Local Government Act 1974. Both the Parliamentary Commissioner and the Local Commissions have been able to remedy many grievances against the administration by investigating them, reporting upon them, and pursuading the administrative authority to make fair reparation. Although the administrative authority has no legal liability, it will usually in practice accept the recommendation of the Commissioner. I have pointed out in para. 23 how the Commissioner has been able to secure remedies for citizens misled by wrong advice from government officials which has resulted in loss. He has thus been able to remedy one of the defects in our administrative law. This new system of administrative redress of grievances is undoubtedly successful, and is proving to be an important supplement to the formal system of legal remedies. It might well be taken into account by the Council of Europe in formulating recommendations about State responsibility.

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(1) Wade (as note 2,p. 69), 75 (central government), 125 (local government).

ADDITIONAL PAPERS

on

the Liability of the State in
the Law of European States

presented by

participants to the Colloquy

The Liability of the State in the Law of BELGIUM*

by
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INTRODUCTION

The purpose of this study is to describe the general rules governing the liability of public authorities. This concept should be understood in its broadest sense. The aim is to discover in what cases the public authorities are liable for acts which cause damage to other parties, whether under the rules of civil liability of any other legal rules.

On the understanding that we shall not concern ourselves with contractual liability, it is our intention to cover the whole field of damage for which the public authorities are held liable, whether the cause of the damage resides in a lawful or unlawful act, and whether or not the damage consists in an infringement of rights or - to anticipate later remarks - in a possible breach of equality or balance between citizens where public duties are concerned.

The settlement of disputes concerned with personal rights is provided for in Articles 92 and 93 of the Constitution in the following terms:

> "Article 92. Contestations arising out of civil rights come under the exclusive jurisdiction of the law courts.
>
> Article 93. Contestations arising out of political rights come under the jurisdiction of the law except in such cases as are laid down by the law"(1).

Article 92 covers all personal civil rights, including the right to compensation for damage caused by the public authorities.

In addition, there is a personal political right to compensation for damage imputed to the public authorities; this forms part of the personal political rights covered by Article 93 (2). These rights created specially by legislation vis-à-vis public authorities, are based on a different concept from civil liability. They are explained by the wish of the legislative power to provide remedies, in those matters and to the extent that it thinks appropriate, for any breach of equality or balance where public duties are concerned.

Articles 92 and 93 together cover all disputes concerned with personal civil or political rights. They do not prevent the legislature from establishing some other system of compensation by the public authorities independent of any personal, civil or political right to compensation even if this is not expressly provided for in the Constitution.

\# A revised and amplified version of this paper (in French only) was presented by the author after the colloquy in the framework of the activity of the Committee of Experts on Administrative Law.

(1) The Belgian Constitution in its original form dates from 7 February 1831. Articles 92 and 93 have not been amended since that time.

(2) We use the term "personal political right" with reference to Article 93 of the Constitution which dates from 1831. In contemporary language, and to avoid any possible misunderstanding, we should talk of "personal public right" which is what we intend to do in the final version of our study.

Such is the case with regard to compensation by the Conseil d'Etat for "exceptional" damage. Here again, we are outside the sphere of civil liability, and damage once more consists of a failure of public duty in the matter of equality or balance between citizens. Compensation is based on equitable principles, all considerations of public or private interest being taken into account. Without giving rise to any personal right to specific compensation, the law provides for the possibility of court decisions, involving some discretionary element, to restore a state of affairs more in keeping with a harmonious combination of public and private interests and with the requirements of equality or balance between citizens where public duties are concerned. Disputes relating to this type of compensation together with those relating to the annulment of administrative decisions, are disputes in rem, as distinct from disputes in personam, which are those relating to personal rights, whether civil or political. The fact that the Act of 3 June 1971 gave the Conseil d'Etat the power of decision in disputes over compensation - whereas, since its establishment by the Act of 23 December 1946 - it had held only advisory powers in this field, has not in our view changed the area of its jurisdiction from disputes in rem to disputes in personam (1).

It should be noted that, under the system laid down by Article 92 of the Constitution, the public authorities are in theory on the same footing as private individuals in respect of personal civil disputes, and that they are in any case answerable before the same courts of the judicial order. Although one effect of the system of separation of powers is that the judicial function and the administrative function are in the hands of separate bodies independent of each other, it does not mean in the case of Belgian institutions that the administrative authorities have their own judges for nearly all their acts. This is not true of personal civil disputes; on the other hand, it is true of personal political disputes in cases expressly provided for by law, since the establishment of the Conseil d'Etat it is an absolute rule within disputes in rem specific to the administrative authorities, particularly compensation disputes.

Leaving aside the administrative courts set up by virtue of Article 93 of the Constitution, which have strictly limited powers, the overall jurisdiction of the courts of the judicial order and that of the Conseil d'Etat are complementary as regards the liability of public authorities. There thus arises the question of the delimitation of their respective fields of competence. In some cases the question would arise which court should take precedence over the other, if the problem had not been settled by legislation. Since the law states that the Conseil d'Etat has jurisdiction in cases where no other court has, the starting point for compensation proceedings depends on the limits set by the courts of the judicial order to their own jurisdiction, and these limits change with their own decisions.

In most cases, it is on the basis of their alleged administrative acts that the question of the liability of the public authorities arises, whether in disputes in personam or in rem. The administration is the organ of the executive power; whether centralised or decentralised, it acts on behalf of the community, and in so doing it sometimes causes damage to others. The administrative authorities also represent the community in cases where it has to take responsibility for some inequality or lack of balance among its members. Accordingly, in this study we shall in most cases continue to speak in fact of the administrative authorities rather than the public authorities.

It should, however, be made clear at the outset that we shall meet two types of personal political right to compensation for damage caused by the judicial power (2) and that, prior to the amendment brought in by the Act of 3 June 1971 on this point, the Conseil d'Etat was entitled to advise on compensation for damage caused directly by an act of the legislative power.

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(1) The Acts of Parliament concerning the Conseil d'Etat were systematised by the Royal Decree of 12 January 1973.

(2) In the event of review of a conviction for homicide and some cases of remand in custody (Act of 13 March 1973). However, we wonder whether in each of these cases there exists a personal public right to compensation. There might be a particular case of compensation forming part of a dispute in rem.

Our study will be divided into three chapters corresponding to the different legal systems applicable in respect of the liability of public authorities. We shall deal successively with the liability of authorities in personal civil disputes, abstract, personal political disputes and disputes in rem (1).

CHAPTER I

THE LIABILITY OF PUBLIC AUTHORITIES IN PERSONAL DISPUTES RELATING TO CIVIL RIGHTS

Section I. General

Non-contractual civil liability is based essentially on Articles 1382-1386 of the Civil Code.

Article 1382 reads as follows:

"Any personal act which causes damage to another places on the person responsible for that act the obligation to make good the damage".

Traditionally, three elements were necessary in order for civil liability to arise: fault, damage and a relationship of cause and effect between the two.

Damage is not defined in the Civil Code; whether caused by an administrative authority or by any other person, it is currently given a very broad interpretation, wider than infringement of rights. It is also acknowledged that compensation for certain types of damage, as in cases of disturbance to neighbours, depends on the recognition of liability even without fault, whether or not such liability is derived from Articles 1382 et seq of the Civil Code.

Article 1382 makes no distinction according to whether the act causing the damage is that of a private or public law person. This has not prevented the courts from being very cautious about applying the general rule to administrative authorities. Rather than seeing in the principle of the separation of powers a justification for judicial independence of the administrative authorities warranting treating them like any other person, the courts seem on the contrary to view it as conferring on those authorities a form of protection which entitles them in the absence of any courts of their own, to expect the general courts either to apply the ordinary law to them with respectful restraint or else not to apply it to them at all.

After a long period of hesitation and relative stagnation, this conception has gradually changed to the point where it has now been totally reversed.

The growing trend of opinion in favour of the establishment of a Conseil d'Etat, the actual existence of this body, established by the Act of 24 December 1946, and the power given to it by law to hear cases involving claims for compensation for certain types of damage caused by the administrative authorities - on which it could first of all advise, and since the Act of 3 June 1971 has had the power of decision-making and - have all had the effect of inducing the courts of the judicial order gradually to cast off their reserve and to be increasingly precise in their definition of the exact extent of their jurisdiction in the matter of the civil liability of administrative authorities.

The analysis of case-law which follows will make this change clear.

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(1) The present text comprises: chapter I, on personal disputes relating to civil rights, chapter II, section I, on personal disputes relating to political rights. It will be followed by chapter II, section II, and chapter III, on disputes in rem.

Section II Restrictive tendencies prior to the judgement of 5 November 1920

I

One important restriction is to view Articles 92 and 93 of the Constitution, which empower the courts to hear disputes arising out of civil or political rights, gives them jurisdiction in respect only of cases relating to these private rights of citizens which are derived from laws passed specifically in their interest as individuals and which alone, on this view, can truly be considered civil and political rights as such, disputes arising out of laws of general concern or laws on public policy, or out of the implementation of decisions of an administrative authority being excluded.

Looked at from this point of view, everything relating to the implementation of administrative regulations and decisions is a matter for the administrative authorities themselves; this would include rulings on difficulties and disputes to which such implementation may give rise, such a function being regarded as merely one particular aspect of administration.

This restriction is a general one which covers all disputes arising out of personal civil or political rights. It has the effect, in most cases, of keeping out of the courts all disputes involving the administrative authorities, in matters of civil liability or anything else.

These restrictive principles were defined by a judgement of 25 June 1840 by the Court of Cassation which was in line with the pleas of the avocat général Decuyper (1) (Pasicrisie 1840, I, 409 with the pleas of the ministère public). The dispute centred on the proper membership of a church council, on which depended the recognition of a property right of the council.

Without departing from these restrictive principles, the Court of Cassation subsequently acknowledged the power of the courts to rule on a claim for arrears of wages or bonuses which the administration was legally bound to pay. In judgements of 30 April 1842 and 18 November 1842, the Court of Cassation found that the right to unpaid arrears was an individual right to monies owing, and hence a civil right (Pasicrisie 1842, I, 182, with concurring pleas by the procureur général Leclercq and Pasicrisie 1842, I, 355, with concurring pleas of the first avocat général, Dewandre).

In the first case, the procureur général had said that the judicial function of the courts covered all rights pertaining to a person, ie any right concerning either a person's civil or political status or the movable or immovable property to which he could lay claim. The procureur général had added that the term "person" should be understood to mean not only an individual but also a legal entity considered capable of having the same rights and duties as an individual.

Referring to the restrictive principles enunciated in the case of the church council, the procureur général had again pointed out that that case had been concerned with the meaning and hence the effect of a purely administrative law (the law governing membership of the church council) ie a law regulating general interests, irrespective of any rights peculiar to a person, since appointment to a church council and the authority attaching to that appointment affected neither the civil or political status nor the movable or immovable property of the individual appointed. It will be noted that no reference is made to the subject of the dispute: the recognition of a property right of the church council as a legal person having rights.

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(1) These pleas refer to Henrion de Pansey, "Traité de l'autorité judiciaire", chapter 42.

In actual fact these theories, which are nowadays rejected, lacked internal logic, and it is not clear why the courts agreed to hear certain cases involving claims against the administrative authorities but declared themselves incompetent to hear most such cases (1).

II

By a decision of 27 May 1852 (Pasicrisie 1852, I, 370, with dissenting conclusions by procureur général Leclercq) the Court of Cassation closed a case involving the civil liability of the State, a case that had gone through various developments and in which the Court of Cassation itself had given a preliminary judgment which its subsequent decision contradicted.

On 3 May 1843, Mr De Pitteurs boarded a train for Brussels at Liège station. The railways were run by the State. During the journey, the carriage in which he was sitting suddenly caught fire; he suffered burns, and furthermore lost some gold coins in his hurry to get out of the carriage. His claim for compensation from the State was dismissed by the court of first instance in Liège. The Liège court of appeal reversed this decision and found in favour of the victim of the accident.

By judgement of 23 February 1850, the Court of Cassation quashed the verdict of the court of appeal (Pasicrisie 1850, I, 163, with concurring pleas by the avocat général Delebecque). It found that, as the Civil Code dealt solely with the rights of citizens as among themselves and with their private interests, its provisions concerned only persons governed by civil law and acts which by their nature and effect formed part of civil life. The court also considered that the State railway administration, in undertaking to transport persons and goods in accordance with the aim of the railways was discharging a governmental duty imposed by law. It concluded that the State, in the exercise of its public function of running the railways, could not be subject to the rules of civil liability, nor in particular to Article 1384 of the Civil Code, the enforcement of which was being sought.

The court of appeal of Ghent, to which the case was referred, passed judgement on 13 May 1851 (pasicrisie 1851, II, 228). It rejected the argument of the Court of Cassation and granted compensation to the victim of the accident. It found that the government was discharging its political and governmental functions when it acted to regulate the running of the railways to meet public interest in order to provide a service and a safe service; it stepped outside that function when, in addition to making such regulations, it ran the railways itself, thereby performing ordinary acts of civil life that were subject to the general rules of private law.

The case went before the Court of Cassation again, which this time disagreed with the conclusions of the procureur général and rejected the appeal by judgement of 27 May 1852, in which it found inter alia that if a passenger accepted the service offered on behalf of the State, there came into being, by consent of the two parties, a contract which had all the features of a normal private agreement like one between an ordinary individual and another individual who operated public transport by land or water, so that the State was not exempt from the form of liability referred to in Article 1384 of the Civil Code.

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(1) Similarly, the courts refused to give full effect to Article 107 of the Constitution, which states that "the courts and tribunals shall not apply any general, provincial or local decrees and regulations save insofar as they are in accordance with the law". The judgement of 23 June 1840 concerning the case of the church council is also significant in this respect: in substance, it says that Article 107 of the Constitution does not confer on the court an unlimited right to review all administrative decisions without distinction, whatever their purpose, and to refuse to apply or enforce them when it finds them not to be in accordance with the law. This right is said to be limited to those administrative decisions which fall within the court's jurisdiction; to go beyond that limit would be contrary to the principle of the separation of powers and their independence.

One might ask whether Article 1384 of the Civil Code should have been applied, as it was or Article 1382, but this question does not form part of our concern.

Nor is it sufficient to welcome the fact that justice was finally done to the victim of the accident.

If justice was done, it was because, before ruling that the acts at issue formed part of civil life and thus gave rise to application of the rules on civil liability, the Court of Cassation had made a false and arbitrary distinction between acts performed by the administrative authorities in the public interest and acts performed in the running of a private business, ie between acts of government and acts of private management.

III

Since the distinction was unjustified, it is not surprising that it was applied haphazardly and that similar acts were in some cases ruled to be administrative acts and in others acts of management. Here is an example.

The fire in a railway carriage in the case we have just described was caused by a careless act, that of placing inflammable and explosive substances in a carriage near the engine, where they were exposed to flying embers. This carelessness, as we have seen, was considered to form part of an act of management.

By judgement of 3 March 1892 (Pasicrisie 1892, I, 119, with concurring pleas by the procureur général Mesdach de ter Kiele), the Court of Cassation considered as an administrative act, and hence one that could not give rise to compensation, the carelessness of a lock keeper, who, in order to enable a boat loaded with poles to pass under a bridge, suddenly lowered the water level in the lock without warning the watermen whose vessels were moored downstream (1).

Section III. The judgement of 5 November 1920

From the factual standpoint the case was of little importance. A tree planted on a plot of ground belonging to the town of Bruges fell on the crops of an adjoining horticultural establishment, the firm "Flandria". The tree was decayed and its roots had almost totally come out of the ground; it was acknowledged that this situation posed a permanent danger and that the owner was at fault for not having taken the necessary remedial action.

The discussion centred on another aspect of the matter. The court of first instance of Bruges found against the municipal authority because, it said, the tree was on its private land. The court of appeal gave judgement along the same lines. The municipal authority appealed to the Court of Cassation, claiming that the tree was on public land and calling for a ruling in line with the judicial precedents. What was really at stake was the review of acts of the administration by the courts.

It was then that the Court of Cassation, by its famous judgement of 5 November 1920, in accordance with the pleas of the first avocat général, Paul Leclercq, rejected the appeal, putting an end to the distinction between acts of public administration and acts of management (Pasicrisie 1920, I, 193, with pleas of the ministère public).

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(1) For an account of the facts, see Brussels 25 October 1890 Pasicrisie 1891, II, 78.

The Court of Cassation found:

"That (by virtue of Article 92) the Constitution has placed under the protection of the judicial power all civil rights, ie all private rights dealt with in the Civil Code and supplementary statutes, and has given the courts the task of redressing any infringements of these rights;

That, with a view to providing such protection, the Constitution has regard neither to the status of the parties to a dispute nor to the nature of the acts said to have caused an infringement of rights, but solely to the nature of the rights infringed;

That in consequence, whenever a person alleges that he has a civil right and that that right has been infringed, and claims compensation for the damage suffered, the judiciary has the power and the duty to hear the dispute and has authority to order reparation to be made, where appropriate, even in cases where the alleged perpetrator of the damage is the State a local authority or any other public law entity, or in cases where the damage is caused by an unlawful act of the public administration; ...

That in accordance with [the rule of the separation of powers] the courts have no power to perform acts of public administration or to reverse or annul decisions of administrative authorities, just as the administration has no power to try disputes relating to civil rights ...

That (under the system laid down in the Constitution) those who govern can do only what they have authority to do and are, like the governed, subject to the law; that their activities are circumscribed by laws, in particular by those dealing with civil rights and that, if they infringe one of those rights, the judicial power may rule that the act was ultra vires and is therefore unlawful and constitutes a fault, and may award compensation for the damage thus caused; that in so doing, the judicial power acts not as an administrator but as a judge in a dispute concerning civil rights."

The courts thus no longer take into account either the status of the parties or the nature of the act which had caused the damage, but solely the nature of the right infringed. For some time to come, they would consider that the damage for which they were entitled to order compensation could lie only in an infringement of rights, more precisely of civil rights. It was only after they had extended the concept of damage beyond this (1) that they were to acknowledge expressly as we shall see below, that an infringement of political rights also constituted damage for which compensation was provided in Article 1382 of the Civil Code.

Given the fact that they were competent to hear disputes relating to civil rights and that among such rights Article 1382 of the Civil Code included the right to compensation for damage caused by others, it seems that, before the sudden changes referred to above took place, the courts had concluded, as a result of confusing two different concepts, that the damage for which such compensation was provided must necessarily lie in an infringement of civil rights.

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(1) See inter alia cassation 2 May 1955, "Revue critique de jurisprudence belge" 1957, pp 99-115, with comments by J Ronse, "La notion du dommage: lésion d'intérêt".

Section IV. The main features of recent developments in case-law

I

The distinction between acts of private management and acts of public administration is no longer made. But that is not the end of the matter.

The ministère public, in its arguments in support of the pleas which preceded the judgement of 5 November 1920, divided acts of the administration into two categories. Acts over which the law gave the administration sole power of review (1), including decisions of a general nature, were considered sovereign acts insofar as they were lawful (2). Such for example were decisions establishing communication routes and providing for their upkeep. On the other hand, acts involving unsatisfactory implementation of such decisions would give rise to compensation for any damage they caused.

This distinction, which was probably less categorical than appears at first sight, and which was not upheld by the judgement of 5 November 1920, nevertheless left its mark on subsequent case-law. A distinction began to be made between decisions and acts of implementation. It was considered that a decision was not subject to review by the judicial power.

By judgement of 11 May 1933, the Court of Cassation rules that a local authority was not to be held liable for the bad state of a track, seeing that the track whose condition was at issue "had remained in the state sovereignly decreed by the local authority, and that the performance of works had revealed no fault" (Pasicrisie 133, I, 222, with concurring pleas of the avocat général Gesché).

By judgement of 3 July 1943, the Court of Cassation introduced into its case-law on the subject the concept of legitimate trust on the user's part: users were entitled to expect public thoroughfares to be maintained in their apparent condition and it was incumbent on the administrative authorities to maintain them in such a way as to meet the legitimate expectations of users. This particular case concerned the condition of a lock on a water way (Pasicrisie 1943, I, 291).

The new concept is more than just a refinement of earlier case-law, since its application led to decisions of administration losing their immunity to court review. It was no longer sufficient for an administrative authority to implement properly the decisions it had taken; it was also obliged to take no decision that had the effect of disappointing the legitimate trust of the user.

The way was thus prepared for the Court of Cassation's judgement of 7 March 1963, which concurred with the pleas of the avocat général Ganshof van der Meersch (Pasicrisie 1963, I, 744, with pleas of the ministère public.)

The Court of Cassation found:

"... That the powers attributed by law to the administration in the public interest do not exempt it from the duty of care that is incumbent on everyone;

... That the public authorities have a duty to establish and open to the public only such thoroughfares as are sufficiently safe; that, except in cases where factors beyond their control prevent them from fulfilling their duty of safety, they must take appropriate measures to obviate any abnormal danger;

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(1) Pasicrisie 1920, I, 223 et seq.

(2) Ibid., p. 225

That, in cases where the public thoroughfare poses such a danger, they have not necessarily performed this duty by erecting warning signs as provided in Articles 93 and 94 of the road traffic regulations;

... That accordingly the court (hearing the case on the merits) found that the erection of sign no. 12 did not constitute a measure obviating the abnormal danger presented by the defective condition of the road and also ruled that the administration, having refrained from taking the necessary measures, had failed in its duty of safety."

Various principles emerge from this judgement:

- The administration, like everyone else, is subject to the general rule concerning the need to exercise due care which is laid down in Articles 1382 et seq of the Civil Code; it follows that, in carrying out its function of regulating traffic on public roads, it has a duty to ensure the safety of the users;

- it is for the court to decide, having regard to their duties, on the legality of decisions taken by the administrative authorities (1).

It does not follow from this last principle that the court is entitled to substitute its own judgement regarding the expediency of an administrative act for that of the administrative authority, but that it is its duty to see whether that authority has exercised its judgement in accordance with the law.

This idea of decisions by the administrative authority that are subject to court review for legality was gradually to be amplified and made more specific by developments in case-law.

II

On 26 April 1963, the Court of Cassation added an important clarification to the principles derived from the judgement of 7 March 1963: the courts' power of review extended to acts, however general, performed in the exercise of regulatory functions (Pasicrisie 1963, I, 905).

The facts were as follows: a child was given a smallpox vaccination, which at that time was compulsory under the Regent's decree of 6 February 1946 issued in pursuance of the Health Act of 1 September 1945. As a result of the vaccination the child contracted a serious and permanent disability. No fault could be imputed to the doctor or to anyone who had helped to administer the vaccine. The parents of the child complained that the State had made vaccination compulsory even though the risk of an epidemic was minimal and it was known that vaccination could, albeit in a very few cases, lead to serious complications. Following a ruling in favour of the parents of the child by the court hearing the case, the State appealed to the Court of Cassation.

The Court of Cassation found that the arguments invoked by the court of appeal did not legally justify its judgement, and that in fact the points it had accepted did not establish the liability of the State. The judgement of the court of appeal was quashed (2).

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(1) See Roger O Dalcq, "La place de l'arrêt de la Cour de cassation du 7 mars 1963 dans la jurisprudence relative à la responsabilité de la puissance public", in Miscallanea, W J Ganshof van der Meersch, Brussels, Bruyland, 1972, pp 25-41.

(2) It would appear that the Conseil d'Etat might have accepted these arguments in compensation proceedings. We shall consider that possibility later on. See also in a similar case the French Conseil d'Etat, Ministre de la Santé Publique c. Epoux Boghossian, 3 February 1972, Revue du droit public et de la science politique 1972, p. 1584.

As far as the principles regulating the liability of administrative authorties are concerned, the important thing was that the court was recognised to have power to review the legality of a decision taken in the exercise of regulatory functions, and to see whether the administration, in discharging those functions had fulfilled its general duty to exercise care.

The Court of Cassation found that:

"... The courts have no power to review the expediency of decisions taken by the administration;

... on the other hand, they are entitled to rule on the legality of such decisions;

... Although the Health Act of 1 September 1945 requires the Crown to take prophylactic measures to prevent or combat certain communicable diseases, none of its provisions gives to his decisions a sovereign authority that would exempt the executive power from the duty to exercise due care imposed upon it by Articles 1382 and 1383 of the Civil Code".

III

In a judgement of 16 December 1965, which concurred with the pleas of the first avocat général Ganshof van der Meersch, the Court of Cassation went one stage further by expressly including in the concept of damage for which compensation might be ordered by the courts, the concept of infringement of political rights (Pasicrisie 1966, I, 513, with the pleas of the ministère public).

An official of the "Société nationale des habitations et logements à bon marché", a public law body, was dismissed as part of a reorganisation of the company. His dismissal was revoked by the Conseil d'Etat. Following reinstatement, he was again dismissed when some of the company's departments were closed; his new appeal to the Conseil d'Etat was rejected. Simultaneously with his first appeal to the Conseil d'Etat he had brought an action before the civil court for compensation for the damage caused to him by his dismissal; he instituted a second civil suit following the failure of his second appeal.

The question arose whether the courts were competent to hear a case concerning an infringement of political rights, in this particular instance infringement of the status of a staff member of a public law body, seeing that the injurious act fell within the jurisdiction of the Conseil d'Etat in proceedings for the annulment of an administrative act.

The Court of Cassation replied in the affirmative in the following terms:

"... A dispute concerning financial redress for the infringement of a right, even a political right, falls within the exclusive jurisdiction of the courts;

... In cases where the source of infringement of the right might lie in an act ultra vires of an administrative authority and the infringement might give rise to annulment of that act, and where a petition to that effect has been lodged with the Conseil d'Etat, neither the judgement as to fault not the judgement as to the damage caused by fault falls outside the competence of the judicial power."

IV

By judgment of 11 April 1969, the Court of Cassation acknowledged that failure by an administrative authority to take a decision which it had a duty to take could constitute fault on its part and give rise to compensation for the resulting damage (Pasicrisie 1969, I, 702).

This was a case of a traffic accident at a crossroads with no traffic signals. The Court of Cassation found:

> "That although the complete absence of traffic signals at a crossroads may be due either to an express decision by the competent authority that the local situation does not merit special signals or to an omission or negligence, this circumstance does not affect the court's power to investigate whether, in view of the local situation, the absence of any measure to ensure traffic safety may be imputed to fault or failure of duty on the part of the municipal authority."

V

On 23 April 1971 the Court of Cassation went further, this time acknowledging that an omission in the exercise of regulatory power was also subject to review by the courts, which could rule that it constituted fault and order compensation for the damage it had caused (Pasicrisie 1971, I, 752).

The Royal Decree of 30 November 1950 on housing for certain categories of staff remunerated by the State stipulated that staff required to occupy specific housing because their work demanded their permanent presence at the place of work were entitled to free housing; the same decree provided that the Crown should decide, in respect of each ministry, to what categories of staff this provision should apply. One ministry official who felt that the nature of his work was such as to entitle him to free housing was placed on the retired list in 1958, at a time when no implementing decision had as yet been taken with regard to his ministry. He claimed compensation from the State for the damage which he considered he had suffered.

The Court of Cassation pronounced judgement in the following terms:

> "... On the one hand, ... the infringement of not only a civil right, but also in particular a political right, may constitute damage giving rise to a duty to provide compensation in the conditions specified in Articles 1382 and 1383 of the Civil Code;
>
> ... On the other hand, ... no constitutional or statutory provision exempts the executive power, in the exercise of its regulatory functions and activities, from the duty under Articles 1382 and 1383 of the Civil Code to redress any damage it causes to others through its own fault, in particular through carelessness or negligence;
>
> ... Lastly, ... even in cases where no statutory time limit is set for the issue of a regulation by the executive power, failure to issue the regulation may, by virtue of Articles 1382 and 1383 of the Civil Code, give rise to compensation for any damage that has resulted;
>
> ... Consequently, ... by ruling that the executive power, subject always to its political responsibility to the legislative chambers, may freely and with sovereign authority determine the procedures for enforcement of its regulatory power and that consequently the judicial power may never hold failure to issue regulations, in particular failure to implement any Act or Royal Decree whatsoever, to be a fault within the meaning of Articles 1382 and 1383 of the Civil Code and hence to give rise to a duty to redress the damage caused, the court (hearing the case) violated the said statutory provisions."

VI

A Court of Cassation judgement of 7 November 1975 defines as far as is necessary the extent of the court's power to review discretionary administrative decisions (Pasicrisie 1976, I, 306) (1).

A local authority, following a reduction of State subsidies for the teaching staff of its school, and faced in consequence with the necessity of terminating a post, applied the rule that, when subsidies are abolished or reduced by law, the education authority must designate members of the teaching staff whose salaries will no longer be paid from government funds. The local authority considered that it enjoyed sovereign or discretionary authority by virtue of this provision.

The Court of Cassation held:

"... That even if it followed from [the applicable provision] that the education authority had a "sovereign" right to decide which member of the teaching staff should no longer be paid once a post was terminated, that would not prevent the legality of the administrative decision laying off a teacher from being subject to review by the courts;

... That consequently, in refusing, on the basis of the principle of the separation of powers and the "sovereign" decision-making authority of the administration, to examine ... whether the (contested) laying off of the teacher was lawful or unlawful, the decision (by the court hearing the case) violated Article 92 of the Constitution ...".

VII

In its judgement of 5 November 1920, the Court of Cassation had declared that regard should be had neither to the status of the parties to a dispute nor to the nature of the act which had caused the damage, but solely to the nature of the right infringed.

Specific reservations continued to be expressed with regard to the concept of damage, which, it was held, could only lie in infringement of civil rights. Later, the concept of damage ceased to be restricted to infringement of right, but, as we have already mentioned, only much later still, as a result of the judgement of 16 December 1965, was infringement of political rights, which on the face of it could be attributed to an administrative authority, to be expressly included as such in the concept of damage.

It is clear that, notwithstanding the terms of the judgement of 5 November 1920, regard was still paid to the nature of the act that caused damage. It needed the whole range of evolution leading up to the judgement of 23 April 1971 for the concept of acts by an administrative authority that could be causes of damage and so give rise to compensation on the basis of Articles 1382 et seq of the Civil Code, to come to include not only acts of implementation, but also decisions, regulatory acts, failure to take a decision that was required and omissions in the exercise of regulatory functions. If clarification was needed, the judgement of 7 November 1975 specified that the court's power of review extended to internal as well as external legality.

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(1) Revue critique de jurisprudence belge 1977, pp. 417-445, with a memorandum by A Vanwelkenhuyzen, "L'autorité de chose jugée des arrêts du Conseil d'Etat en matière de responsabilité de la puissance publique". (It should be noted that the person concerned in this case, before taking action in the courts of the judicial order, had with varying degrees of success instituted annulment proceedings in the Conseil d'Etat).

It would thus appear that, in principle, no act or omission that can be imputed to an administrative authority, whatever damage it may have caused, can escape the application of Articles 1382 et seq of the Civil Code from any angle.

With regard to these provisions public law persons are on the same footing as private individuals.

It should be added that this is also true of areas where the existence of liability without fault is accepted, as was strikingly shown in respect of disturbances to neighbours by the Court of Cassation's judgements of 6 August 1960, which, concurred with the pleas of the avocat général Mahaux. On identical grounds one of these judgements found against a private individual and the other against the State (Pasicrisie 1960, I, 915, with the pleas of the ministère public common to both cases).

In the first case, a private individual had built a block of flats next to a house already standing and in so doing had raised the height of the party wall, causing the chimney to stop drawing.

In the second case, the State had undertaken the widening of a canal; this had resulted in damage to an adjoining property and disturbance of possession for the firm that owned it.

It was acknowledged that no fault lay with the builder of the block of flats in the first case or with the State in the second.

The Court of Cassation nevertheless held them liable, on the basis of the following argument:

> "That Article 544 of the Civil Code recognises the right of every proprietor to enjoy normal possession of his property;
>
> ... That since neighbouring proprietors thus have an equal right to enjoyment of their property, it follows that, once the relations between neighbouring properties have been established, taking into account the normal duties of neighbourhood, the resulting balance between the respective rights of the proprietors must be maintained;
>
> ... That the owner of a building who, by an act without fault, destroys this balance causing disturbance to a neighbouring proprietor that exceeds the normal drawbacks of neighbourhood, must give him fair and adequate compensation that restores the balance destroyed;
>
> That since he has thereby infringed the property rights of his neighbour he must compensate him in accordance with tradition and with the general principle laid down inter alia in Article 11 of the Constitution".

Section V. Some particular applications in recent case-law

I

It is interesting to note a number of court decisions which are remarkable for the way in which they have applied principles in various particular cases.

The municipal regulations of the city of Brussels on the water supply at one time provided that the installation of the meter and the laying, alteration and repair of pipes and accessories should be carried out by and at the expense of the subscriber but under the supervision and in accordance with the instructions of the water department.

By judgement of 12 December 1968 (Pasicrisie 1969, I, 343), the Court of Cessation ruled that the water department could well incur liability in the event of failure to exercise the power of supervision vested in it. The court argued as follows:

> "... That the power of supervision and the right to give instructions ... vested in the [intermunicipal company responsible for the water supply] have as their purpose not only to prevent possible fraud by the subscriber in the performance of the above-mentioned works but also to enable the company to fulfil the duty of safety incumbent on the operator of such a public service".

II

The award of a contract was annulled by the Conseil d'Etat because the competent Minister had himself decided to approve a tender other than the lowest regular tender, whereas the legislation in force at the time required such a decision to be taken by the Council of Ministers or, in case of emergency, by the Prime Minister. The firm which had submitted the lowest tender accused the State of the fault of not having observed the rules in force and claimed compensation for the damage suffered as a result of losing the contract.

The court had acknowledged that there had been fault on the part of the State, but rejected the claim on the grounds that there was no causal link between the fault and the damage. The ministère public had expressed the view that the action ultra vires penalised by the Conseil d'Etat had caused no damage to the rejected tenderer and was not even of a nature to occasion such damage (Brussels court of appeal, 10 December 1963, Journal des tribunaux 1964, p. 147, with opinion of the advocat général van den Branden de Reeth).

III

A local authority promoted one of its officials. A Royal Decree passed in the context of administrative supervision of the local authority rescinded its decision. The Conseil d'Etat revoked the Royal Decree. The decision to grant a promotion thus stood, but for reasons peculiar to the case, which were recognised as valid, the official's new salary was paid only from the date of the revocatory judgement by the Conseil d'Etat. The official concerned claimed compensation for damage from the State, which he alleged, on the evidence of the revocation by the Conseil d'Etat to have wrongly interpreted the municipal regulations on promotion.

The court considered whether the State had committed fault in the exercise of its supervisory power, but decided in the negative, taking into account the fact that several authorities had interpreted the text of the municipal regulations - which were not devoid of ambiguity - in the opposite sense to the Conseil d'Etat, and that there was no reason to believe that the decision complained of had resulted from a less than thorough examination of the question or from a lack of professional competence (Brussels court of appeal, 11 May 1970, Recueil de jurisprudence du droit administratif et du Conseil d'Etat 1972, p 152; Revue communale 1970, p 123)(1)

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(1) See to the same effect the French Conseil d'Etat 5 December 1958, Revue du droit public et de la science politique 1959, p. 611: only grave fault can give rise to liability on the part of the administration in the performance of its supervisory duties.

IV

Some firms filed suit against several municipalities for having adopted and against the State for having approved, regulations making them taxable, which were subsequently revoked by the Conseil d'Etat. These firms, not content with obtaining reimbursement of the taxes they had paid, claimed interest calculated on the basis of each annual payment. Their action was based principally on alleged fault by the local authorities and the State in that they had adopted and approved regulations which were ultra vires.

The court, taking into account the fact that in order to rule on the illegality of the regulations at issue it had been necessary to carry out long and painstaking studies, found that the local authorities and the State could not seriously be accused of a misconceived view of the legality of the regulations, and that consequently there could be no fault giving rise to liability (Liège civil court, 5 January 1973, unpublished).

V

A person who worked simultaneously for the local authority and the public welfare board was dismissed on the basis of the same facts by two separate decisions, one by each of the two competent authorities. When both decisions were challenged by the Standing Committee of the Provincial Council, the two authorities concerned appealed to the Crown; one of the appeals was accepted, while the other was rejected and, as a result, one of the acts of dismissal remained valid and the other was revoked. The two Royal Decrees were referred to the Conseil d'Etat which quashed the two of them on the grounds that their arguments were inconsistent with each other. The central authority, which should have taken fresh decisions on the appeals again pending before it, failed to do so; the two dismissals remained the subject of appeals against the Provincial Council's decisions. More than seven years after the judgement by the Conseil d'Etat the official concerned claimed against the local authority and the public welfare board for the arrears due to him; both bodies claimed against the State.

The court ruled that the State's failure to act constituted fault and ordered it to indemnify the local authority and the public welfare board for the decisions taken against them (Namur civil court, 15 May 1973, unpublished).

VI

A member of the armed forces gave up a career which entitled him to a full pension, as a result of assurances given to him by the National Defence Department, in reply to requests for information that a law conferring benefits on career officers and non-commissioned officers placed on the retired list for the sake of the promotion of younger men. The decision of the individual concerned was taken on the basis of the information supplied to him, which was unfortunately erroneous.

By judgement of 4 February 1973 (Pasicrisie 1973, I, 434), the Court of Cassation ruled:

> "... That (the error committed) constitutes ... fault involving liability on the part of the administration responsible for applying the law, which furnishes such information, provided that the erroneous interpretation was formulated without sufficient investigation or without indicating that some doubt attached to the answer provided;
>
> ... That, although it is clear from (his own particular circumstances) that the claimant's situation was a complex one both in fact and in law, it is not apparent that the services of the Ministry of National Defence either carried out the necessary consultations or drew his attention to the possibility of dispute as to their interpretation".

VII

A stockbroker resigned after committing various irregularities. The Stock Exchange Commission accepted his resignation somewhat hastily and without any investigation of his activities. The Commission is a public institution which by law is required to ensure that stockbrokers fulfil their duties to each other and to third parties in the interest of the latter as their clients, a function which includes a supervisory duty and a disciplinary authority, the two being complementary. A suit was filed against the Stock Exchange Commission for having failed in its supervisory duty and compensation was claimed for the resultant damage.

The court held that the duty of the judicial power to review the legality of administrative decisions was not confined to purely administrative acts of implementation or decision-making but also extended to disciplinary decisions taken by the administration within its field of competence. It also found that the Stock Exchange Commission had seriously failed in its supervisory duty (Brussels court of appeal, 26 September 1974, Pasicrisie 1975, II, 53).

VIII

As will be seen, the courts' power to review acts by the administrative authorities that cause damage extends to all fields. The courts rule on the activities of those authorities in the exercise of all its supervisory functions, when it enters into contracts and in connection with the manifold aspects of its departmental operation; eg when it supplies information to a member of the public.

The few cases that we have described and analysed are of course only examples. There is abundant case-law relating to the civil liability of public authorities, and we have reported only a certain number of features that appear to us significant (1).

Mention may be made in passing of the role played by the Conseil d'Etat, when its annulment of an administrative act provides the injured party with proof of fault on the part of the administrative authority. One conceivable change in the law, which would involve revision of Article 92 of the Constitution, would be to give the Conseil d'Etat power when hearing an appeal for the annulment of an administrative act, to rule on the harmful consequences of that act and on any compensation for it. Better still, it might be considered whether a system whereby the Conseil d'Etat had jurisdiction in all cases involving civil liability on the part of the public authorities would not make it possible to render justice which took better account of the specific requirements of public administration and the duties as well as the rights to which it necessarily involves for all citizens.

IX

Lastly, it is worthwhile recalling - if only for their historical interest - two old judgements which, at a time when only the infringement of personal civil rights appeared capable of giving rise to compensation, held that the rights of members of public services with regard to their status constituted such rights.

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(1) See J L Fagnart, "La faute des pouvoirs publics", in "Chronique de jurisprudence; La responsabilité civile" (1968-75), Journal des tribunaux 1976, pp. 569-633, in particular pp. 597-602. See also by the same author, the earlier law reports on the subject published in the same journal.

A civil servant, after being the subject of a series of administrative measures involving suspension from his post, finally had imposed on him a disciplinary sanction involving a retroactive stoppage of salary. This action was taken without allowing the individual concerned the benefit of statutory safeguards. After finding that the state could be ordered to pay damages if it had infringed the official's civil rights - which in the context of the judgement meant those conferred on him by his administrative status - the court ordered the State to make good the damage caused to the official by the loss of his salary (Eschweiller case, Brussels court of appeal, 28 February 1948, Recueil de jurisprudence du droit administratif et du Conseil d'Etat, 1948, p. 33, with observations by Jules Lespès).

In the other case, a civil servant who had been denied promotion to which he considered himself entitled claimed compensation for the damage he had suffered in consequence. The court found that, although State officials had no rights with regard to appointment or promotion, they were entitled to the strict application of their staff regulations and that the safeguards for stability and proper administration of their careers constituted personal rights. The violation of those rights, which in the court's view, in accordance with legal theory and judicial practice, could only be civil rights, gave rise to compensation (Thibaut case, Brussels court of appeal, 23 November 1953, Recueil de jurisprudence du droit administratif et du Conseil d'Etat 1954, p. 229, with observations by Paul de Visscher; Journal des tribunaux 1954, p. 550, with observations by Pierre Wauthier; Revue critique de jurispurdence belge, 1955, p. 5, with observations by M Vauthier entitled "Sanction de la violation par l'Etat du statut des fonctionnaires"). Legal writers are not unanimous in acknowledging that these cases involved personal rights. It is true that the distinction between disputes in personam and disputes in rem like that between personal civil rights and personal political rights, was still extremely uncertain. It would appear that these two judgements have remained as isolated exceptions. However, they had the merit of stimulating reflection on the respective spheres of the courts of the judicial order and the Conseil d'Etat, at a time when that body had only just embarked on its work of settlement of disputes, and thereby on the work of discovery and development of administrative law in which it has continued ever since.

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CHAPTER II

THE LIABILITY OF PUBLIC AUTHORITIES IN PERSONAL DISPUTES RELATING TO POLITICAL RIGHTS

As was seen in the introduction to this study, the law has in some cases created personal political rights to compensation of damage by the public authorities. These rights differ from those derived from the written or unwritten rules of civil law which govern civil liability on the basis of fault on the part of the person by whom the damage was caused, or of some other civil law concept such as disturbance of the balance which should be maintained between the respective civil rights of neighbouring proprietors.

It will be recalled that disputes relating to personal political rights are a matter for the courts of the judicial order unless the law has provided otherwise by virtue of Article 93 of the Constitution.

In most if not all cases, when the law establishes a personal political right to compensation for damage it gives an administrative court the task of hearing disputes relating to that right. Although the possibility cannot be ruled out of its designating for the purpose an administrative authority actively engaged in administration, it more usually sets up a new administrative court in collegiate form. Unless otherwise provided, the Conseil d'Etat acts as a court of cassation in disputes of this type: cassation proceedings relating to disputed administrative decisions combine with proceedings for the annulment of administrative acts performed in the course of the administrative function to form the aggregate of annulment proceedings in general, which thus form part of both in personam and in rem proceedings.

For the implementation of personal political rights to compensation for damage, the law usually applies the system of political disputes. As soon as claim for compensation is formulated, even before it gives rise to no objection on the part of the public authority against which it is made, it is submitted to an administrative court. By this sytem, the law seeks to ensure that the individual's claim and the administration's reply even if there is no conflict or divergence between them, are automatically juxtaposed for decision by the court. This secures a rigorously legal approach intended to exclude considerations of the expediency from the decision.

The liability of the State in the law of CYPRUS

by

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Pre-constitutional State

1.1 Under the legal system in force in the Crown Colony of Cyprus, before the establishment of the Republic of Cyprus on 16 August 1960, it was not possible to sue for a civil wrong the government administering the island in the name of the British Crown.

1.2 According to the English mediaeval principle that the King could do no wrong, the Crown could not be sued. Section 4 (1) of the Civil Wrongs Act, Cap. 148, provided that no action in respect of any civil wrong could be brought against Her Majesty and that a public officer who had committed in the course of the discharge of his duties, a civil wrong, could be sued personally but he could escape liability by proving that the act complained of was within the scope of his lawful authority. The public officer's superior was only liable if he had expressly authorised or ratified such a civil wrong but not otherwise.

1.3 The Courts of Justice Law, Cap. 8, Section 64, provided that no claim of any kind whatsoever against the government could be entertained in any court unless it was a claim of the same nature as claims which might be preferred against the Crown in England under the Petitions of Right Act, 1860, and even in the latter case the written consent of the Governor authorising a claimant to bring an action in such form and subject to such qualifications as the Governor in respect of such claim might direct was a prerequisite.

1.4 The provisions of the Crown Proceedings Act, 1947, whereby the Crown in England was made liable in tort as an ordinary person was not extended to Cyprus. It was, however, an established practice in a proper case for the government of the then Colony of Cyprus to satisfy a judgement given against a public officer when sued personally.

Post-constitutional State

Article 172 of the Constitution

2.1 Article 172 of the Constitution of the Republic of Cyprus remedied the above situation. It reads:

> "The Republic shall be liable for any wrongful act or omission causing damage committed in the exercise or purported exercise of the duties of officers or authorities of the Republic.
>
> The law shall regulate such liability."

2.2 The Courts of Justice Law, 1960 (No. 14/60 of the Republic), expressly provides (s. 57) that actions by or against the Republic are brought by or against the Attorney-General and subject to any law or rules of court are carried on in the same manner in every respect as suits between private parties.

2.3 The law governing liability of a private person for wrongful acts or omissions was embodied in the Civil Wrongs Law, Cap. 148. It was, however, judicially held that this code is not exhaustive and that the Common Law of England is applicable in Cyprus to supplement it.

Though Article 172 appears to envisage more comprehensive legislation, it was held by the courts that the provisions of Section 57 of the Courts of Justice Law, 1960, and the pre-existing legislation of the Civil Wrongs Law, Cap. 148, were sufficient to bring into immediate effect this article, as this article was not a directive or a legislative programme. Thus the Republic is expressly made liable for wrongful acts or omissions of its officers and authorities.

2.4 "Authorities" includes any person or corporate body exercising a function in the State without being officers or organs of the State. The wrongful act or omission, in order to establish State liability must be committed in the exercise or purported exercise of the duties. In a case where an army officer, who wrongly shot and injured with his service pistol, whilst in anger, a soldier in his camp who was disobedient, was held to have committed the act in the purported exercise of his duty and, therefore, the Republic was liable to compensate the victim.

2.5 President and Vice-President - No action can be brought, however, against the President or the Vice-President of the Republic in respect of any act or omission committed by him in the exercise of any of the functions of his office. This provision, however, does not deprive any person of the right to sue the Republic as provided by law.

2.6 Legislative authorities - The wording of s. 172 of the Constitution does not make liable the Republic for any legislative acts of the House of Representatives. A law which is repugnant to the provisions of the Constitution may be declared by a court of law as unconstitutional. It is doubtful, however, whether a citizen is entitled to damages for injuries he suffered by a law contravening express provisions of the Constitution whereby the fundamental rights and freedoms of the citizens are safeguarded.

2.7 Judges - The Constitution provides for the establishment of two superior courts - the Supreme Constitutional Court and the High Court. The judges of these superior courts are not liable for any act or words spoken in their judicial capacity - (Articles 133.10 and 153.10 of the Constitution).

No action can be brought against any judge of an inferior court, nor against any official receiver nor against any arbitrator in respect of any civil wrong committed by him in his judicial capacity if the act causing the civil wrong was within his jurisdiction - (Section 4 (4) of the Civil Wrongs Law, Cap. 148). Therefore, the Republic probably is, in a proper case, liable for any wrongful act committed by such judges and other persons acting in a judicial capacity, if they act beyond their jurisdication.

No other officer or authority is exempted from liability and no law can exempt them as it would be contrary to the provisions of Article 172 of the Constitution.

2.8 The liability is for wrongful act or omission and not for unlawful acts, as there may be a case in which an unlawful act is not wrongful as a breach of a statute does not always create liability towards a person suffering damage. The liability is subjective, except in the cases of strict liability where the commission of the act sufficiently establishes liability.

The "risque administrative" is not part of the law of Cyprus.

2.9 The liability of the State is direct in the sense that the claim need not be made against the public officer wrongdoer but the action can be instituted against the Republic directly. Nevertheless, the liability of the officer or authority is a necessary prerequisite for finding liability against the Republic.

2.10 Damages - The damages which are awarded are usually compensatory. Exemplary damages may be also awarded against the State where there has been oppressive or unconstitutional action by the government or its agents. Damages are reduced by the percentage of the fault of the unjured person. "Fault" includes blameworthiness

and causation. Damages may be also reduced if the plaintiff failed to do what it was reasonable in the circumstances to minimise the loss he suffered. The court in assessing the sum payable for the loss of earnings takes into consideration the tax that the injured person would have paid on such an amount. Other benefits, however, provided by social legislation are not usually deductable.

In the case of damage to movable or immovable property used by the State in case of war, the State is liable unless the damage is what is described "battle damage". A number of claims were made as a result of the invasion of the Republic in 1974. The courts applied the English decision of the House of Lords in Burmah Oil Co. v. Lord Advocate, (1965) AC 75, as the Common Law of England is applicable but not the Statute Law.

2.11 Besides damages to which we have already referred, injunctions - both interlocutory and perpetual - may be issued against the State.

2.12 The law governing the liability of the local authorities for the acts or omissions of their agents and servants causing damage is generally the same as the law governing the liability of private persons or bodies.

Expropriation

3.1 The right of property is safeguarded by the provisions of Article 23 of the Constitution. Restrictions or limitations are only permissible if they are absolutely necessary in the interest of the public safety or the public health or the public morals or the town and country planning or development and utilisation of any property to the promotion of the public benefit or for the protection of the rights of others. Such restrictions or limitations may be imposed by law. Just compensation shall be promptly paid for any such restrictions or limitations which materially decrease the economic value of such property; such compensation in the case of disagreement is determined by a civil court.

3.2 The Compulsory Acquisition Law, No. 15/62, provides that the compensation to be awarded is the value of the property presumed to have been sold by a willing vendor in the free market at the time of the publication of the notice of acquisition. As in some cases a long time elapses from the time of the publication of the notice of acquisition until the determination of the trial, the courts, in order to comply with the Constitution which provides for just compensation, may award interest on such an amount. Due, however, to the galloping of prices of immovables, this remedy in many cases has proved insufficient.

Damages under Article 146 of the Constitution

4.1 The process of judicial review of administrative acts has been introduced into our judicial system by Article 146 of the Constitution. It created for the first time an exclusive jurisdiction in administrative law matters. The Supreme Constitutional Court (now reconstituted and renamed the Supreme Court by the Administration of Justice (Miscellaneous Provisions) Law, 1964 (Law No. 33/64)) has exclusive revisional and annulling jurisdiction on administrative matters. In the past, in the absence of such a court, such administrative jurisdiction, very limited and inadequate by modern standards, was exercised either by the ordinary courts or some executive organ according to the nature of the particular case.

4.2 Article 146 reads as follows:

"1. The Supreme Constitutional Court shall have exclusive jurisdiction to adjudicate finally on a recourse made to it on a complaint that a decision, an act or omission of any organ, authority or person, exercising any executive or administrative authority is contrary to any of the provisions of this Constitution or of any law or is made in excess or in abuse of powers vested in such organ or authority or person.

2. Such a recourse may be made by a person whose any existing legitimate interest, which he has either as a person or by virtue of being a member of a community, is adversely and directly affected by such decision or act or omission.

3. Such a recourse shall be made within 75 days of the date when the decision or act was published or, if not published and in the case of an omission, when it came to the knowledge of the person making the recourse.

4. Upon such a recourse the court may, by its decision -

   a. confirm, either in whole or in part, such decision or act or omission; or

   b. declare, either in whole or in part, such decision or act to be null and void and of no effect whatsoever; or

   c. declare that such omission, either in whole or in part, ought not to have been made and that whatever has been omitted should have been performed.

5. Any decision given under paragraph 4 of this article shall be binding on all courts and all organs or authorities in the Republic and shall be given effect to and acted upon by the organ or authority or person concerned.

6. Any person aggrieved by any decision or act declared to be void under paragraph 4 of this article or by any omission declared thereunder that it ought not to have been made, shall be entitled, if his claim is not met to his satisfaction by the organ, authority or person concerned, to institute legal proceedings in a court for the recovery of damages or for being granted other remedy and to recover just and equitable damages to be assessed by the court or to be granted such other just and equitable remedy as such court is empowered to grant."

4.3 Article 146.6 expressly provides for the right to damages consequent upon a decision of the Supreme Court under paragraph 4 of the same article.

4.4 The proper court to assess and award damages to a "person aggrieved" under paragraph 6 of Article 146, is the District Court. It is neither the duty nor within the competence of the Supreme Court to declare that a person is entitled to damages or to assess the same.

4.5 It is the duty of an administrative organ whose act or decision is declared by the Supreme Court to be null and void to give effect and act upon the decision of the Supreme Court. Should the administrative organ fail to meet the claim of the "aggrieved person" to his satisfaction, the "aggrieved person" may bring a civil action in the District Court for compensation.

4.6 Article 146.6 requires that the person claiming compensation should (inter alia) be in the position of a "person aggrieved". This is a requirement of locus standi in an applicant. It is not possible to formulate a definition of this phrase to embrace all possible circumstances under which the requirement of locus standi may arise. Whether a plaintiff is a "person aggrieved" will depend on the facts of each particular case.

4.7 The State, including any organ, authority or person, exercising a function as part of the constitutional structure for the purposes of the State, is amenable to the provisions of Article 146. The local authorities are included.

4.8 The damages to be awarded in an action instituted in pursuance of the provisions of Article 146.6 should be just and equitable. In interpreting this expression the Supreme Court stated:

> "In assessing damages in relation to a decision which has been declared to be void, the respective importance of the culpability of the administration and of the claimant must be taken into account."

(The French Council of State in the case of Deberles (7 April 1933) was followed). Damages should not be assessed by the District Court on the basis of a master and servant relationship or on the basis of the common law.

The Liability of the State in the Law of FINLAND

by
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A. INTRODUCTION

1. The Concept of Public Body

The concept of public body refers to the State, a commune (a unit of local self-rule), a parish or other public entity or institution. One of the most essential features of a public body is that it exercises public power. Exceptionally even a private entity may be entrusted public power to be exercised in a specific field. Thus, for instance the Finnish Bar Association is, under the law, entitled to and responsible for exercising public disciplinary power over its members. Liability for injury or loss caused by a private entity in its exercise of public power is determined in the same way as the corresponding liability of a public body.

2. Constitutional Provisions

According to the Constitution, anyone who has suffered an injury, loss or violation of his rights as a result of an illegal act or negligence of an official is entitled to receive compensation from that official. On the other hand the Constitution does not oblige the State or other public bodies to compensate for injury caused by the acts or omissions committed by their officials in the course of their official duties. The Constitution only contains a statement according to which special provision shall be made concerning the question whether and how far the State is liable for such injury. Presently there are two statutes governing State liability: the Tort Liability Act and the Act Concerning Compensation from State Funds for Anyone Wrongfully Arrested or Sentenced. These Acts will be dealt with later in this paper.

The Constitution also contains a short provision regarding expropriation. According to that provision, expropriation may be undertaken for public needs for full compensation as is separately prescribed by law. Special legislation concerning expropriation does exist but its details will not be dealt with here.

3. The Liability of a Public Body under Private Law

A public body may also appear as a legal subject in the field of private law. The State may, for instance, own real property or function as an employer under private law. Any public body can also own cars, for example.

Whenever a public body acts as a legal subject in the field of private law it is treated in the same way as any other legal subject acting in a similar context, unless an exception has been prescribed by law. If a public body causes injury or loss while not exercising public power, its liability is determined according to general law of torts.

There are quite a few situations where the liability of a public body is governed by private law. As examples can be mentioned liability for traffic damage caused by a car which belongs to a public body, damage caused by negligence in the management of real property owned by a public body, and liability for damage caused by an employee of such a body (for instance a worker of a road and water construction authority).

A public body may also incur liability on the basis of a contractual relationship and under the principles governing contract liability. This kind of liability plays an important role in the postal services and in railway transportation. The terms under which mail is carried and passengers and goods are transported by train have been laid down in special decrees issued by the President of the Republic. Under these terms especially the liability of the Postal Services has been limited to a relatively low maximum sum. The decrees have been given without an approval of the Parliament, because they have been regarded as regulating the terms under which one party to a contract, the State, enters into contracts concerning the carrying of mail and the transportation of passengers and goods.

B. THE LIABILITY OF A PUBLIC BODY FOR INJURY OR LOSS CAUSED IN THE EXERCISE OF PUBLIC POWER

1. Liability under the Tort Liability Act

a) Basis for liability

The Tort Liability Act entered into force on 1 September 1974. It regulates liability outside contractual relationships. It also governs liability in the exercise of public power.

According to the Tort Liability Act a public body is liable for injury or loss caused in the exercise of public power through an error or omission. An additional condition for the liability is, however, that reasonable requirements which the performance of the act or task, considering its character and purpose, presupposes, have not been observed. This reservation is aimed at protecting the public bodies against unreasonable compensation claims, especially those arising in connection with counselling or inspection services.

Liability under the Tort Liability Act always presupposes that an error has been committed and that an injury or loss has arisen as a result of such an error. The causal connection must be adequate. An error refers to objective fault (objective culpability). It is enough for the injured party to be able to show that the performance of the act or function objectively seen has been deficient. He does not need to show fault on the part of a particular official.

Liability may arise both in connection with an administrative act as well as a decision of an administrative authority or a court. The State and the communes are, however, not liable for loss caused by a faulty decision, if the injured party has refrained without a valid excuse from pursuing an appeal by which the loss would have been averted. A specific exception has been prescribed by a provision according to which the State and the communes are not liable for damage caused in piloting.

b) The Scope of Compensation

The liability of a public body extends to all material damage or loss. In addition to personal injury and damage to property, even pecuniary loss (a loss not connected with personal injury or damage to property) must be compensated for. As a rule the compensation must cover the damage or loss totally. However, the compensation may be adjusted, if full compensation, considering all the relevant circumstances is to be deemed unreasonable. The compensation may also be adjusted, if the injured party's own fault or circumstance not connected with the official's act or omission have contributed to the damage (the requirement of adequacy).

In connection with personal injury, even unpecuniary injury or damage must be compensated for. Mental suffering must be compensated for in case it has been caused by a criminal offence infringing someone's freedom, honour or privacy, or by a comparable offence.

c) The Compensation Procedure

The decision concerning the payment of compensation is to be made by the administrative authority within the field of competence of which the injurious acts have taken place. If the injured party is not satisfied with the decision of the administrative authority, he must bring his action before a general court of first instance. The proceedings and appeals are governed by the rules governing civil procedure.

2. Compensation for Wrongful Imprisonment or Court Sentence

There is a special statute governing compensation to be paid for anyone who has been wrongfully arrested, imprisoned or sentenced. Under these provisions, compensation from state funds is due for a person who has been arrested or imprisoned as a suspect of a criminal offence and is later found not guilty. Likewise, compensation is due, if a person who has been sentenced to imprisonment has served his punishment in whole or in part and the sentence is later repealed. In these cases, compensation is paid on an objective basis. Liability does not presuppose any fault whatsoever on the part of the respective authorities.

The compensation shall cover material damage or loss. Unpecuniary damage or loss is to be compensated for only if there are special grounds for it.

Compensation can be claimed in the same criminal proceedings for which the claimant has been arrested or imprisoned. If the matter has not been decided in the course of the criminal proceedings, the claimant must bring a civil action against the State before a general court of first instance.

3. Other cases

In Finland, the law does not put a public body under obligation to compensate a third party for injury caused by the lawful acts of its officials. Thus, under the law, the state is not liable for damage or injury caused to third persons by lawful coercive measures taken by the police for the purpose of arresting a dangerous criminal. In practice, however, this kind of damage is compensated for. Even though the law does not make provision for such compensation, the government has discretion to accept a petition to that effect. The State budget contains a special appropriation for unforeseen expenditures and these funds can be used in these cases.

The Liability of the State in the Law of THE FEDERAL REPUBLIC OF GERMANY

by
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Liability of the automated administration

A special aspect of State liability is becoming more and more important in connection with modern development of the administrative organisation: the use of electronic data processing equipment and signalling systems with sovereign functions; they work, it is true, according to a read-in programme which has been conceived and elaborated in detail by officials, but their final products in the form of administrative acts of the most different types affect, without being checked again by officials, the citizen for whom they are destined favourably or detrimentally by an act of sovereignty. Will there be any liability or not on the part of the administrative authorities which make use of these technical installations for the performance of their public functions if the installations do not work properly and thereby cause detriment to the citizen?

1. Use of electronic equipment in the administration

Electronic data processing is in a breathtaking phase of development, the end of which cannot yet be foreseen. In the Federal Republic of Germany, it is used mainly in the financial system and in social administration. In these fields every year millions of tax assessments or pension assessments will be made out, issued and made known to the citizens by fully automated procedures, without any further checking by officials, the legal consequences being that the citizen has to pay taxes in the amount assessed by the computer or is paid social benefits assessed in the same way.

Modern traffic cannot be imagined without the use of electronically-controlled traffic lights. Similarly, although to a lesser extent, administrative acts in the residents' registration system, in the registration of births, deaths and marriages, in the procedure for issuing licences for motor vehicles, in the military recruiting system, or in the education system will be issued by computers instead of by officials. In connection with the integration of data processing, which at this stage already has a substantial impact on the administrative procedure, the prediction that at least in the branches of mass administration, the administrative act issued by an official personally will be the rare exception in the near future would not appear to be an exaggeration.

2. Problems arising under liability law

The triumphal progress of electronic data processing in public administration cannot be stopped, for the pressure for rationalisation is too strong. The more we must take care that the citizen, who is put at the mercy of such installations, should not have his legal protection reduced by the fact that instead of an official, the computer will now deal with his matters by way of sovereign acts. The citizen's rights can be violated by a failure of the technical installations. As in the case of administrative acts of the traditional type, he can avail himself, first of all, of the remedies of legal protection that are available to him against faulty administrative acts in general. In particular, against an administrative act which is inconsistent with the legal situation, he may lodge a legal remedy and have the error rectified before any damage or other detriment has been caused. For the administrative act issued by the technical installation must be attributed to that authority which has initiated it and, as regards the granting of primary legal protection in administrative and judicial proceedings, it must be treated like a

normal administrative act. In fact, this is expressly laid down in the laws on administrative procedure in the Federal Republic of Germany. As opposed to that, under liability law, the situation is not equally logical and uncomplicated. At least under the State liability law of the Federal Republic of Germany, there are considerable difficulties in granting a citizen state compensation if, as a result of a faulty administrative act due to a technical failure, he has suffered a pecuniary damage which he could not avert by availing himself of legal remedies.

Before these difficulties are dealt with in greater detail, it should be explained for the sake of clarification what kind of failure this is. We are not concerned with cases in which the faults are caused by human inefficiency, ie they are not errors made in programming, reading-in or operation. Responsibility for inefficiencies in programming, ie the logical structure of the programme or its reading-in, is vested in the competent official and thus does not differ from the traditional legal situation. The problem we are discussing concerns only the so-called machine failure. This can be attributed only to the technical installation and no longer to an employee of the administration. Apart from the failure of mechanically driven parts, potential causes of such defects are, in particular, variations in the electric current, over-heating, loose contacts, interruption of circuits and short circuit. Although such defects can be eliminated to a certain extent by control mechanisms in the installations themselves, they cannot be avoided altogether. Similar considerations apply to electronically-controlled signalling systems, such as traffic lights, and other signalling installations. In this case, false signals and signalling time defects are caused by defective or worn construction elements, bent or charred contacts, short circuits, loose clamps or burnt-out bulbs. Even a maximum of careful checking and maintenance cannot eliminate such defects.

What, then, prevents state liability in cases where technical installations fail as a result of machine defects?

There are two examples in order to explain these problems under liability law more thoroughly:

Example A: Tax assessment by computer

In the assessment of income tax, the programme, which has been read incorrectly, is executed incorrectly as a result of a machine failure. Misguided impulses lead to the fact that the tax assessment then put out shows a tax debt ten times the amount of the programmed calculation. As the tax debtor - a businessman and owner of a retail enterprise - is in financial trouble, his creditors, demand in the course of negotiations on a prolongation of credits, the production of the tax assessment and, after having seen it, refuse to give any further credits, in spite of all assurances by the tax debtor that the revenue office has erred. The retail enterprise collapses.

Example B: Defective traffic lights

Traffic at a crossroads is controlled by traffic lights. A road on which users have the right of way and which is marked by signs showing that users of this road have the right of way meets with another road, users of which do not have the right of way, and which is marked by a "Give Way" sign. The plaintiff drives his passenger car into the crossing from the road which actually does not have the right of way, but where the green light is showing, trusting, as he is entitled to do, that the green light will bar the right of way users have on the major road. In the middle of the crossing, he collides with the defendant's passenger car, which is on the road which actually has the right of way. The light on which the defendant is supposed to act, however, does not show any signal as a result of a technical defect in the mechanism, which could not be foreseen, so that he, assuming that the lights are out of operation, relies on his supposed right of way. The action for compensation for personal injury and damage to property brought against the community responsible for the maintenance of the

traffic lights was dismissed by the Federal Court of Justice (Bundesgerichtshof) as court of third instance, on the grounds that the claim was not founded under any provision of the State liability law in force.

Under the German State liability law in force in both cases mentioned by way of example, a liability of the administrative authorities for the failure of their technical installations will not come into consideration.

The claim based on liability for breach of official duty under Article 34 of the Basic Law, read in conjunction with Section 839 of the Civil Code, hinges on the requirement that a person, in the exercise of sovereign power, through his fault commits a breach of official duty incumbent on him as against a third party. The required breach of official duty through fault is tailored to human behaviour and cannot directly or analogously be applied to machine malfunctioning. A machine, whether a taxation computer or an electronically-controlled traffic light, cannot be the holder of rights and duties and is therefore excluded as a subject of personal liability. Even less is a technical installation capable of acting culpably because culpable behaviour is, according to its nature, human behaviour.

Liability of the administrative authorities under the rules developed by the courts on quasi-expropriational infringement and infringement similar in nature to the special sacrifice situation must likewise be ruled out in both cases. It is not least with regard to the strict limitation of State liability by the requirement of fault in the elements constituting a breach of official duty under Article 34 of the Basic Law, read in conjunction with Section 839 of the Civil Code, that the courts have held in their practice that State liability arises, independent of fault, if, by unlawful infringement, the administration brings about a loss of these legal rights directly in the life, health, physical integrity, personal freedom of movement, or in the property of the citizen. It is true that State liability under these liability doctrines does not fail for the mere reason, if for no others, that machine behaviour initiated damage to be caused. The doctrines merely presuppose some unlawful measure by the State, which may manifest itself in an administrative act or in a real act to be attributed to an administrative authority. The administrative products of technical installations meet these requirements. Nevertheless State liability does not arise in either case.

In example A, the claim based on liability fails by reason of the mere fact that the unlawful tax assessment with the tax debt wrongly calculated by the computer does not directly interfere with the rights protected by law (see above), but rather has some effect only on the businessman's assets as a whole, which are not, however, protected by the case law liability doctrines of quasi-expropriational infringement and infringement similar in nature to the special sacrifice situation.

In example B, the failure of the traffic light, although it must be qualified as an unlawful sovereign action, does not give rise to liability because it does not directly cause the loss of legal rights. It is, at any rate, with this reasoning that the Federal Court of Justice (Bundesgerichtshof) dismissed as unfounded the asserted claim for damages. The court said that the light signals of the traffic lights at the crossroads which contradicted each other merely created a dangerous situation, but did not directly interfere with legal positions of the road users; that this would presuppose that further causes of damage contributed to it; that the lacuna in the law of liability could not be filled by way of case law; this was solely a matter for the legislator.

3, Models for solution

The reporter for the Federal Republic of Germany, Professor Bender, has already pointed out that in the course of the reform of State liability law, with which the legislative bodies are at present dealing, it is intended to create a special tort giving rise to liability where technical installations fail. The

above-mentioned gap in the public law compensation system under the law in force urgently needs to be closed. This aim will be achieved by a legal fiction. According to it, the failure of a technical installation is meant to be equivalent to a breach of official duty by the executive authority giving rise to liability where an authority has executive power, exercised by such an installation, instead of by persons and where the failure would correspond to such person's breach of official duty. This conception of liability law is essentially prompted by the idea that the State should not be allowed to evade its responsibility by entrusting independently-operating technical installations instead of persons with the exercise of sovereign power. In the result, this special liability for technical installations resembles absolute liability to the nature of which elements of fault, which would limit liability, are alien. This makes it necessary to limit the extent of liability with the help of other liability correctives. Instead of the usually provided limitation of the amount of liability, in the case of liability for technical installations compensation for loss of earnings and compensation for intangible damage, ie in particular, an award for pain and suffering, shall be barred. Other solution models can certainly be imagined. In this respect, the legal systems of the other member states of the Council of Europe, provided they have similar liability systems, may supply extremely valuable suggestions. The author of this paper, who is charged in the German Federal Ministry of Justice with preparing law reform, is therefore interested in receiving suggestions or contributions with regard to this topic from other participants at the colloquy.

The Liability of the State in the Law of GREECE

by
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I. HISTORY OF LIABILITY

A. Historical introduction

State liability made its appearance in Greece immediately after the 1821 Revolution and the recognititon of the Greek State, but it has evolved quickly and substantially only during the last 50 years.

In general terms, the evolution may be divided into three stages: (a) non-liability of the State, (b) acceptance of State liability under the rules of private law and (c) State liability under the specific rules of public law.

Except for a few special items of legislation of very limited scope and Articles 67, 68 and 69 of the short-lived 1945 Civil Code Act No. 900/1946, the liability of the State and public officials in Greece was not systematically covered by constitutional or legislative provisions until the 1940 Civil Code came into force on 23 February 1946.

B. Previous system

a. Non-liability of the State

In the absence of any specific legislation, the previous system was entirely a matter of court practice. The civil courts, adopting a mistaken view of the Roman-Byzantine law then in force, whereby the State could do no wrong, at first accepted non-liability of the State, which was for long regarded as the corollary of sovereignty.

b. System based on the rules of private law

Early in the second half of the 19th century, the courts overcame the difficulties arising out of this approach and ceased to accept the non-liability of the State.

In so doing, they relied on the rules of Roman-Byzantine law concerning the master-servant relationship, ie they regarded public officials as servants of the State. Consequently, they accepted the liability of the State for any act committed or omitted by its representatives, provided only that the latter acted within the bounds of the duties to which they were assigned.

Later, the courts, adopting the distinction between malice and negligence, admitted the idea of more limited State liability, confined to malicious acts by its officials.

c. System based on the rules of public law

In due course, the civil law principle of the master's liability for his servant's actions was abandoned. The courts sought to find a solution to the problem of liability in principles of public law, especially in the exercise of public authority in the general interest on the one hand, and the proper functioning of public services on the other.

This line was followed up until 1946, when the 1940 Civil Code came into force.

C. The present system

The present system of State liability is no longer based on court practice but on legislation. State liability is governed by the Civil Code Act which came into effect on 23 February 1946.

The Civil Code (hereinafter CC) itself contains no provisions dealing with State liability. The subject is dealt with in the Civil Code Act (hereinafter CCA), that is to say Act No. 2783 of 30 January 1941, promulgated on the same date as the CC, especially Sections 104, 105 and 106.

II. THE PRESENT SYSTEM OF STATE LIABILITY

A. Liability of the State and local authorities in the Greek legal system

a. Statutory provisions

Sections 104, 105 and 106 CCA, governing the liability of the State and other public authorities, read as follows:

Section 104

> The State shall be liable, according to the provisions of the Civil Code concerning legal persons, for the acts or omissions of its agents concerning legal relationships in private law or bearing on the private domain.

Section 105

> The State shall be liable for damages in respect of acts or omissions contrary to the law committed by its agents in the performance of their public duties, unless such acts or omissions arise out of failure to comply with a provision prescribed in the general interest. The person responsible shall be equally and jointly liable with the State, subject to special provisions governing the liability of ministers.

Section 106

> The provisions of the two preceding sections shall apply also to municipalities (Demes), communes and other public corporations, in respect of acts or omissions by their servants.

State liability, as governed by Sections 104-106 CCA may take one of three forms: (a) liability arising out of the acts or omissions of the State's servants concerning legal relationships in private law (Section 104), (b) liability arising out of the acts of the State's servants, committed in the exercise of public authority (Section 105), and (c) liability of local authorities etc and other public corporations (Section 106).

b. State liability

aa. Twin aspects of State liability

As elsewhere in Europe, in Greece government activity falls partly under private law and partly under public law.

Accordingly, the acts (and omissions) of State bodies are generally divided into two major categories: (a) private law acts and (b) public law acts.

The system introduced by the provisions referred to above is based primarily on this division. However, there is no clear dividing line between the two.

State liability for acts falling into the first category is governed by the provisions of Section 104 CCA, whereas liability for acts in the second category is governed by Section 105 CCA.

The twin aspects of State activity also apply to secondary public authorities, such as local authorities and other public corporations.

bb. State liability for administrative acts falling under private law

1. General remarks

This general category of State activities comprises: (a) all acts relating to the management of the State's private property, (b) all other acts performed according to the rules of private law, and (c) all acts of "trespass" (see below).

2. Management of the State's private property

By the State's private property is meant that property which is not public. Public property comprises: (a) property for common use as specified in Article 967 CC, and (b) non-commercial property as specified in Article 966 CC. Accordingly, property in which trade may be conducted falls into the private category.

Furthermore, acts of management are those which the State performs when acting as a legal person, administering services as if it were an ordinary private individual and submitting like any ordinary person to the rules of private law.

The State is liable for acts relating to management of its private property according to Section 104 CCA.

Such acts include: (a) acts in connection with the purchase, sale or rental of State property, (b) acts concerning the construction, alteration, repair or maintenance of buildings belonging to a public service, schools, roads, bridges, harbours or other premises in public ownership, (c) acts by the postal and telecommunications, railway and transport services, etc concerning the provision of services to individuals, (d) acts by public establishments concerning the production and distribution of electrical energy, gas, water, etc.

3. Acts concerning relations in private law

This category comprises all acts giving rise to relationships in private law. An example is the contract for hire of labour concluded between the State and the manual and technical staff of public services.

4. "Trespass"

The State and other public authorities very often cause damage to individuals, through their agents, by committing "trespass", by which is meant any serious and improper intrusion on private property or individual liberty.

5. Liability under Section 104 CCA (private liability)

Section 104 CCA deals separately with the management of the State's private property and specifies that, in the case of damage caused by acts in this category, State liability is governed by the rules of the CC on the liability of private bodies corporate.

According to these rules, the acts of any agent, that is to say any physical person representing the corporate body in accordance with its articles of incorporation are deemed to be acts of that body which is liable for them as for its own acts.

cc. Liability for administrative activities falling under public law

1. Acts of public authority

It is difficult to specify positively what are acts of public authority. However, it is generally accepted that such acts are those whereby agents of the State give orders to members of the public and which by their nature cannot be performed by private persons.

Accordingly, this category comprises in general all acts involving the exercise of public authority. These include: (a) all measures to secure public safety (police measures in the broad sense, acts or omissions concerning riots, etc), (b) all acts by military authorities etc concerning national defence, and (c) all acts by other public authorities except those concerning management of State property or relations in private law.

2. Liability under Section 105 CCA (public liability)

State liability for these acts and the damages resulting from them is governed by Section 105 CCA.

For such damage, the State is liable subject to certain conditions vis-à-vis the person suffering the damage. The Greek State does not normally enjoy immunity. The State is liable for most acts of its agencies. However, the State is not liable if the act (or omission) is due to failure to comply with a provision prescribed in the general interest.

c. Liability of local authorities and other public corporations

aa. General remarks

It has always been accepted by Greek legal authors and by the courts that not only the State, but any other corporate body engaged in public administration may be liable for damage caused by the acts or omissions of their servants. This is the same rule as is to be found in the Act at present governing the liability of public authorities.

In the Greek system, there are no variations in liability as between different public authorities. "Public authorities" means local authorities, including municipalities (demes) and communes, and all other public corporations. The latter are administrative entities set up for public ends, such as the provision of public utilities, etc. There is no clear and precise definition of a public corporation.

In Greece, the liability of public authorities has always been approached in the same way as state liability. The same system applies to both under CCA.

Sometimes it is difficult to distinguish between liability of the State or of another public corporation.

bb. Liability under Section 106 CCA (liability of public authorities)

According to Section 106 CCA, the provisions of the two preceding sections (104 and 105) also apply to municipalities (demes), communes and other public corporations, for acts or omissions of their servants.

This section simply extends the system of State liability to public authorities. Accordingly, public authorities' private liability is governed by the provisions of Section 104 CCA, whereas their public liability is governed by Section 105 CCA.

Since public authority liability is the same as State liability, the two will be dealt with together in the remainder of this paper.

B. Conditions of liability

The conditions of liability vary according to the system of liability (private or public). However, some conditions are common to both systems.

a. Conditions common to both systems

These are as follows:

aa. Sustainment of "damage subject to compensation"

In order that the question of liability may arise, damage must have been suffered by an individual. This damage may arise out of a legal act (or omission), or out of a physical action. It may be material or non-material. It must be direct and must affect a legally protected situation.

bb. Existence of an "act" or an "omission" attributable to the State

State liability requires that an agent of the State must have performed an "act" or an "omission".

"Act" means any positive conduct by the State's agent causing a change in a legal situation or having a direct effect on a certain state of affairs. It does not matter whether or not it is in the form of an enforceable decision or whether it is individual or in the form of a regulation. "Omission" means failure to do something which the agent should have done, or to take measures favourable to the interested party.

cc. Existence of an "agent" committing the act or omission concerned

In the case of both private and public liability, the damage must have been caused by an act by an "agent" of the State.

The term "agent" in Section 104 CCA is used in a narrower sense than in Section 105; it means the same as when applied to the agents of private corporations. Section 104, which recognises State liability "according to the provisions of the CC concerning legal persons", refers to the latter regarding the notion of an agent. These provisions are Articles 71, 68, 334 and 922 CC.

On the other hand, the notion of an organ in Section 105 CCA is broad. It embraces all persons to whom the exercise of public authority is entrusted by the State or by any other public corporation. These include civil servants and other public officials. It is not necessary for there to be a permanent service relationship between the State and its agent. A temporary link is sufficient (eg the mayor).

The State's liability does not only extend to the conduct of a natural person acting on its behalf; it may also attach to the conduct of a corporate body or even a public authority as such.

Individuals entrusted as such by the State or some other public corporation with a specific task in the performance of a public service, by virtue of regulations providing for their assistance, are not its agents.

As the notion of an agent is broader than that of a civil servant, it must also be taken to include ministers who, however, cannot incur personal civil liability unless first convicted in criminal proceedings specially prescribed for ministers.

Failing any special distinction in the law, "agents" must be taken to include judges, magistrates, and other legal officers.

dd. "Internal link" between the act committed or omitted and the performance of the agent's duties

Liability under Section 104 CCA and under Section 105 requires that there must be an "internal link" between the act committed or omitted and the performance of the agent's duties, ie with the functions of the service.

On this point, there has been an interesting change in prevailing opinion and court practice: to begin with, it was accepted that there was such a link where the agent had acted within the limits of his functions. Subsequently, it was agreed that this link also exists in cases where the agent, although acting in his official capacity, nevertheless exceeds his duties.

It is now accepted that the act or omission giving rise to damage is attributable to the service wherever the State's agent has acted in an official capacity. However, the State is also liable for acts lying outside his province, except in the case of legal acts lying entirely outside the functions of the agent performing them and which may be considered "non-existent".

ee. "Link of cause and effect" between the act or omission and the damage

Under both Sections 104 and 105 CCA there must be a causal relationship between the unlawfulness of the act and the damage suffered. That is to say that, for the purpose of State liability, a link of cause and effect must be established between the act or omission of an organ and the damage.

b. Special conditions governing private liability (Section 104 CCA)

The private liability of the State and other public authorities generally obeys the CC rules governing the liability of private corporations. For instance, the material prerequisites of liability for the acts of their agents in private law are the same as for all other corporate bodies according to Article 71 CC, to which Section 104 CCA refers.

In addition to these common conditions of liability, there are also the following special conditions.

aa. Existence of an act or omission governed by "private law"

The private liability of the state requires that the act or omission of the State agent concerned be governed by the rules of private law.

The act or omission is governed by private law where the administrative agent has acted outside his province. The damage must result from either an administrative legal act or a physical action.

bb. Existence of an "obligation to compensate"

State private liability requires that the act or omission by the State's agent must give rise to an obligation of compensation for damages. Whether or not there is such an obligation is determined by the rules of private law.

c. Special conditions governing public liability (Section 105 CCA)

Apart from the conditions common to both systems (private and public), the following apply in the case of public liability:

aa. Existence of an act or omission committed in "the exercise of public authority"

Public liability depends on the act or omission by the State's agent having been accomplished in the exercise of public authority. Public authority is deemed to have been exercised when the State agent acts within his province.

bb. "Unlawfulness" of the act of omission

Another necessary condition is that the act giving rise to compensation must have been unlawful. The State is not liable for damages caused by legitimate acts.

State liability is not normally regarded as including compensation under the rules governing expropriation, to offset exorbitant prerogatives enjoyed by the administration, or on grounds of the equality of individuals vis-à-vis the public services, solely by reason of the damage or other harm caused by them.

However, according to another view, even since the entry into force of the CC, there is State liability for legitimate acts (eg on grounds of enrichment without lawful cause, or personal violation of the property of an individual, or acts causing an unequal sacrifice on the part of an individual).

Although the act must be unlawful, it is not essential that its illegality be attributable to the person committing it. Under Section 105 CCA, guilt on the part of the person acting for the State is not a prerequisite of State liability.

Normally guilt, that is to say fault on the part of the official, coincides with the necessary condition of violation of the law. However, the commission of an unlawful act without any fault on the part of the official is not impossible. It happens when the unlawfulness consists in erroneous interpretation of a genuinely very obscure text.

This means that illegality without fault does give rise to State liability. On the other hand, the degree of gravity would be taken into account in establishing the official's personal liability, if any.

Illegality must be understood according to the meaning it bears in administrative law. In general, unlawful acts of the public authority are those which violate procedural and substantive rules.

The Council of State Act and the practice of the courts have established the following main instances of unlawfulness: (a) lack of jurisdiction, (b) procedural defect, (c) violation of substantive law, (d) error of fact, (e) improper use of discretionary powers and (f) abuse of power.

cc. Violation of legislation not enacted in the "general interest"

Illegality in itself does not suffice to incur State liability; the act must also be contrary to legislation protecting the interests of the person suffering harm.

The provision in the second sentence of Section 105 CCA requires that the act or omission concerned must not be due to failure to comply with a provision enacted in the general interest. Determination of the scope of this clause, the separation of provisions into two categories, those which protect the general interest and those

which protect the interest of a person or a group of persons, and the assignment of any particular provision to the one or other of the two categories cause to courts considerable difficulties.

Neither legal matters nor the courts have dealt with these questions uniformly.

One view is that the person concerned cannot claim compensation without having to prove that the act complained of violates a law whose purpose is to create a right or afford special protection to an interest which he enjoys, since State liability is ruled out if the purpose of the law violated is simply to protect the general interest, even where the act complained of violates an indirect interest of an individual.

Another, conflicting view, relying on a narrow interpretation of Section 105 CCA rules out liability only where the law violated is enacted exclusively in the general interest. A variant of this opinion is that, to exclude liability, the law violated must specifically create a subjective public right.

Between these two opposite opinions is one which rules out State public liability where the law violated is principally enacted in the general interest, even where the act complained of has indirectly violated the interest of an individual.

The third opinion appears the most satisfactory. The first makes the positive rule of public liability on the part of the state virtually impossible to apply, whereas the second results virtually in State immunity from liability because there is probably no provision enacted in the general interest to the exclusion of the interests of individuals.

According to legal authors, a provision may be regarded as having been enacted in the general interest if: (a) it is mandatory, (b) it affords the possibility of litigation and (c) it covers the protection of certain individual rights.

C. Exclusion or limitation of liability

a. For certain public services or certain types of damage

After the general rules governing state liability were laid down in Sections 104-106 CCA, no further rules were laid down for specific categories of State acts. However, alongside the general system laid down in the CCA, there are a number of special provisions limiting or excluding State liability for the acts or omissions of its agents in the case of certain public services or types of damage.

The following are some examples:

Public services: (a) postal services (Section 55, Act No. 4581/1930), (b) telecommunications services, ie telegraph and telephone (Section 9, Ordinance of 4-8 July 1936 and Section II, Ordinance of 1 September 1949), (c) civil status registration offices (Section 5, 5 of Act No. 2430/1920), (d) monetary board (Legislative Decree No. 659/1948), (e) mortgage offices (Article 1345 CC, as amended by Section 13, Act No. 4201/1961).

Damage: (a) damage caused by government vehicles (Section 13, Act No. 3950/1911), (b) damage caused by international treaties (Section 2, Act No. 102/1936).

b. Owing to the particular nature of the measures taken

aa. Acts of government - acts of policy

If a public agent carries out an act of government or political act (eg an act concerning the political or international function of the executive authority), is the State liable under Section 105 CCA? This is a moot point. Two diametrically opposing views have been put forward:

The first is that the court trying the case for damages is entitled also to consider the legality of the act of government, insofar as it may consider the legality of any administrative act. It may, therefore, award damages if appropriate, despite the fact that the act complained of continues to be valid.

The second view is that the court cannot award damages to compensate for harm suffered as a result of an act which the Council of State has already found to be "an act of government". According to this view, since the decision by the Council of State has the force of res judicata, the lower court is bound by it. If no such decision has been reached, however, then the court is free to decide.

It is the first opinion that has prevailed. Consequently, the State is liable for acts of government or acts of policy.

bb. Acts of war

Except where there are special legislative provisions (eg Acts Nos. 2109, 3125/1924, 3306/1925, 812/1943 etc), the State is not liable for damage due to acts of war.

War damage means damage resulting from operations necessitated or caused by war and national defence, eg loss, pillaging, atrocities, etc.

This principle of non-liability is based on the notions of vis major or chance.

Since the end of the second world war it has been possible to compensate for war damages in the form of lump sums under special legislation and relevant international treaties.

cc. Legislative acts by the administration

According to the predominating opinion, legislative acts by the administration do normally give rise to State liability under Section 105 CCA.

Such legislative acts include: (a) presidential decrees (formerly royal decrees), (b) orders made by ministers to issue regulations, (c) cabinet orders, (d) police regulations and (e) public corporation by-laws and articles of incorporation.

Liability arising out of acts in this last category is governed by Section 106 CCA.

Contrary to the opinion mentioned above, there is another which rules out liability for legislative acts by the administration and for legislative omissions, in the same way as legislative acts by the legislature proper.

dd. Judicial acts by the administration

Judicial acts by agents of the government may incur State liability under Section 105 CCA in the same way as the judicial acts of the courts.

The government is deemed to engage in judicial activity where the law gives administrative agents judicial functions (eg in cases where police officers perform judicial investigation functions).

c. Owing to the special legal position of the State agent concerned

In Greek law, State liability cannot normally be excluded or restricted by reason of the particular legal situation of the agent concerned.

The following are some special cases:

aa. Acts by the Head of State

According to the 1975 Constitution, the Head of the Greek State is the President of the Republic.

His acts, eg presidential decrees, may give rise to State liability under Section 105 CCA.

bb. Cabinet acts

State liability may also be incurred as a result of Cabinet acts.

d. Other restrictions or exemptions from state liability

There are a number of principles in the Greek legal system which, although not relating to the above-mentioned agents or acts, nevertheless influence the system of State liability.

These principles are: (a) vis major, (b) self-defence (Article 284 CC) and (c) damage caused due to the injured party's own fault (Article 300 CC).

e. State liability towards foreigners

It is unanimously accepted that the rules of the Greek State liability system apply to foreigners as well as nationals. However, this conclusion is arrived at by different means.

Some authorities invoke Article 4 CC, which reads: "aliens shall enjoy the same civil rights as nationals", whilst others refer to Article 5, 1 of the 1975 Constitution, which provides that all persons in Greek territory shall enjoy absolute protection of their life, honour and liberty without distinction as to nationality, race, language, religious or political convictions.

It is no doubt the latter provisions that provides the best basis for afforing foreigners the same treatment as Greeks.

D. Mode and extent of compensation

a. Harm and damage for which the State is liable

The State is liable vis-à-vis the injured party to the extent that the CC makes the relevant agent responsible for compensating the individual concerned. The applicable provisions are accordingly Article 298, 299 and 932 CC, which lay down general rules governing compensation, and Article 904 CC governing enrichment without legitimate cause.

Consequently, the State is liable for positive damage and loss of earnings suffered by the individual (Article 298 CC). It is also liable, in the case of non-material damage, for compensation in money, in cases laid down by law (Article 299 CC).

Since it is a matter of a special unlawful act, the State is liable for not only material but also non-material damage.

b. Mode of compensation

Where the State is found liable, the damage or loss concerned must be made good in money terms. There is no entitlement to compensation in kind.

By virtue of the separation of powers, the courts have no authority to require an administrative official to make an order, or to prevent him from so doing or from performing the acts attaching to his duties, except after a decision by the Council of State or the ordinary administrative courts.

c. Extent of compensation

The government department responsible must compensate the injured party for all the damage suffered. Compensation is not confined to loss of actual property. Loss of earnings or of enjoyment are also subject to compensation under Article 298 CC.

Nor is cash compensation limited to a specific figure.

The extent of compensation is not assessed according to the seriousness of the fault committed by the state agent concerned.

However, the behaviour of the victim may afford grounds for reducing or refusing compensation.

E. Procedural aspects of liability

a. Formal conditions

To institute proceedings in liability, the injured party must bring his case before the ordinary courts. No prior decision by the administrative authority is required.

Claims to compensation for damage caused by the State are barred after five years. Claims by public officials are barred after two years and by military officers after one year.

b. Jurisdiction

Jurisdiction in State liability actions has lain and will continue for a short time to lie with the ordinary civil courts.

The courts holding jurisdiction in State liability actions are determined by Article 94 of the 1975 Constitution. This provision lays down that administrative actions (such as State liability actions) are a matter for the existing ordinary administrative courts set up under Legislative Decree No. 3845/1958.

However, Article 94,2 of the Constitution stipulates that administrative actions concerning State liability which have not yet been transferred to the ordinary administrative courts continue to be the responsibility of the judicial (civil) courts. However, according to the same provision, this transfer must be effected within five years from the entry into force of the new Constitution, that is to say by 10 June 1980, unless this time-limit is extended by law.

When this transfer has been completed, jurisdiction in matters of State liability will be as follows: claims under Section 104 CCA will continue to lie to the civil courts; claims under Section 105 will fall under the jurisdiction of the ordinary administrative courts.

c. Proof

In matters of private liability, governed by Section 104 CCA, it is up to the plaintiff to prove all the elements of State liability.

On the other hand, in public liability cases, as governed by Section 105 CCA, in the absence of any special provisions, the civil courts must examine ex officio the legal and material conditions on which State liability depends.

Where assessment of damage is concerned, there are no special rules for public liability. Accordingly, it is left to the court to make its own assessment in the course of the proceedings.

d. Res judicata

The courts are in no way bound by any previous decision by an administrative authority ruling that the behaviour of the defendant was lawful or unlawful. They are, however, bound by a previous decision by another court, according to the general rules of res judicata.

e. Enforcement of compensation orders against the State

Enforcement of a compensation order against the State depends on the compensation concerned. Confiscation and forced management orders may not be made against the State. Nor can the State be obliged to perform or not perform, except in pursuance of Section 50 of the Council of State Act.

F. Liability for acts by legislative agents

a. Liability for legislative acts

According to Article 26 of the 1975 Constitution, the legislative function is exercised by the Chamber of Deputies and the President of the Republic.

In the Greek legal system, there is no State liability for legislative acts or omissions by agents of the legislature, except in the case of administrative acts issued under legislation contrary to the Constitution.

According to Section 105 CCA, unlawful acts by public agents also include non-constitutional legislation. Such liability is derived from the fact that the notion of an "agent" also includes legislative agents; Section 105 CCA makes no distinction in this respect.

Damage due to the adoption of a non-constitutional provision will normally arise out of the execution of an administrative act based on that provision, in which case the agent concerned is not the legislative body, but the agent issuing the administrative instrument.

However, the predominant opinion holds that State liability is incurred not by any non-constitutional act, but only by such acts as infringe the rights of individuals, as formally recognised by the Constitution.

According to a recent opinion, however, the State is liable for the legislative acts of its agents wherever an enactment causes damage to the rights, in general, of individuals.

On the other hand, if a legitimate constitutional act causes damage to individuals, the State is not liable.

b. Liability for non-legislative acts

As regards acts by agents of parliament (eg the President of the Chamber of Deputies) outside their legislative functions (eg administrative decisions such as the appointment of staff), the State may be liable under Section 105 CCA, which makes no distinction between types of State agents.

G. Liability for acts of the judiciary

a. Liability for judicial acts

The question of whether improper judgements by courts and tribunals incur State liability cannot be answered simply. There are three main opinions. The first accepts without distinction that the State, according to Sections 104-105 CCA, is not liable for the acts of its agents which, by virtue of relevant provisions of the Constitution (Articles 82-98 of the 1952 Constitution or Article 26,3 87-100 of the 1975 Constitution), exercise judicial functions, independently of the executive (eg courts, magistrates, etc).

The second view holds that the State may be liable only in cases specifically provided for by law, in particular by the Code of Criminal Procedure.

The most satisfactory is the third opinion whereby Section 105 CCA prescribes State liability for acts or omissions by judicial organs, relying mainly on the argument that Section 105 CCA makes no distinction between kinds of State agents. It is added, however, that the application of Section 105 CCA must be combined with the Article governing actions for denial of justice.

b. Liability for non-judicial acts

In the case of non-judicial acts by the judiciary, State liability may no doubt be incurred under Sections 104-105 CCA.

H. Personal liability of persons acting for the State

The personal liability of persons acting for the State does not obey the same principles according to whether the activity in question is governed by private law or public law.

a. Private law of personal liability

Under Section 104 CCA, the CC rules applying to damage arising out of acts or omissions by State agents concerning the State's private activity.

These rules may be found, for example, in Articles 71, 284, 285, 298, 299, 300, 334, 487, 488, 914, 922, 1345 CC, etc.

Consequently, the personal liability of persons acting for the state by reason of their private law acts is governed by these CC provisions.

b. Public law of personal liability

In cases where the activity giving rise to the damage is carried out in the sphere of public law, the liability of State agents is not governed by a single set of rules. It depends on the special status of the persons concerned.

aa. Liability of persons subject to the Civil Servants' Code

1. General remarks

The present Civil Servants' Code (hereinafter CSC) is the 1951 Civil Servants' Statute (Act No. 1811/1951), as subsequently modified and codified (Presidential Decree No. 611/1977).

Apart from State administrative officials, the officials of local public authorities (by virtue of Section 39 of Legislative Decree No. 1140/1972), as well as the staff of public corporations (in pursuance of Royal Decree No. 23/31.12.1955 and Article 86 CSC) are subject to the CSC rules as regards civil liability.

No prior authorisation is required to bring an action against public officials or the employees of local authorities or other public corporations, in pursuance of Article 104,3 of the 1975 Constitution (Article 19 of the 1952 Constitution).

The personal liability of the persons mentioned above is at present governed by the provisions of Article 85 CSC.

2. Liability of officials towards the State

According to Article 85, 1 CSC, officials are liable for positive damage caused to the State and for compensation which the State has been obliged to pay to third parties. The official must have committed or failed to carry out an act wilfully or through gross negligence. An official is not liable for negative damage, as in cases of only slight negligence.

Under paragraph 3 of the same Article, the rules of civil law apply in cases where several officials together have caused damage to the State.

3. Liability of officials towards the public

According to the last sentence of Article 85, 1 CSC, officials are not liable to third parties for acts or omissions in the performance of their duties.

4. Special liability for the management of public funds

According to Article 85,4 of the CSC, civil liability for the management of public funds is governed by special provisions.

5. Liability of officials of local authorities

Section 39 of Legislative Decree No. 1140/1972 provides that the relevant provisions of the CSC concerning the liability of public officials shall apply similarly to the officials of local authorities.

6. Liability of officials of other public corporations

According to Article 86 CSC, the provisions of Article 85 CSC concerning the liability of public officials apply similarly to the officials of public corporations. Such officials are liable vis-à-vis the corporations by which they are employed.

bb. Liability of officials not subject to the CSC

1. General rules

The liability of officials not subject to the CSC (eg court officials, staff of the Chamber of Deputies etc) is governed by Section 105 CCA.

According to this provision, public officials are liable jointly with the State. Liability is cumulative. The following system has been developed by legal writers and the courts:

If the act giving rise to damage is simply unlawful, without any fault being committed by the official, the State alone is liable.

On the other hand, if the unlawful or improper nature of the act is attributable to the official, liability is incurred by both the State and the official.

In the latter case, the victim can chose between bringing an action against the official personally or against the State. Most choose the latter alternative, because of doubt as to the financial resources of most officials.

2. Special rules governing the liability of ministers, judges and magistrates, military personnel and other officials

In addition to the provisions of Section 105 CCA, there are special texts governing the liability of government ministers, judges and magistrates, military personnel, judicial officials and certain other categories of officials. Some of these texts are exactly the same as Article 85 CSC, eg Article 38 of the Judicial Officials' Code (Legislative Decree No. 1025/1971).

c. State claims against officials

Where the State has paid compensation for damage following an action by the injured party, it in turn has a claim against the official whose conduct incurred the State's liability. However, such cases are not governed by Sections 104-106 CCA.

aa. Officials subject to the CSC

For staff subject to the CSC, the question is governed by Article 85 CSC. According to paragraph 1 of this Article, a public official is liable vis-à-vis the State for all positive damage he causes wilfully or through gross negligence in the performance of his duties. He is also liable for compensation paid by the State to third parties by reason of acts committed or omitted in the performance of his duties, whether wilfully or through gross negligence.

Furthermore, according to paragraph 2 of the same Article, the appropriate civil or administrative court may, in the event of negligence, after assessing the special circumstances, attribute to the official a part of the damage suffered by the State or the compensation which it has been obliged to pay.

bb. Officials not subject to the CSC

In the absence of specific provisions, Articles 487-488 CC apply. These enable the State to recover damages paid from the official responsible.

The State is not obliged to invoke the liability of its officials in this way. But if it does not, it must follow the special procedure laid down for settling State disputes in the interests of the service.

d. Claims by officials against the State

Whether or not an official has a claim against the State in cases where an action has been brought against him by the victim depends on his status.

aa. Officials subject to the CSC

In the case of officials subject to the CSC, there is no question of a claim against the State; Article 85 CSC rules out liability on the part of the official towards third parties and hence also rules out a claim against the State.

bb. Officials not subject to the CSC

In the case of other officials not subject to the CSC, the question is governed by Sections 104-106 CCA, particularly the last sentence of Section 105, which stipulates that the official concerned is also "jointly liable with the State". Relations between co-debtors is also dealt with in Article 487 CC.

III. CONCLUSIONS

After a brief survey of the Greek system of the liability of the State and other public authorities, the following conculsions may be drawn:

The present system recognises State liability and the liability of local authorities (municipalities and communes) or other public corporations, in respect of all State activities, whether in the private or public sectors.

The Greek system is virtually the same for the State and for other public authorities.

Furthermore, only the State's private liability under Section 104 CCA, and only in respect of certain acts, presupposes guilt (fault) on the part of the State's agent, whereas the State's public liability under Section 105 CCA is based exclusively on the unlawfulness of the agent's acts or omissions, independently of guilt. It may be concluded that the Greek system of State liability is, in the main, one of strict liability.

It is also obvious that the Greek legislator seeks to limit to some extent the cases which give rise to the State's public liability. For instance, the Greek system prescribes the extent of such liability, partly by limiting it to acts or omissions of the public authority and, secondly, by limiting it to cases of violation of legislation enacted in the interests of individuals, thus ruling out State liability arising out of the violation of legislation enacted in the general interest.

In any event, it may be said that, apart from these cases, the Greek system of State liability and the liability of other authorities affords individuals complete and satisfactory protection.

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The Liability of the State in the Law of IRELAND

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The position in Ireland is governed by the written Constitution of 1937. All the organs of the State can only act in accordance with the Constitution as interpreted by the Supreme Court. Previous law is in force only in so far as it is consistent with the Constitution. The Supreme Court has held that the Irish State is a juristic person capable of being sued and held vicariously liable for the torts of its servants. It is not protected by any doctrine of sovereign immunity. Sovereignty under the Constitution rests in the people, not in the State. The feudal maxim that the King can do no wrong has no place in a democratic republican State.

Similar principles govern the liability of regional and local authorities for damage caused by their agents. So far as damage caused by administrative services is concerned, there is a rapidly developing judicial tendency to control such acts in a way which would not have been expected ten or twenty years ago.

The history of the matter is as follows. In 1922 the Irish Free State became an independent member of what was then called the British Commonwealth. The existing common law was taken over and applied by the courts in Dublin. On several occasions they recognised that the State had inherited the immunity from suit of the British monarch and therefore could not be sued. The only exception was that the citizen could proceed by petition of right in cases where the complaint alleged a breach of contract rather than a tort.

The first change was made by the legislature in 1933. The Road Traffic Act of that year, section 170 (now section 59 of the Civil Liability Act, 1961), provided that a person injured by a State-owned vehicle could sue the Minister for Finance without obtaining the consent of the Attorney General as if the Minister for Finance were the employer of the driver of the vehicle. This statutory change proceeded on the fiction that the Minister was the employer of the driver. But in Irish constitutional theory, as in English, both the Minister and the driver, however humble a position in the official hierarchy the latter may occupy, are both fellow servants of the State or the people. Nevertheless, the Act undoubtedly provided a simple and effective method of dealing with a problem which has become more acute with each passing year. (It is interesting to note that in 1933 there were only 56,000 vehicles registered in the Free State and of these only 410 were owned by the State itself.) It is also interesting to note that in this particular area the Irish legislature anticipated a reform which was not made in England until the Crown Proceedings Act, 1947.

But in the area of other wrongs arising out of accidents or disasters otherwise along the highway the Irish legislature lagged behind the British, which in 1947, in the Crown Proceedings Act, finally abolished the feudal maxim that the King can do no wrong. It is also worth noting that the Irish legislature had lagged behind that in other countries. In France the State was held liable in 1873; in Germany in 1896; in Australia in 1903; in South Africa in 1910 and in the United States in 1945. The reason for this was frankly conceded by successive governments to be the possibility of financial strain on the public exchequer.

The change in the position was therefore made by the courts and not by the legislature. In Macauley v. Minister for Posts and Telegraphs [1966] I.R. 345 the plaintiff sought a declaration from the High Court that the Minister was obliged to provide him with a proper, reasonably efficient and effective telephone service.

Section 2 of the Ministers and Secretaries Act, 1924, required that the permission of the Attorney General had to be obtained before a citizen could sue a Government Minister. In this case the Attorney General had refused his permission and the question was whether the requirement was consistent with the Constitution. Mr Justice Kenny held that the necessity for the Attorney General's consent was unconstitutional because it prevented the citizen's right under Article 40, section 3, subsection 1, of the 1937 Constitution of free access to the courts to vindicate his rights.

On 18 September 1965 Miss Kathleen Byrne suffered personal injuries as a result of a fall caused by the collapse of the footpath outside her home at Bray in County Wicklow. The collapse of the footpath was alleged to be due to the fault of a cable-laying crew from the Department of Posts and Telegraphs. The individual members of that crew were no doubt personally liable in negligence or in nuisance but, equally certainly, they were not worth suing. It was also certain at that stage, or thought to be certain, that the employers of the cable-laying crew were not liable, even though as private employers they would have been so liable. The employer was not, of course, the Minister for Posts and Telegraphs who was a fellow servant of the Irish State or the Irish people, but the State itself. Nevertheless Miss Byrne was advised to sue the People of Ireland and the Attorney General. The Chief State Solicitor accepted the summons on behalf of the Attorney General but queried the right of any citizen to sue "the People of Ireland". By consent the High Court ordered that "Ireland" be substituted for "the People of Ireland" and that the preliminary issue as to whether any action lay against Ireland and the Attorney General should be tried by a judge sitting alone. In October 1968 Mr Justice Murnaghan followed the existing authorities and held that Miss Byrne's action was not maintainable. An appeal against his decision was heard in February and March 1969 but judgement was not given until 30 July 1971. So, although the plaintiff had been kept waiting for a long time for a favourable decision, it was a landmark in Irish constitutional law when it was delivered.

Thus in Byrne v. Ireland [1972] I.R. 241 the Supreme Court dealt with the whole problem in a comprehensive and sweeping series of judgements. The impact of the decision of the majority of the Court in Byrne v. Ireland can be seen most clearly by reference to the dissenting judgement of Mr Justice FitzGerald. The judge said:

> "In my view, the extension of the liability of the State as a juristic person to the law of tort involves such a radical change in the accepted view both of the courts and of the legislature that this court should decline to undertake such a step. Such an extension of the meaning of juristic person would appear to leave the State liable to the same control and sanctions which are applicable to a private individual, including the criminal and bankruptcy jurisdiction.
>
> If the liability of the State for the tort of a public servant is to be established, in my view it should be imposed by the legislature as has already been done in this country under the Road Traffic Act and the Workmen's Compensation Act."

But the majority, no doubt recognising the political truth that the legislature had proved itself unable or unwilling to make the necessary reform, held that the State could be sued for the following reasons. First, the sovereignty of the State referred to in Article 5 of the Constitution did not render the People immune from suit. As it was the People who had created the State by a plebiscite in 1937 they alone possessed sovereignty.

Secondly, the Court referred with approval to developments in other jurisdictions which have already been mentioned above. Thirdly, the Court emphasised that the State established under the 1937 Constitution was a modern republican State which was uninfluenced by feudal concepts such as the monarch being unable to be sued in his own courts.

Fourthly, the importance of equality before the law guaranteed by Article 40, section 1, of the Constitution was emphasised and finally the importance of Article 40, section 3, was stressed. This is the provision which requires the State to vindicate the personal rights of the citizen, and one of the personal rights of the citizen is undoubtedly his right to sue the employer of a negligent servant in tort.

The majority also considered the practical difficulties which might hinder the enforcement of a judgement against the State. The matter was disposed of as follows:

> "If the plaintiff is successful, in the ordinary way the damages would be assessed during the course of the trial; there would seem to be no reason to believe that the necessary monies to meet the decree would not be voted. That would only be what would be normally expected in a State governed according to the rule of law, and there would seem to be no reason to believe that the State would not honour its legal obligations."

Experience in the six years since the judgement was delivered has borne out this prediction. The Irish State is a constitutional organism which observes the rule of law in its dealings with its own citizens as well as with other States.

The principal task of the judgements of the majority of the Supreme Court was to establish a constitutional justification for the decision and to answer certain practical objections to it. In this the judgement succeeded. But they left uncertain the exact extent of the State's liability in tort. The judgements seem to adopt what has been called the "master's tort theory" of vicarious liability. In short, before there can be recovery against the Irish State the plaintiff must show that there is some servant of that State who has committed a tort - normally the tort of negligence. Difficulties may arise here if the plaintiff wishes to allege that the State personally has broken some duty which it owes to him - ie the personal duties of an employer to provide a safe system of work. In this respect the English Crown Proceedings Act, 1947, section 21, is superior in that it specifically covers this problem.

It is also uncertain how far the wide range of persons employed in or under a modern State can be regarded as servants of that State. For example, are members of the police force, members of the armed forces and judges State servants or not? The liability of the police is a particularly difficult question, partly because actions for assault, battery or wrongful imprisonment are fairly common, and partly because Irish law, in theory at any rate, adopts the former principle of English law that a police officer is merely a person doing for pay what any private citizen might do voluntarily if he so wished. In short, a police officer, in the antique theory of the common law, is an independent officer of the law for whose acts and omissions nobody is really responsible. In England this problem has been solved by the Police Act, 1964, section 48, but in Ireland there is no judicial decision on the matter. In practice such legal authority as exists, in the way of dicta rather than decisions, indicates that the police are indeed servants of the State. It is uncertain how far there is liability in Irish law for mistakes made by Ministers or civil servants at a planning level as distinct from an operational level. Probably the courts would follow the trend of English decisions on this point and hold that there is liability for mistakes made only at operational level. There is probably no liability for judicial errors. The Constitution specifically recognises that judges are immune from action for official acts. There is therefore no tort committed when a judge makes an error and as there is no tort there can be no vicarious liability for it under the reasoning in Byrne v. Ireland. It is also uncertain how far there would be liability for administrative agencies when they are required under the familiar principles of administrative law to act judicially - ie in planning matters. Perhaps such a function can be classified for the purposes of Article 37 of the Constitution as a limited judicial function and is therefore immune from action.

There seems to be little doubt that members of the armed forces are servants of the State for purposes of vicarious liability in tort. Indeed, in this respect, Irish law is somewhat broader than English law. In Ireland the State has assumed responsibility for a negligent act committed by one serving soldier against a second soldier. Such an action in England is precluded by section 10(1) of the Crown Proceedings Act, 1947. In Ireland also the important decision in The State (Gleeson) v. Minister for Defence (1976), I.R. 280 holds that a soldier can only be dismissed if the army authorities follow the principles of constitutional justice or natural justice. Finally, it may be asked whether the recognition of the general right to sue the State in tort laid down by Byrne v. Ireland in any way supersedes the particular statutory right first created by the Road Traffic Act, 1933 and now re-enacted by section 59 of the Civil Liability Act, 1961. It can only be said that in practice the remedy provided by section 59 is regarded as a comprehensive one which is suitable for processing the overwhelming majority of road accident claims against the State.

Local government

The system of judicial control of administrative authorities in Ireland is largely an inherited legacy from British rule. County Councils and Urban District Councils are subject to two main ways of controlling administrative excesses - political control and judicial control. Political control derives from the fact that in theory a Minister of State is responsible politically for all the acts of his subordinates. (It might here be noted that before the decision in Byrne v. Ireland there was the curious paradox that a minister might be politically responsible for the wrong of a subordinate when he was not legally responsible.) Such political control is mainly enforced nowadays by means of questions in the Dail but this technique is of questionable effectiveness. Further, in Ireland political control does not extend to the decisions of numerous State-sponsored bodies which are a feature of the economy. There are over eighty State-sponsored bodies of various kinds, some of extreme importance such as Coras Iompair Eireann, the State transport concern, and others being little more than advisory committees. These bodies display a bewildering variety of legal and financial structures - there are statutory corporations, public or private companies, and unincorporated bodies. The courts have also been specifically entrusted by the Constitution with the task of examining the question of the validity of any law having regard to the provisions of this Constitution. "Any law" in this sub-section means any post-1937 statute enacted by the Oireachtas. The Supreme Court has shown an increasing tendency over the last two decades to review the validity of such statutes and, if necessary, hold them unconstitutional.

The court has also insisted that the executive branch of government should remain within the four corners of the powers granted to it. The court has been particularly vigilant to ensure that judicial power is not exercised by persons or bodies other than judges appointed under the Constitution. So the court has held unconstitutional the statutory right of the Incorporated Law Society of Ireland to strike a solicitor off the Roll; the statutory power to prohibit, within the framework of the Criminal Law (Amendment) Act, 1935, the importation of contraceptives; the making of an order permitting shops to be open during hours otherwise prohibited merely on the grounds that it would facilitate persons holding certain religious beliefs.

In recent years, judicial control has extended into the area of purely executive or administrative decisions which were at one time thought to be immune from review, at least if the local or statutory authority in question had acted in good faith and reasonably. In the East Donegal Co-operative case (1970), I.R. 317, the court specifically held that even where general and unqualified language is used empowering an authority to do something, such language does not vest the authority with arbitrary discretion in these matters. The discretion of the authority must be exercised having regard to the objects of the empowering Act and the Constitution itself. There is here a striking resemblance to the similar decision reached by the

House of Lords in the Padfield case in 1968. There is also a resemblance with the decision of the House of Lords cutting down the scope of Crown privilege in the Supreme Court decision in Murphy v. Dublin Corporation (1972), I.R. 215, in which the court held that the certificate of the Minister of State that production of the document or the class of documents would be contrary to the public interest was not conclusive, but could be reviewed by the court itself.

In summary, it can be said that while the Republic has followed the English practice in providing no special courts for the determination of disputed questions between the citizen and the State, and also making, as far as is possible, all such questions private law questions relating to the scope of vicarious liability in tort, yet it has added an exceptional or unusual public law dimension to the problem by stressing the importance of a written Constitution within the ambit of which all powers and discretions must be exercised.

The Liability of the State in the Law of ITALY

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The liability of the public administration has been constantly admitted for damage caused by unlawful acts of the administration. The basis for this liability is the need to compensate the "damnum iniuria datum". On this basis, the following conditions must be fulfilled in order to determine that the public administration is liable:

1. existence of an act contra ius attributable to the public administration;

2. incidence of this act on the subjective rights of a citizen;

3. relation of causality between the administrative act and the damage caused to a private party;

4. fault of or fraud committed by the civil servant involved.

The damage attributable to the public administration may be caused by acts under the ordinary law (eg non-fulfilment of a contract, collapse of a building, owned by the public administration, which neglected maintenance; imperfect construction of a public work; an accident caused by a vehicle, which was driven by a public employee on duty). The damage to the citizen may result from an administrative act (which is the expression of a public function) (eg a decree of expropriation; administrative sanction; imposition of a loan; refusal of admission to a profession).

There are no problems when the damage was caused by an act which is covered by the ordinary law; in fact, this act is treated as any act committed by an ordinary person.

When the damage was caused by an administrative act, the indemnification of the citizen and the liability of the public administration necessitate the declaration of the unlawfulness and the annulment of the administrative act.

The latter remains valid up to the moment of its annulment and until this moment it must be treated as an act of a public authority, having competence to affect the interests of the citizens. For example, an unlawful act of expropriation, until its annulment, is an act capable of transferring the expropriated objects from one subject to another, the latter being obliged to pay only the indemnity for expropriation (this indemnity is due on the basis of a lawful act). Dismissal involves the removal of an employee from service until such dismissal will have been cancelled. The plaintiff's claim, on the grounds of the unlawfulness of the administrative act, is possible after a judicial or administrative procedure, which ends with the quashing of the administrative act.

The quashing of the administrative act permits indemnification without the obligation of proof of fault on the part of the officials who participated in the procedure which led to an unlawful act.

This approach was justified on the ground that it was impossible for a civil judge to control an administrative action. This impossibility was considered to be a consequence of the principle of separation of powers. This theory was abandoned, however, because under Articles 24 and 113 of the Constitution, any administrative action (both public and private) can be controlled by judicial

authority (both civil and administrative). Under the present Constitution, it is impossible to admit a limit to judicial authority in relation to the public administration. Such a limit would be tantamount to reducing the judicial guarantees given to the citizens in relation to the public administration. In fact, the problem of fault can be considered as having been overcome because the law has been gradually modified in the direction of objective fault, independent of any proof of fault or fraud on the part of the subject liable.

Many laws govern specific cases of objective liability (damage suffered as a result of an act committed by an employee of an entrepreneur (Article 2049 Civil Code); damage caused by children, apprentices (Article 2048 Civil Code); animals (Article 2052 Civil Code); damage arisen in connection with the collapse of a building (Article 2053 Civil Code)).

There is a limit to liability when an injury was suffered as a result of a casual accident, force majeure, or an unforeseen event. It is impossible to take into account casual accidents or force majeure, when an administrative act is involved. The latter requires deliberation, preliminary investigation, and independence of decision. When an administrative decision is involved which was taken on the basis of "vis cui resisti non potest", or when the public employee acted under duress, it is necessary to conclude that the administrative decision is not an exercise of public authority.

Administrative liability requires, however, the existence of a contract of employment in the public service. It is admitted that there is an infringement of public service, when the public servant makes a decision with selfish, fraudulent intentions. An act is considered to be selfish and fraudulent when the agent acted intentionally for the purpose of satisfying a personal interest (eg making a decision affecting personal liberty on the ground of personal revenge). This conclusion is an improvement compared to previous solutions, according to which there was no administrative liability when an agent committed a crime in the exercise of his duties.

At present, manslaughter, committed by a civil servant in the exercise of his duties, raises the question of the liability of the public administration. The same applies when a policeman intentionally kills someone while on duty.

Administrative liability requires injury to a right. It is not sufficient to have an interest in claiming compensation. It has been denied that the unlawful refusal of a building permit would give rise to a claim to compensation, even if the act was subject to judicial review or annulment.

This theory is based on the absence of a "ius aedificandi" until the permit is granted. This theory is at the moment being strengthened by the coming into force of the law of 28 January 1977, No. 10, according to which the possibility to construct a building can derive from an administrative concession.

The administrative liability is pre-eminent, ie it is not dependent on the personal liability of the employee. The public administration is liable, together with the public employee (Article 28, Constitution), but the grounds for administrative liability are not dependent on the obligation for the employee to indemnify the injured party. The public administration is liable for an injury or loss caused by an employee, but these events are attributable, from a legal point of view, to the public administration.

The latter, also, is liable for its own acts; for this reason, the limits on the liability of employees cannot be applied to public administration, which is liable also when the employee is not. For example, the doctor or surgeon in a public hospital is liable for damage which has been caused by serious negligence (Article 2236, Civil Code); the judge is liable for the damage which he caused

intentionally (Article 55, Code of Civil Procedure). In spite of this, the public administration is liable when the doctor, surgeon or judge acted in fault. The liability of the public administration is not tenable, however, as was stated above, when an employee acted for a selfish motive.

The public administration can be liable also for lawful acts when these have caused a loss to a private party. This liability, admissible only in specific cases specified by the law, is justified in order to avoid that specific benefits to society correspond to disadvantages to private parties.

The judgement whereby the public administration is ordered to indemnify the damaged private body determines the problem of the execution of that judgement. The individual can bring his action for execution of the judgement before the civil judge, with the aim of obtaining the fulfilment of his right against the property of the public administration (real estate, money, personal property). Nevertheless, the courts have sustained that the property of the public administration is not covered by executive procedures when it has the function of satisfying public interests. This attitude gives rise to a serious limitation on the execution of the sentence. In fact all goods or money, owned by the public administration, are aimed at satisfying public interests. Under the law, which is in force, a private body can bring his action before an administrative judge, with the aim of obtaining the execution of the judgement against the public administration.

When there is a negative attitude on the part of the public administration which has been ordered to compensate for damage, the administrative judge can order the treasurer of the same administration to pay the amounts specified in the judgement. A commissioner "ad acta", appointed by an administrative judge, instead of an administration which failed to indemnify, can order the treasury to pay. The administrative judge can also order an administrative body (or official) (eg ministry or its directors) to insert into the budget of the State the amounts which are necessary to cover the expenditure arising from a judgement. On the basis of this insertion into the budget the treasury of the State can pay the private party. The availability of money is assured by the funds that are in the treasury or by the loans given by the central bank, with the aim of making up for any inadequacy of the budget.

With regard to public bodies, other than the State, the administrative judge can adopt the same executive measures as are applicable to the State. In particular, the judge can order that the amount, specified in the judgement, be inserted into the budget of the public body. It is clear that there thus arises a problem concerning the financial balance of the public bodies.

It is possible to achieve this balance in the following ways:

1. reduction of optional expenses;

2. increase in income;

3. increase in contributions made by the State, being the authority which is assisted by public bodies, or the administrator of public funds aimed at financing extensive public services;

4. loans from banks.

The increase of public expenditure, which results from court decisions can lead to an investigation of the causes of such increases. In this way it is possible to modify or improve the administrative organisation or to provide better professional training and education for public employees.

The Liability of the State in the Law of LUXEMBOURG

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Under Luxembourg law, State liability is governed by the same rules as apply to individuals. In the non-contractual field, these rules are mainly contained in Articles 1382 ff of the Civil Code.

According to Article 1382 of the Civil Code, "Any human act which causes damage to another person requires him whose fault caused the damage to redress it".

The basis for State liability is thus fault, whether it be the personal fault of an official, or the fault of the administrative service.

This explains why liability is limited to administrative acts which may be attributed to the incorrect or negligent behaviour of their author. As the King can do no wrong, no liability may arise from legislation or - provided that they are not against the law or apply only to one specific case - regulations. The executive could, however, be held responsible for damage suffered by an individual because it did not make an implementing regulation laid down by the law and indispensable for its execution. With this proviso, State liability extends to all acts carried out or attributable to the executive authority.

As regards acts of the judicial authorities, judgements, liability can be invoked only by the special procedure (prise à partie) of suing a judge personally; the State cannot be held liable.

State liability fully applies only to individual administrative acts and physical acts. For it to be put into operation, the injured party must bring proof of incorrect behaviour on the part of the person who took the measure. The illegality of the measure alone is not sufficient to establish fault. For instance, it has been ruled that if a decision is set aside by an administrative court on grounds of illegality, the beneficiary is not entitled to compensation if the person responsible for the decision concerned cannot be blamed for the illegality committed by him, ie if the illegality results from an error of interpretation of the law which may be explained by the complexity of the legislation and does not arise from insufficient consideration of the question or from a lack of professional conscientiousness.

There is only one instance where a special text provides for liability without fault: that is the liability of the municipality for damages caused in the event of riots.

The basis for this liability must be sought in the idea of solidarity of the social group: the municipality where the offenders reside must contribute to the compensation.

State liability may be direct or indirect. It is direct when the damage is caused and the fault committed by an organ of the State, ie a person or body having authority to represent the State. When the incorrect behaviour is that of an employee of the State, its liability will be vicarious, that of the principal for the acts of his agent. Moreover, like any individual, the State is assumed to be liable for damage caused by the things it has in its keeping. This liability can only be avoided by proof of liability on the part of a third party or the victim or by proof of force majeure.

In the special field of public works, the courts acknowledge liability without fault, obliging the authorities to compensate damage caused even blamelessly by a direct infringement of a private right or vested interest.

As the State is treated on the same footing an individuals, only the judicial courts have jurisdiction in liability actions against the State.

While this is the state of the actual law, administrative practice increasingly has to deal with situations in which damage is caused to an individual by the operation of a public service, where none of its staff is at fault but where it would nevertheless be inequitable to leave the victim to bear the damage alone.

The most obvious case is that of judicial error, when it emerges as a result of a new trial that a person has been wrongly convicted. For this reason, a Bill before parliament acknowledges the victim's right to compensation in such cases. A similar situation arises when a person detained pending trial is discharged or acquitted after spending some time in prison. In this case too there is a Bill under which a person unjustly deprived of his liberty would be entitled to compensation even if there had been no fault on the part of the police or the courts.

There are other situations which seem equally worthy of consideration. These include cases where damage is caused by escaped prisoners or minors absconding from a community home. When these prisoners or minors are placed in an open environment under a special scheme, the authorities can hardly be held liable if they take advantage of the scheme in order to commit offences. It seems equally unjust to make the injured party support the damage. Should one not rather acknowledge the obligation of the community which in the interests of all, puts into practice liberal methods of penal treatment to assume the risks and to compensate individuals who may become victims of injurious acts committed as a result of the use of these methods? Thus, the Luxembourg authorities are tending to take responsibility for compensation in such cases voluntarily, on the basis of the French notion of the risk created by recourse to open environment penal treatment schemes.

Although this theory has hitherto been applied only in cases of damage caused by persons placed in open public institutions, one may wonder whether it should not be similarly applied in all cases where a person sentenced to imprisonment has not been required to serve his full term (by means of early release on licence or another means of serving the sentence or even by means of a free pardon), at least in those cases where he has taken advantage of his release to commit a crime of the same kind as that for which he was serving or should have been serving his sentence.

More generally, one may wonder whether the State should not compensate at lease the most serious damage caused by unidentified or insolvent offenders, because in failing to prevent the perpetration of crimes it has failed in its essential function of safeguarding property and personal safety. One may also think that this compensation is justified by considerations of social solidarity. A Bill to this effect is at present being discussed by the government.

On another level, normal operation of the uniformed or plain-clothes police, can cause damage to innocent people. For instance, passers-by may be injured in a police operation during the arrest or pursuit of armed criminals; possessions of people who are uninvolved may be affected by steps taken in judicial investigations. Even if neither the officers who carry out these measures nor the higher authorities can be blamed, it would be unjust to leave the innocent victims to bear the cost of the damage on their own. The community in whose name and interest the action was carried out must be considered obliged to compensate the damage suffered blamelessly by persons who were not involved in the action.

A special problem is raised by voluntary helpers, particularly members of the public who come spontaneously to the aid of the police to help apprehend criminals caught red-handed or people who assist in rescue operations. Although the courts have always refused to make the State liable for damages suffered by these persons, recent administrative practice has been to accept responsibility for them, basing this policy on the French theory of the liability of the public authorities for damages suffered by their occasional helpers who, by this token, must be considered as performing a public service.

All these considerations have led the Luxembourg Ministry of Justice to undertake a study of the problem of indemnification of innocent victims of even the normal operation of the public services and of voluntary helpers who have suffered damage while helping the public services. The basis for such liability may be found either in the idea of risk created by the operation of the public services, or more simply in an idea of social solidarity, whereby any unjustified damage caused in the pursuit of an activity in the general interest should be borne by the community on whose account this activity is carried out.

The Liability of the State in the Law of THE NETHERLANDS

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1. Unlawful actions

1.1 Art. 1401 Civil Code

Under Dutch law State liability is in principle governed by the same rules as apply to individuals. In the non-contractual field, these rules are mainly contained in Articles 1401 ff of the Civil Code (Burgerlijk Wetboek). According to Article 1401 CC, "Any unlawful act which causes damage to another person requires him whose fault caused the damage to redress it".

1.1.1 Competence

Since Supreme Court (Hoge Raad) 31-12-1915 the competence of the civil courts is independent of the legal relation (private or public) between both sides. Only the plaintiffs claim determines the competence (objectum litis). If this claim is based on civil law (for example based on Article 1401 CC) the civil courts are always competent.

1.1.2 Admittance to court

Nevertheless, the civil courts have to dismiss the appeal, if with regard to the injurious action an administrative procedure which ends with a Crown or administrative court decision, is available. If the administrative procedure next to the nullification of the decision etc does not provide for a compensation or only provides for a fair compensation, there may be a possibility to get full compensation afterwards ex Article 1401 CC (explicitly in cases of Crown appeal and appeal based on the Administrative Jurisdiction (Decisions of Public Authorities) Act 1975 (Wet AROB), see Article 58b of the Council of State Act).

Conclusion: with the gradual development of a system of administrative legal protection in the Netherlands the role of Article 1401 CC in cases of State liability gets more and more a subsidiary character.

1.1.3 Conditions for liability ex Article 1401 CC

a. unlawfulness

b. injury

c. fault

d. adequate causality between act and injury

e. relativity, ie the infringed norm (written or unwritten) has to protect the violated interest.

In private law an act is unlawful, when the act is an infringement of rights (for example proprietary rights), a violation of legal norms or an infringement of the principle of the duty of care (unwritten private law). Till the second world war the principle of the duty of care was only applicable to the State when the State was acting as a private person. The result was a considerable lack of legal protection, especially in cases of discretionary power. Since the second world war

the Supreme Court has developed two principles for the limitation of the discretionary power: the principle of prohibition of "détournement de pouvoir" and the principle that the authority should act reasonably. There are also nowadays many examples of the application of the principle of the duty of care in cases of public acting.

1.1.4 General principles of proper administration

This term originates from the De Monchy Commission established in 1946, which was to make a report on the possibility of increased judicial protection against the administration. In this report published in 1950 the Commission proposed inter alia that the decisions of the administration should be examined not only in the light of the law but also in the light of the unwritten general principles of proper administration. They include the principle that the authority should act with due care, prepare its decision carefully and should give its decision a proper motivation. Furthermore, the authority should treat equal cases equally and should meet raised expectations.

Under the stimulus of this report the existing special administrative courts in social security and civil service affairs have applied and developed those principles by judge-law. They are also embodied in various new statutes, which regulate new administrative procedures for judicial protection. But it is still a major question if infringement of those unwritten public law principles constitutes unlawfulness in the sense of Article 1401 CC.

1.1.5 Justification

Is the public interest a justification for unlawful acting? There are two (elder) Supreme Court sentences in which the public interest indeed constitutes a beginning of justification. According to those sentences the general interest combined with the offer of financial compensation is capable "to justify unlawfulness".

Reform

In Article 6.3.1.5b Draft New Civil Code "important public interests" prevent an injunction procedure but do not affect the unlawfulness and with that the compensation.

1.1.6 Subjects of liability

State liability may be direct or indirect. It is direct (ex Article 1401 CC) when the agent is an organ of the State, ie a person who represents the State and acts within the formal sphere of his competence (a very wide concept). State liability is indirect when the agent is not an organ but merely an employee (Article 1403 CC). Difference: State liability ex Article 1403 CC is vicarious and an injunction procedure is therefore impossible (the act is not an act of the State).

1.2 Administrative procedures

Various administrative statutes have a provision for either administrative appeal (within the administration) or administrative jurisdiction. We saw already the very subsidiary role of the civil court with regard to State liability for acts governed by those statutes. It is important to emphasise the absence of the fault question in administrative procedures. In administrative appeal the appeal grounds are legality and efficiency principles. In administrative jurisdiction the grounds are violation of the law and regulations, "détournement de pouvoir", unreasonableness and violation of the general principles of proper administration. Special administrative jurisdiction for administrative acts has been founded by the

Administrative Jurisdiction (Social Security) Act 1901, the Civil Service Act 1929 (for administrative acts and real acts), the Administrative Jurisdiction (Public Professional Organisations) Act 1954 (for administrative acts and real acts) and the Administrative Jurisdiction (Taxes) Act 1959.

For administrative acts without special judicial protection or insufficient legal protection (ie administrative appeal, which does not end in a Crown decision) in the concerning statute, general supplementary administrative jurisdiction has been established by the Administrative Jurisdiction (Decisions of Public Authorities) Act 1975.

Conclusion: a general administrative jurisdiction for all public acting is missing in the Netherlands, so Articles 1401 ff of the Civil Code is still very important with regard to other acts than administrative acts, especially real acts.

2. Lawful actions

A general regulation for compensation of damage caused by lawful conduct is not available in the Netherlands. Nevertheless various administrative statutes have a provision. We will find the legal grounds for such a compensation within the general principles of proper administration, especially in the principle of equality (or the French principle of "égalité devant les charges publiques") and the principle of the duty of care.

2.1 Expropriation Act 1851

According to the Expropriation Act it is possible to expropriate by means of an administrative act under the authority of the Town and Country Planning Act 1962 or directly by means of a law if this is necessary for the public well-being. Expropriation requires an administrative and judicial procedure. The court determines the compensation. Due to the principle of total indemnity compensation both for the positive damage (real diminution of property) and for the negative damage (loss of earnings) has to be considered.

An actual political issue is reform proposals to introduce in the valuation of the ground more or less the user's value instead of the (extremely high) market value.

2.2 Re-allotment Act 1954

Full compensation, determined by the executive commission, with a first appeal to the investigating judge and a second appeal to the court of justice.

2.3 Restriction of Property Rights Act 1927

Full compensation, determined by the district judge. Public Works Act 1900: full compensation, determined by the court of justice.

2.4 Delta Works Acts

Fair compensation, determined by the administration with appeal to a court of justice and cassation by the Supreme Court.

2.5 Town and Country Planning Act 1962

According to Article 49: equitable compensation (fair compensation) for damage caused by municipal planning determined by the city council with an appeal to the Crown. Because of a strict interpretation by the Crown possibilities to get compensation are very limited.

2.6 Recent administrative statutes as Forest Act, Preservation of Nature Act, Removal of Soil Act and environmental acts as for example Surface Waters Pollution Act, Air Pollution Act, Chemical Waste Materials Act have a compensation system similar to Article 49 of the Town and Country Planning Act. Due to the restricted Crown jurisdiction on Article 49 prospects for compensation are minimal.

2.7 Even without special legal ground in the concerning statute the Crown acting in administrative appeal has sometimes in exceptional cases adjudged an equitable compensation.

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This note is based on P de Haan, Th.G.Drupsteen, R Fernhout, Bestuursrecht in de sociale rechtsstaat, Instrument en waarborg, Deventer 1978.

The Liability of the State in the Law of PORTUGAL

by
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I. INTRODUCTION

a. Purpose

Bearing in mind the theme of the colloquy, this paper is limited to the liability of the administrative authorities, central, local or other. Liability for acts of the legislature or judiciary is thus excluded.

b. Constitutional basis

The Constitution of the Portuguese Republic (1976) defines the liability of the administration to the public so far as the fundamental rights of the citizens are concerned. It prescribes that the State and other public bodies are jointly and severally responsible with the members of their organs, their officials or agents, for acts or omissions in the exercise of their functions, or caused by such exercise, which result in violations of rights, freedoms or safeguards or in damage to another party (Article 21 (1) - see Appendix 1).

Although it appears directly to concern liability for unlawful actions, this constitutional rule is also interpreted as accepting liability for risk or for the consequences of legitimate acts. The general principle quoted is confirmed, eg, as regards the "right to a healthy and ecologically balanced human environment", in as much as Article 66 of the Constitution, after so stipulating, goes on to state (paragraph 3) that any citizen who considers that this right is threatened or infringed may apply as provided by law for an end to the causes of such violation and for appropriate compensation.

Article 271 (1) of the Constitution further declares that officials and agents of the State and of other public bodies shall be liable to civil (and also criminal or disciplinary) proceedings for acts or omissions which result in infringements of those rights or interests of citizens that are protected by law, the taking of action or proceedings not being subject at any state to approval by a higher authority.

Such liability shall not however exist if (apart from cases punishable under criminal law) the official or agent has acted under orders or instructions on a service matter from his legitimate superior, provided that he previously requested or required that they should be given or confirmed in writing (ibid., paragraphs 2 and 3).

And the same article adds (paragraph 4) that the conditions on which the State and other public bodies are entitled to reduce an office holder, official or staff member to a lower grade shall be regulated by law.

Finally, the Constitution (Article 120, in general, and Article 199, as regards members of the government) lays down that even holders of political office are civilly (as well as politically and criminally) liable for their acts and omissions performed or legalised in the exercise of their functions.

c. Legal framework

The legal basis for the liability of the administrative authorities towards the citizen is, fundamentally, the distinction between acts of public management and acts of private management. The former are normally considered to be acts governed by

public law, ie by rules conferring on the administration powers to engage in the pursuit of public interests, and regulating such activity or organising the necessary means for the purpose.

The general legislative texts applicable are, essentially, two in number. First, there is Legislative Decree No. 48051 of 21 November 1967, on the liability of the State and other public bodies - except local authorities - for unlawful acts, and liability for risk and for legitimate acts on the part of the administration generally (see Appendix 2); secondly, there is the Administrative Code, especially Articles 366 and 367, on the liability of local government bodies for unlawful acts (see Appendix 3). Also in force are certain special systems, the most important of them relating to determination of fault and the limits of compensation, eg in postal and public transport matters.

In addition, there are specific legal rules which, in some sectors of administrative activity, determine the application of the general system of liability for acts of public management - eg the recent Medical Practitioners' Statute (Legislative Decree 373/79 of 8.9.79, Article 8) and the National Health Service Act (No. 56/79 of 15.9.79, Articles 11 and 12). Prior to the publication of these texts one branch of doctrine expressed doubts whether the system governing acts of public management should apply to the activities of doctors in public health establishments.

Acts of private management, on the other hand, are those that come under the general rules of private law; where the administration engages in such acts, it does so without holding any authoritative powers in the matter and is hence in a position similar to that of private bodies. The liability stemming from acts of this nature is primarily regulated by the Civil Code - Articles 483 et seq., especially Articles 500 and 501 (see Appendix 4).

II. LIABILITY FOR ACTS OF PUBLIC MANAGEMENT

This type of liability will be dealt with first, since it is here that are revealed the specific features of the public administration as such. In this context the law establishes a distinction between liability for unlawful or wrongful acts, for risk and for lawful acts.

a. Liability for unlawful and wrongful acts

The general principle underlying acts of public management is that the State and other public bodies are jointly and severally responsible towards the citizen for violations of his rights or of legal provisions designed to protect his interests, where such violations are the result of unlawful and wrongful acts performed by their organs or agents in the exercise of their functions, or caused by such exercise (Legislative Decree 48051, Article 2; Administrative Code, Article 366). Among leading cases the following may be cited:

- wrong information given by an official (judgement by the Supreme Administrative Tribunal (STA) of 31.3.77);
- theft, from a recluse, of a sum of money for whose safety he had had fears, but which had been inadequately protected (STA, 4.11.68);
- electrocution of a member of the public, owing to failure to keep the electrical installation in good repair (STA, 17.1.69);
- road accident caused by a motor vehicle falling into a non-advertised hole left by a street-repair gang (STA, 28.6.72);
- collapse of a mediaeval wall on to a number of houses, for want of timely repairs (STA, 28.7.71);

- explosion during a chemistry lesson at a high school, due to inattention by the teacher in the course of an experiment in hydrogen preparation (STA, 16.3.72);

- explosion of an army munitions depot as a result of inadequate supervision (STA, 26.4.74);

- several cases of detonation of hand-grenades left behind after military exercises (STA, 26.7.71; 29.11.73; 23.4.74; 3.3.77; 27.7.78).

1. Elements of liability

a. Unlawful acts

Unlawful acts capable of entailing liability for fault may be either positive acts or omissions. They must, in any event, constitute an infringement of the citizen's rights, or at least of the legal rules intended to protect his interests; this type of liability thus includes injury to basic interests protected by law.

Such acts must have been performed by organs or agents of the administration, not only in the exercise of their functions (ie on the occasion of that exercise) but also because (by virtue) of that exercise.

Lastly, the acts in question may be either juridical acts (eg the decision by a mayor illegally to suspend the working of a sand pit (STA, 11.10.73)), or material actions. Juridical acts will be illegal to the extent that they infringe legal rules or regulations or the general principles applicable (Legislative Decree 48051, Article 6). Similarly, material actions will be considered unlawful if they infringe such rules or principles, or rules of a technical nature or common prudence (ibid.).

b. Fault

Fault is assessed in accordance with the general rules of civil law (Legislative Decree 48051, Article 4). Thus, under Article 487 of the Civil Code, it is defined in relation to the care taken by a "good paterfamilias" in all given circumstances. The burden of proof (still under Article 487 CC) hence rests with the interested party, although court decisions are sometimes based on certain presumptions of fault, as, for example, in the exercise of such dangerous activities as public road works (STA, 29.6.72).

Neither the law nor court decisions have so far laid down the concept of "official fault", independently of the determination of individual fault, and arising from the bad organisation or operation of the administrative authority - although incidental reference thereto is made in certain rulings, eg judgement rendered by the Disputes Tribunal on 10.7.69.

c. Damage

Indemnifiable damage may be either material or moral. Case law sometimes distinguishes between real damage (affecting material objects), patrimonial damage (affecting, not material objects, but the assets of the victim) and purely moral damage.

Leading cases which illustrate recognition of purely moral damage include awards of compensation for suffering, whether physical or moral (STA, 4.2.71; 29.11.75), for facial disfiguration caused by an explosion (STA, 16.3.72, already cited) and for frustration of a probable artistic career. The damage may be either present or future - but, if the latter, it must be foreseeable (STA, 17.12.70): expense entailed by certain future but necessary facial operations to be performed on a pupil injured by an explosion during a chemistry lesson).

d. Cause and effect

There must be a cause and effect relationship between an unlawful act, or negligence, and the damage suffered by a third party. In accordance with the general principle found in Portuguese civil and ordinary law, such relationship is defined in terms of the concept of adequate causality. It was not held by the court to exist, for example, between the negligence of a prison administration which allowed a prisoner to escape and the payment of security by a third party who was duty-bound to surrender him for trial (STA, 15.11.63), nor between an unlawful administrative act and the judicial and extra-judicial costs incurred by the citizen concerned in making good his claim (STA, 25.3.71).

2. Relations between the administration and its office-holders, officials or agents

Such relations will vary in accordance with the nature of the unlawful act or the degree of fault.

Thus:

a. Exclusive liability of the office-holder, official or agent

The office-holder, official or agent will be solely liable if, by his action, he has exceeded the limits of his functions (Legislative Decree 48051, Article 3; Administrative Code, Article 367). Clearly, for this to be the case (leaving aside a purely literal interpretation of the law), the official or agent must, in addition, have exceeded the field of activity of the administrative authority in general.

Acts performed by office-holders, officials or agents outside the powers and competence proper to their functions (and those of the administrative authority in general) are commonly defined as personal acts.

b. The administration, its office-holders, officials and agents to be jointly and severally liable

The administration, together with its office-holders, officials and agents, shall be jointly and severally liable if they have acted unlawfully and with fraudulent intent, causing damage to third parties, even in the exercise of their functions and because of such exercise - see Legislative Decree 48051, Article 3 (2); Administrative Code, Article 367.

c. Exclusive liability of the administrative authority

The administrative authority is exclusively liable, vis-à-vis the citizen affected, if, in the exercise of its proper functions and by virtue of such exercise, it has committed an unlawful act purely through negligence. It has however, the right to take disciplinary action (eg down-grading) against

the member of staff concerned, if the latter has acted with less care and attention than he was under a duty to observe by virtue of his office. Where such is not the case, the authority has no such power (see Legislative Decree 48051, Article 2 (2), and Administrative Code, Article 366 (2)).

It may be doubted, however, whether these arrangements are consitutional since Article 21 of the Constitution, already quoted, provides that in general the State and other public bodies are jointly and severally liable for acts committed by their officials and agents.

On the other hand, it might be argued that the same article defines only the most stringent system, the one that is most favourable to the citizen, whilst not excluding other systems that would be less so. This reasoning, however, is not entirely decisive, since Article 21 of the Constitution forms part of the chapter on the citizens' fundamental rights, which must not be interpreted restrictively and whose scope cannot be reduced by ordinary law.

Be that as it may, this question has not yet been expressly dealt with by either doctrine or case law.

3. Rules governing liability

a. Where several persons are liable, Legislative Decree No. 48051 prescribes that the general rules of civil law shall apply (Civil Code, Article 497). The persons concerned are thus jointly and severally liable. Disciplinary action against them is proportional to their degree of fault and its consequences. If the proportion cannot be determined, each is presumed to have been equally at fault.

Court decisions have held that plurality of persons liable exists as between various agents responsible, between a servant of the administration and the victim himself, if the latter has also contributed to the damage produced (STA, 24.6.71), or between an agent and some other party foreign to the administration (STA, 14.6.73: injury caused to a member of the public by a shot from a gun, fired by a forest guard at a malefactor with whom he was struggling).

b. Relation between liability and legal proceedings

The obligation to compensate does not depend on the exercise, by the victim, of his right to take legal proceedings against the act which caused the damage.

But reparation will be made only insofar as the damage cannot be ascribed to the failure to take proceedings, or to procedural negligence on the victim's part in pursuing such action as he may have taken (Legislative Decree No. 48051, Article 7).

c. Statutory limitation

The right to compensation and the right to take disciplinary action are extinguished (Legislative Decree 48051, Article 5) after the general period of limitation prescribed by the civil law, viz 3 years (Article 498 CC). Hence we are concerned here with a statutory limitation period, including all its concomitant features (possibility of suspension, interruption, etc) and not with preclusion.

b. Liability for risk

Present-day law (Legislative Decree 48051, Article 8) lays down the principle whereby the State and other public bodies are liable for specific and unusual damage caused by the operation of administrative services or exceptionally dangerous material objects and activities.

Liability for risk thus exists in regard to the operation of exceptionally dangerous public services (eg the police: gunshot wound caused to a third party by a police officer who fired on an escaping prisoner - STA, 4.2.71) and in connection with material objects or activities presenting a similar hazard. The resulting damage must, however, be both specific (ie it must affect one or more particular persons and not be merely general) and unusual (ie it must exceed the normal risks attendant upon a given situation).

Liability for risk ceases to apply, however, in cases of:

- force majeure, unconnected with the operation of the service;
- fault by the victim or a third party, when liability is proportional to the degree to which each of the parties is at fault.

c. Liability for lawful acts

Finally, another general rule, found in Legislative Decree No. 49051, Article 9, prescribes that the State and other public bodies shall indemnify citizens upon whom, in the general interest and through legal administrative acts or lawful material acts, they have imposed burdens, or to whom they have caused specific and unusual damage.

Theorists and court practice concord in holding that such liability for lawful acts is founded on the principle of equality before the law: compensation is due to those who, in the general interest, are subjected to particular damage (specific damage as compared to that suffered by the citizenry as a whole) and to unusual damage in the sense that it lies outside the margin of risk attaching to the particular situation.

Case-law shows that individual sacrifice to the rights and interests of the general public, which is indemnifiable in this context, may be regarded as either total or partial.

Certain theorists suggest - but the question has not yet been explicitly taken up by the courts - that in this field (eg in the matter of the consequences of compulsory vaccination) recourse should be had to a cause and effect relationship between the administrative act and the damage, going further than the doctrine of adequate causality.

The same clause quoted from Decree No. 48051 provides for yet another special case of liability for a lawful act, namely a state of necessity, where, for reasons of imperative public interest, the administration has specifically sacrificed, in whole or in part, a material object or right belonging to a third party (eg possible damage caused through the occupation of a private house by an army unit, in time of war and as part of a military operation: STA, 28.6.73).

d. Compensation

1. Form

Although the law does not expressly so provide, it is generally accepted that compensation shall be paid in cash.

2. Amount

Here again the general rules of civil law apply - Article 494 CC.

If the injurious act has been committed with fraudulent intent, compensation must cover the whole of the damage caused.

If liability is for negligence only, the court may award compensation at a figure lower than the damage, in accordance with criteria of equity, if such a ruling is justified by the agent's degree of guilt, his economic situation and that of the victim, or other circumstances.

e. Procedure

Competence to assess all requests for compensation in respect of liability for acts of public management lies with the administrative tribunals (Legislative Decree 48051, Article 10 (2); Administrative Code, Article 315 (1)(b)).

Recent leading cases (eg judgement by the Disputes Tribunal of 10.7.69) have made it clear that this is also held to apply to complaints lodged by ordinary citizens against agents of the administration, who are jointly liable with the latter (court practice here had previously varied).

There are two administrative tribunals of first instance whose competence is defined on a territorial basis: these are the "auditorias administrativas" of Lisbon and Oporto. Appeals from their decisions lie to the Supreme Administrative Tribunal (STA) whose judgement is normally delivered by its section on administrative disputes. In certain conditions, however (unconstitutional circumstances; contradictory judgements), it is possible to obtain a second decision, by recourse to the Supreme Administrative Tribunal meeting in plenary session.

The procedure before the administrative "auditorias" allows for evidence of all kinds. Deliberations are, however, always written and all evidence must be produced in writing.

The entire procedure before the STA is also conducted in writing. There is no executive action in administrative disputes: thus, if the victim is awarded only a general judgement, he must lodge fresh declaratory proceedings in order to request that practical or specific effect be given to that judgement (STA, 8.7.71).

III. LIABILITY FOR ACTS OF PRIVATE MANAGEMENT

a. General features of the system

The State and other public bodies are liable for damage caused by acts of private management committed by their organs, officials or agents, in accordance with the civil law rules governing the liability of executants for the acts of their employees (Civil Code, Article 501).

This general rule is sometimes given concrete form by certain special rules applicable to particular sectors of public activity - eg public companies, whose statutes (Legislative Decree 260/76, of 8.4.76, Article 46) provide that the appreciation of their civil liability is a matter for the ordinary courts. They are thus subject to the rules of ordinary law.

Cases of liability for acts of private management which most frequently come before the courts are those of road accidents caused by vehicles belonging to public corporations (eg STA 26.5.69; 17.10.69; 28.10.69). The courts systematically try such cases under the ordinary rules of private law, despite the opinion of certain theorists that cases where the driver (eg a soldier) has to drive the vehicle under the orders of a superior officer should rather come within the purview of administrative law.

The administration, as an executant, is liable for acts of private management carried out by its office-holders, officials or agents, where such acts are committed by them (even deliberately and counter to its orders) as its employees and subordinates in the exercise of their functions, if such employees are equally under a duty to provide compensation (Article 500 CC).

It is thus clear that in this field the administration is liable provided that, and insofar as, its organs and agents are also liable.

b. Liability for unlawful and wrongful acts

The general principle of the law (Article 483 CC) is that the basis of civil liability is the commission of an illicit and wrongful act.

1. Elements of liability

a. Unlawful acts

These may be either positive acts or omissions - the latter term applying when there was a legal or presumptive duty to perform the act (Article 486 CC). To involve liability, it must consist in the infringement of another person's right or of a legal provision intended to protect the interests of third parties (Article 483 CC).

b. Fault

Fault may take the form of fraud or of negligence. It is determined in accordance with the reasonable care expected of a "good paterfamilias" in any given circumstance (Article 492 CC). It must, as a general rule, be proved by the victim, except where some specific legal presumption exists (as, for example, in regard to buildings or other construction works - Article 492 CC).

c. Damage

Over and above compensation for material damage, the civil law provides for moral damage to be indemnified, wherever it is so serious as to deserve legal protection (Article 496 CC). There are even specific rules concerning compensation for the victim's death.

d. Cause and effect

The relationship between an unlawful act and the resulting damage is assessed by reference to the concept of adequate causality (Article 563 CC).

2. Relation between the executant and the employee

The administrative authority, as the executant, has the right to take disciplinary action (downgrading) against the office-holder or agent (employee). If it is also (ie through the action of other bodies or agents) guilty of the act having caused the damage, the liability of each person involved and the scope of the disciplinary action are proportional to the respective degree of fault (Article 500 CC).

3. Where the responsibility lies with a number of persons, they are jointly and severally liable. Corresponding disciplinary action will be in proportion to the varying degrees of fault (if assessable - otherwise equality is presumed) and to their consequences (Article 497 CC).

Statutory limitation

The right to claim compensation and the right to take disciplinary action are barred after three years from the time when the victim was apprised of his right (Article 498 CC).

4. Compensation

Where there is fraudulent intent, compensation must cover all the damage suffered. If mere negligence is proved, the amount of compensation may be fixed by the courts on an equitable basis, as already stated in regard to liability for acts of public management (Article 494 CC).

5. Procedure

The ordinary courts are competent to rule on the liability of the administrative authority and its organs or agents, with regard to acts of private management.

c. Liability for risk

In civil law, and hence in regard to the responsibility of an administrative authority for acts of private management, liability for risk constitutes an exception (Article 483 (2) CC). Certain hypothetical cases of the kind are however provided for by law, eg damage caused by animals (Article 502 CC) or vehicles (Article 503 CC).

GENERAL REPORT

4 October 1980

GENERAL REPORT

by

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A. Introduction

At the end of this colloquy, the delicate and dangerous task of trying to draw conclusions from our discussions has fallen to me. In these two days we have been faced with a mass of information relating to very different legal systems, many of which have opposite basic concepts and opposite approaches. Under these circumstances it would be rather hazardous to draw conclusions which apply to all the legal systems in question.

Therefore, instead of dwelling on the differences, I would mainly like to use the time in putting the emphasis on the factors which unite us and pointing out the subjects which need more detailed investigation.

It is fashionable to say that one of the hallmarks of the present age is the increase in activities by the State and its encroachment into the widely differing fields which were hitherto the preserve of private initiative.

This extension of the State's functions has led, among other things, to a reconsideration of its role and, as a secondary question, the liability which it may incur to citizens who suffer loss or injury as a result of those activities.

The problem hardly existed at a time when the state acted primarily as policeman, with the duty of maintaining national cohesion, and keeping internal law and order. The idea of sovereignty ("the king can do no wrong") and of acts performed "iure imperii" also ruled out any idea of liability for the damage which could be caused to private individuals by acts of the government.

The question only began to arise when the State extended the scope of its powers in order to perform functions and carry on activities which were outside the narrow framework of sovereign government.

Now that all European States have achieved a high degree of democratisation in their institutions, parallel with the establishment of the social role of the State, which has become more and more a provider of services and benefits intended to compensate for social inequalities and absorb the blows of fate or bad luck, it may be thought that the time has come to take stock regarding this question in our different countries, not only from the purely theoretical viewpoint, but with a practical purpose and in the hope of creating some initiative with a view to harmonisation in the European context.

This colloquy has been most useful in enabling representatives of different legal systems to set out the solutions found in their national laws, to compare their points of view and to seek common rules or, better still, ideal solutions which could be proposed as a model for national legislation.

In almost all European States there is a characteristic development of ideas, beginning with the abandonment of any idea of State immunity for acts performed in the course of its governmental functions, passing then to the confirmation of its liability for any fault on the part of its employees or services, and ending, either generally or in specified cases, with the acknowledgment of a duty to pay compensation when a citizen suffers loss from an act of the administration, without fault on his own part. The fact is that the problem is being considered more and more from the viewpoint of the citizen and in relation to his obligation to bear a loss resulting from a particular activity in the interest of the community at large. This consideration will result in decisive importance no longer being attached to establishing fault on the part of the administration, and the main question will be whether it is socially fair to leave an individual to bear the loss or damage arising from the operation of a public service, even though this may objectively be in accordance with law.

The fact that this colloquy is being held under the auspices of the Council of Europe, whose purpose in the legal field is mainly to promote harmonisation, if not the complete uniformity, of law in the European context whilst always respecting the rights of the individual, has dictated the general tendency of the contributors who have tried, by adopting a forward-looking comparative law approach, to re-think the fundamental concepts governing the liability of public authorities for damage caused to individuals.

Furthermore, this is the idea underlying the present general report, which does not propose to present an exhaustive list of the solutions adopted by the different legal systems represented in the colloquy. This report is essentially practical and its primary aim is to identify the new currents of opinion appearing in the different European legal systems, while putting the emphasis on the new problems arising with regard to damage caused by the action of the administration.

Bearing in mind the nature of the authority which has organised this colloquy, its purpose could not possibly be purely academic, but must be related essentially to future action.

Therefore, after a quick survey of comparative law, to show the basic approaches of the different legal systems, I will try to identify some fundamental concepts which could serve for concerted action in the future, and I shall indicate the main points which, in the light of our discussions, would require a solution.

B. Results of comparative study

Arising from the theme of the colloquy, the four most important topics for consideration were:

1. determination of acts giving rise to liability;

2. basis of the liability to pay compensation;

3. the extent of the compensation (in full or equitable);

4. identifying the party responsible and procedure for remedies.

1. Determining acts giving rise to liability

The scope of the enquiry covered all acts by the administration, in the wide sense, only legislative acts being excluded. Since the only State liability as such was under consideration the enquiry did not extend to the field of contract. Several speakers dwelt on the need to restrict discussion to acts which only the State can perform and to exclude those which could be performed by private individuals also. This would rule out the problem of the liability of hospital services administered by public authorities.

Subject to this proviso, we had to establish whether all acts and decisions of the administration, regardless of their formal nature, are capable of involving the administration in liability. Furthermore, it was interesting to know whether all acts are subject to a single general system, satisfying a single criterion, or whether there are special rules for specific categories of acts and giving rise to different bases of liability depending on the nature, function and object of the activity involved.

With regard to the different forms of administrative activity, we have had to distinguish between the following categories of acts:

a. Acts of subordinate legislation by the administration (ie rules or orders enacted by virtue of law) may give rise to liability in certain States if they are enacted in contravention of the law (Spain). While some countries require this contravention to be attributable to improper conduct (West Germany, United Kingdom), in others liability arises even for failing to enact a regulation which is essential for the application of an Act (France) and even if no time limit has been prescribed (Belgium).

b. Legal acts of individual application (ie administrative decisions taken in a concrete case) constitute our essential field of enquiry, because in all the States in question they give rise, in one way or another, to liability on the part of the State. Liability may be founded on the mere illegality of the act or improper conduct of the person responsible for the act, and illegality may give rise to a presumption of fault, since the primary duty of the administration is to observe the law. However this may be, it seems that liability cannot arise when the act or decision has become final (this is laid down in Swiss law at least).

c. Physical acts occur in the course of the countless forms which administrative activity may take (police operations, public works, maintenance of public order, health and hygiene, management of public services, prisons and reformatories, information services, traffic control). Every legal system acknowledges liability in respect of such acts, whether by virtue of the ordinary rules of liability in tort (United Kingdom, German Bill), the theory of nuisance or the civil obligation to make good damage caused by infringement of a civil right (Belgium, Luxembourg) or special rules of public law (France).

With particular regard to the supply of wrong information by the administration, the systems we have considered tend more and more often to acknowledge an obligation to make good the damage caused, whether the wrong information constitutes an administrative error (faute de service) (France) or itself gives rise to liability in cases where the administration has a legal duty to provide the information (Germany, Switzerland). Other systems reach the same result on the basis of fault or culpable negligence (Belgium, Luxembourg, United Kingdom).

d. Omissions may consist either in the administration's neglecting or refusing to take a decision, in cases where it is required to do so, which amounts to a negative act, or in refraining from performing physical acts necessary for the proper operation of its services (maintenance of highways), which comes under the rules governing physical acts.

e. Acts of judicial authorities

It has been shown that certain legal acts, particularly those of the judicial authorities, are generally governed by particular rules. Although in certain countries there is general or specific liability on the part of the State for damage caused in the administration of criminal justice (particularly as a result of unjustified arrest or judicial error), in the field of civil justice there does not

appear to be any liability other than the personal liability of the judge, and even this arises only in strictly defined cases. However, it should be mentioned that France has an Act passed in 1972 which lays down the principle of general liability of the State for any damage caused by the defective administration of justice. Nevertheless it seems difficult to determine precisely the cases where this applies. In Spain, Section 121 of the Constitution provides for compensation for damage caused by judicial error or abnormal administration of justice, but this rule seems to be restricted to the criminal jurisdiction and non-judicial acts in civil matters. Other countries grant complete immunity for all acts performed by judicial authorities.

Apart from the harmful consequences of legal and physical acts of the administration and its services, it may be asked whether account should not be taken of a special category of damage which, although not really arising out of acts of the administration, may neverthless be considered to be connected with the operation of its services. First, there is the damage caused by persons who are in the care of administrative services (prisons, reformatories, treatment centres and schools) for the purpose of serving a sentence, undergoing medical or educational treatment, or receiving instruction. Since the community has in one way or another taken charge of these persons whose common characteristic is that they may be considered to require assistance or supervision in their own interest and more particularly that of society as a whole, one may take the view that the community should be held liable for any damage caused by these persons. Secondly, there is the damage suffered by persons who do not belong to a public service while collaborating with that service in some way. The community, which has the benefit of this assistance, should in return be obliged to compensate a voluntary collaborator for damage he may have suffered in the performance of his task, at least if there is no fault on his part. Certain Swiss cantons acknowledge an obligation of this sort. Decisions by the French courts are following the same line, and in Luxembourg there is an administrative practice which strives to achieve the same result.

In another context, it was interesting to find out whether, in the legal systems which were considered, all activities of public authorities fell under a single general set of rules, or whether there were particular sets of rules for specified categories of administrative acts or operations, with the likelihood that this distinction would affect the basis of liability, which could accordingly vary from one category to another. With regard to strictly administrative acts, the single set of rules appears to be the exception, since it occurs unadulterated only in Spain and the United Kingdom, although on diametrically opposite foundations. Beside a general system based on fault, most countries have special schemes for specific categories of acts (eg the police and hospital services) or for special kinds of damage (exceptional damage).

2. Basis of liability

With regard to the core of the subject, which may be described as the philosophical basis of the law of State liability, the four national reports which have been submitted to the colloquy appear to represent the different concepts which have led those countries to provide for compensation for damage which may be caused by their employees or the operation of their services.

The different systems may be classified into two main categories which in turn may be sub-divided, according to the particular approach and nature of the basis of liability.

a. The first approach is to treat the State as a private individual for the purpose of civil liability, by applying to it the ordinary rules of civil law. Accordingly the State is liable for its acts and omissions to the same extent as ordinary individuals. In the countries which have this system, the State's liability is based mainly on fault or negligence (United Kingdom, Holland) or even

on presumptions of fault (liability for things in one's custody or the acts of other persons) or again on infringement of a civil right, particularly the right of ownership (Holland, Belgium, Luxembourg). The specific nature of administrative functions, which are primarily governed by law, may lead to a wide interpretation being given in these systems to the concept of civil fault, with the result that the mere fact of not having complied with the law may be regarded as an improper act giving rise to civil liability on the part of the administration, without further proof of fault being required (Brussels, 14 September 1978, JT 1979 484).

In these countries, the judicial means for recovering compensation is through the ordinary civil courts, since the State can be brought before the ordinary courts. Compensation is determined according to the ordinary rules, ie full compensation is paid.

In some countries the liability of the State is governed in principle by civil law rules, but it has been felt necessary to make certain adjustments to this system by providing for compensation under specific rules of public law going beyond the civil law requirements. This is the position in Belgium in particular, which generally allows compensation in equity for exceptional damage caused even by proper performance of a public service, and there is an administrative procedure for this. The situation is the same in Holland, where the courts more and more frequently find liability even for legal acts which have caused damage, if the administration has failed in its duty of care and has not conformed with the principles of proper administration. Compensation for the victims of judicial mistakes or unjustified detention on remand, or even for the victims of acts of violence, may specifically come within a similar public law scheme in countries in which in other respects State liability is governed by civil-law rules.

b. A diametrically opposite approach is to impose a specific public law liability on the public authorities, having regard to their particular functions and role in the organisation of economic and social life.

In the systems which approach the matter in this way, State liability, which is not governed by civil law but subject to its own specific rules, may be based on very different kinds of considerations and foundations.

1. Liability may be strict (purement objective) and disregard any idea of fault in the conduct of the administration.

In a system of this sort, the obligation to make good the damage caused is not founded solely on the concept of improper acts, but on considerations of social solidarity, equity and the equal sharing of burdens. The injurious act is considered not so much from the viewpoint of the person responsible for it, but primarily from that of the victim. The victim's right to compensation depends on the legitimacy of the right which has been infringed. The Spanish system expresses this idea best by laying down that there is a right to compensation whenever, by virtue of the activity of the administration (even where perfectly normal), a private individual incurs damage for which no rule of law makes him solely responsible. It may be thought that this is an application of the general principle that any damage caused, even involuntarily, for the purpose of the public good, should be borne by the community which is assumed to benefit from the activity in question.

2. Conversely, for State liability to arise, other systems require fault, either on the part of an official or of the service as a whole. Mere illegality is not in principle sufficient (France), but forms one element of the improper act (Germany, Austria). However, these systems normally provide also for specific liability in certain cases based on special considerations, such as the existence of an

administrative risk constituted by the very existence of an administrative service (in France, damage caused by minors who have escaped from an open reformatory, or by mental patients on trial release) or where a special sacrifice not justified by the law is imposed (Germany). The very concept of fault is tending to become more flexible so as to include that of negligence, and even extending to cover failure to take precautions.

3. Other systems are satisfied with the illegality of the measure taken by the administration (Switzerland), since fault can be presumed (as in certain Swiss cantons) or inferred from the infringement of the law to which acts by every administrative authority are subject. However, certain States do not consider that illegality gives rise to liability unless it consists in an infringement of a rule enacted in order to protect private interests, and not in the general interest of the community (Greece).

4. In most of the States in question, there are special rules for damage arising from public works, where compensation follows automatically from the infringement of the right of ownership, without the existence of fault or illegality on the part of the administration. The basis of the right to compensation seems to be derived from the law of compulsory purchase (expropriation) and to consist in the principle of equality in sharing public burdens, or to constitute an application of the theory of nuisance in civil law (Germany, Belgium).

5. Furthermore, in States where the liability of public authorities is governed by public law, there are generally several concurrent systems based on different considerations and fundamental principles for specific categories of administrative activity. In this way, while in principle the liability of the State is subject to proof of fault by its employees or services, certain States recognise liability without fault in specified cases, whether by virtue of special statutory provisions or principles evolved by case law, where liability without fault is based on the idea of the risk created by the administrative activity, or on the idea of equal sharing of burdens by citizens, or of social solidarity.

The extent of the loss or damage incurred may constitute a criterion in certain fields, particularly in relation to measures of a financial nature, in systems based on the idea of an infringement of the principle that public burdens should be shared equally (France, Belgium).

c. It should be pointed out that reforms are under way in some countries for the purpose of extending the bases of public liability, either generally, as in Germany, where it is proposed to adopt original liability of the State in all cases where its administrative and judicial services cause damage by infringing a rule of public law, in the absence of any improper act or in special fields, as in Luxembourg. In other States a similar development towards compensation in cases which are becoming ever more numerous has been brought about as a result of decisions by the courts. This applies particularly in France, where the law of public liability is essentially judge-made law. The position is the same in Holland where, on the basis of civil law rules, the courts have evolved special standards of conduct for the administration, failure to observe which results in an obligation to make good the resulting damage.

3. Compensation

The basis of the particular liability seems largely to determine the extent of the compensation to which the victim is entitled. In systems based on fault, compensation is always in full. In certain systems (particularly Great Britain and Holland), a remedy may be obtained in the form of an order whereby the court directs the administration to withdraw or alter a decision, or make a decision to a specific effect.

Liability is normally shared where there is contributory negligence or a third party has contributed to the damage, the rules hardly differing from those of the ordinary law. Compensation may be equitable only in certain systems, particularly those based on concepts such as equality in sharing public burdens and social solidarity. Full compensation may also be provided for generally in systems with strict liability (Greece) and fault, misrepresentation or negligence may be taken into account in determining the amount of compensation (Spain, Switzerland).

4. Procedure and remedies

a. Party responsible

The party responsible for paying compensation is always the public authority, ie the public law-legal entity on whose behalf or for whose account the particular activity was carried on. Generally the individual officer, to whom the harmful act is attributable, is liable but only internally in the sense that the administration can bring a claim against him. In certain systems where the liability of the legal entity is only indirect, the obligation to pay compensation may be conditional on prior identification of the individual to whom the harmful act is attributable. In certain systems, liability of the public authority co-exists with personal liability of the official in question, and the victim may choose whom he sues (particularly in Spain and certain Swiss cantons).

b. Procedure

In systems which have special rules governing the liability of the administration, an action must normally be brought before the administrative courts, whereas in systems where the administration's liability is based on the same principles as that of private individuals, the matter is brought before the ordinary courts. There may be two judicial remedies in countries such as France where, apart from the general public-law system, the liability of the administration may be governed in certain cases by civil law rules. The same applies in countries where the State accepts responsibility in principle in accordance with the civil law rules in the ordinary courts, but where there may also be special rules for particular cases which must be submitted to the administrative authorities and courts (Holland).

Conclusions

After this brief summary of our exchange of information, I come to the conclusions which may be drawn from it, particularly as regards action by the Council of Europe in this field.

When we finished our work yesterday evening, some of us wondered what the final result of our discussions ought to be, or what conclusions should be drawn: ought we to propose the drafting of a convention intended to give equal protection, throughout the whole of Europe, to the citizen against damage which he may suffer from an act by the administration, or should we, more modestly, suggest that this object be achieved by means of recommendations? The speakers who dealt with this question expressed doubts as to whether such an approach was realistic. They took the view that the existing institutions and remedies in the different countries are the result of a long tradition and originate from fundamental concepts of law, so that it would be an illusion to expect that the States in question would be prepared to abandon them for the purpose of European unification.

However this may be, we cannot have any such ambition. More humbly, we must agree that our task consisted in collecting as much information as possible on the different judicial systems, particularly in order to establish whether in substance one can define converging paths towards a result which it seems to us desirable to achieve, ie to ensure that the citizen is entitled, to the greatest extent possible, to compensation for damage which he may suffer, without fault on his part and without legal obligation, as a result of acts by administrative services.

As has been pointed out, in this connection we have found that as a whole the different systems, whatever their approach and justification, tend to achieve similar results. Thus, countries where fault is required as a condition for State liability are not in fact unlike those with strict liability when they consider mere illegality or even the existence of damage caused to a private individual as indicating fault.

I think the most significant result of our colloquy has been to show that there has been a similar trend in all our countries.

This evolution has consisted, in some countries, first in treating the State as a principal and requiring it, in this capacity, to accept liability for harmful acts done by its agents in the course of their acts of administration, then, abandoning any distinction between acts of authority and acts of administration, in establishing the principle that the State has an obligation to make good any damage caused by the faulty operation, or merely defective operation, of its services (Duguit, Traité de droit constitutionnel, vol I, p. 256), while certain States are content with the existence of damage unlawfully caused to a citizen. In other countries, this evolution has led to the sovereign State being regarded as an ordinary individual who can be sued in the civil courts for any damage he causes to particular individuals if it involves infringement of a civil right (Cass belge 5 March 1917, Pas b 1917, I. 118; Cass 5 November 1920, Pas b 1920, I. 239, submissions by Leclercq).

Certain States have remained attached to the traditional theory of the separation of powers and do not accept that the State identified with the sovereign people can be subject to the jurisdiction of the courts. They accordingly refer disputes concerning acts of the administration to special administrative courts, which are regarded as part of the executive, in spite of the de facto independence of their judges (cf De Page, De l'interprétation des lois, vol II, p. 151-154).

These are details mainly of a procedural nature, and it appears possible to disregard them in the European context, since in substance the solutions reached achieve the same result.

Consequently, so far as its scope is concerned, the principle of liability for acts performed by the State and public authorities in their specifically administrative functions is universally recognised. For purposes of harmonisation, the obvious thing to do seems to be to take into account above all acts performed in the course of a public service and by such procedures that they can only be performed by a public authority. Acts which can be performed just as well by private individuals must, it seems, be dealt with under the ordinary civil law rules, since the administration is deemed to act in the ordinary sphere of civil law. At the very most, the obligations of the administration should be judged more rigorously, having regard to its special task of securing the safety and well-being of the public at large (for example, where the public has access to means of communication which are structurally dangerous or of dangerous design).

If the liability system is to cover all formal and informal acts by the administration, it seems that provisos will have to be made for acts of the judiciary, particularly judicial acts which normally enjoy absolute immunity. It is hardly conceivable that the State could be made liable for damage suffered by individuals as a result of judicial decisions being set aside or cancelled on appeal, or when case law is reversed, at least in civil matters. On the other hand, in criminal matters where the fundamental rights and liberties of the individual are at stake, it should be acknowledged in principle that the State is liable for any unlawful or unjustified deprivation of liberty, as well as for any infringement of the rights of the individual and property rights. In civil matters, on the other hand, liability is conceivable only for acts other than judicial acts.

There are substantial differences between the different systems regarding the theoretical basis of liability - civil fault, personal fault of the employee, administrative error (faute de service), failure to observe the rules of proper administration, risk, equality in sharing public burdens, social solidarity -

but, first, in the same legal system, rules based on fault may co-exist with rules giving rise to strict liability and, secondly, case law and practice tend to blur the differences. Consequently, in systems based on fault, "fault" is interpreted very widely, even to the extent of imposing an obligation on public authorities to ensure that no damage is caused to citizens. Even the British system, which has remained the most deeply attached to the principle of liability for fault (negligence), treating the State as an individual for purposes of liability, seems to be evolving towards a wider concept by acknowledging that not only negligence is unlawful, but in particular the abuse of power consisting in arbitrary or unreasonable acts. In systems with strict liability, fault may play a part in determining the extent of compensation. Passing over the details, one can say that there is a general trend towards acceptance by the public authority of liability for damage caused by defective administration, or by an act not in conformity with the law or its purpose. This trend seems to have reached its ultimate conclusion in the Spanish system, where the administration is liable whenever its action causes damage to a private person, unless a statutory provision requires him to bear the damage himself. Inspired by this, and without being concerned by the legal basis of liability, one could propose, as an ideal solution, that the administration should accept an obligation to pay compensation for damage suffered by a citizen as a result of an act performed in the course of a public service, even if it conforms with a statutory provision, unless the legal purpose of the provision in question is precisely to place the burden of the damage on the person concerned. In this case the existence of any damage, not intended by the legislature, would give rise to a presumption of unlawful exercise of its powers by the administration involving its liability unless it could rebut the presumption, eg by showing that the victim was under an obligation to tolerate the infringement of his rights, or that the damage was caused by the act of the victim himself or by a third party. In the context of civil rights, this would amount to acknowledgment of the theory that everyone should share equally in public burdens, which is largely accepted in public law and which ought normally to be extended to damage caused by the operation of administrative services which are assumed to act for the public benefit, so that any loss or damage which may result from them should constitute a charge on the community as a whole. The socialisation of the law should result in socialisation of the risks flowing from living together, in the same way that it has already contributed to make the community responsible for exceptional damage (war damage, epidemics, disasters).

This sort of approach should enable the community to be made liable for damage suffered by individuals as a result of decisions legally taken by public authorities acting within their jurisdiction, without it being necessary to attribute any fault of judgement to the authority in question. Under this heading could be classified the obligation on the part of the State to pay compensation for damage caused by persons with respect to whom State services have been required to take measures for medical treatment (mental patients released on trial) or penal treatment (scheme for semi-liberty, provisional liberty or placing in an open institution).

It is true that extension of administrative liability involves considerable financial consequences, particularly for authorities with modest funds. In order to avoid too heavy a burden on small authorities which are not capable of securing a statistical distribution of risks, one solution would be to organise the compensation on a wider territorial scale, by calling on national solidarity. But would this solution result in blunting the sense of responsibility of local authorities and reducing their vigilance with regard to institutions and officials who are directly subordinate to them?

Attention has been drawn to the fact that the general acceptance of liability based solely on the idea of risk could lead to a reduction in compensation, as the courts might demand a higher standard of proof with regard to the causal connection.

As regards the amount of compensation, the proposal may be that it should be paid in full and cover all the damage suffered, if there was fault. In cases of minor fault or liability without fault, it seems more in conformity with the idea of compensation for social risks, to pay only equitable compensation for such damage as cannot reasonably be left to be borne by the individual who is the innocent victim.

Although the idea of compensation originates to a certain extent from a feeling of social solidarity, it must be asked whether full compensation is justified in all cases. In cases where liability does not presume improper conduct by the administration, it may seem socially unfair to pay compensation for the whole of the financial loss if the victims are well-off, whereas ultimately it is the community as a whole which assumes the burden of compensation. In systems with strict liability, one may ask whether special consideration should be given to the idea of exceptional damage or limitations of liability. The question may even arise as to whether there should not be exclusions of liability for damage suffered by commercial operators as a result of administrative intervention in framing economic policy, since this is a risk which businessmen must bear in carrying on their activities with a view to profit.

It has been said that the principle of equality must give rise to unequal treatment of unequal situations, which would enable compensation to be limited to persons for whom the damage constitutes an intolerable burden. The victim's ability to make a contribution would therefore be an important factor in assessing the amount of compensation, which could furthermore be subject to fixed limits.

As regards the identity of the victim, there must be no discrimination between nationals or foreigners, residents or non-residents.

With regard to the party liable, the trend seems to be towards systems of direct liability of the public entity to whom the act is attributable, without it being necessary to identify the individual who contributed to causing the damage. This particular problem should only arise internally within the administration for the purpose of taking proceedings against the official at fault. This would enable compensation to be paid for damage resulting from the anonymous defective operation of the administration, which is likely to become more frequent as a result of the increasing numbers of staff employed and overlapping of powers.

An interesting question was raised, but no answer was found, regarding the liability of members of a political body which has taken an illegal and improper decision which has caused damage to the community (improper decision by a local authority involving an increase in the rates paid by inhabitants). Should the members of the authority be personally liable for making good the damage?

In another context, there was a question as to whether, in cases where the administrative act which produced the damage was done in the special interest of a few persons (damage caused by the fire brigade to neighbouring houses, loss caused to a third party as a result of an improper act giving financial advantages to the beneficiary), those persons should contribute to the compensation.

With regard to the procedural method for determining liability, one may regret the duality of judicial and administrative remedies and the resulting complications, but these are basically only unimportant details which in many cases have their origin in fundamental concepts on the division of powers in the State.

The institution of the ombudsman may be a valid solution for enabling private individuals to enforce their rights to compensation without recourse to complicated proceedings which are often very long and costly. However, since the institution of ombudsmen is for procedural purposes only, it would hardly have any effect on the issue of the complaint. It is recommended in all cases where the determination of liability presupposes an administrative stage before the judicial stage.

To conclude, we must observe that in these few hours which have been devoted mainly to exchanging information, it has not been possible to prepare schemes for model solutions. This was not our task. We have achieved our purpose by examining the problems and setting out the main lines of development which could be used for later attempts at harmonisation.

In this respect, our discussions may be considered fruitful and I think the results of our colloquy can serve as a starting point for future work under the aegis of the Council of Europe.

However, I would not like to close without thanking the University of Madrid for having given us the scientific framework which was indispensable for our exchange of ideas. The Spanish contribution seems to me of some importance for future development, because Spanish legislation on this subject may certainly be considered the most progressive.

Our gratitutude to Spain seems to me to be owing not only for the material hospitality which it has showered upon us, but above all, for providing the necessary technical assistance for our transactions.

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