

GENERAL REPORT

Presented by

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INTRODUCTION

English lawyers brought up in the traditions and usages of English law find considerable difficulty in dealing with the laws of other countries so very different in theory and content from their own. This must serve as an apology for the many shortcomings in this general Rapport. I would like to pay tribute to the clarity and detail in the papers written on this wide subject by the National Rapporteurs. I feel that rather than attempt a detailed analysis and comparison between the laws of the various countries relating to the liability of public authorities I would prefer to allow the Rapports to speak for themselves.

It is accepted that the term 'administrative action' was incorrectly defined in paragraph two of the Initial questionnaire. The term was chosen deliberately in order to bring under one heading a review of the laws governing administrative liability to pay damages for wrongs committed by public authorities, their servants or agents, to pay damages for breach of contract, and to include those cases where public authorities recognize their liability to pay compensation for injury done to the individual, despite the absence of legal wrong.

In ENGLAND and IRELAND the term 'administrative action' would more properly be used to describe judicial review by the High Court of actions by Administrative Tribunals or other administrative authorities, exercising quasi-judicial functions, in order to annul a decision or to compel them to make a decision. In so far as any comparison can be made, and the comparison must not be pushed too far, this would approximate to a review (*cas d'ouverture*) by an Administrative Court in France on one or other of the four grounds of incompetence, *vice de forme*, violation de la loi or *détournement de pouvoir*.

In some countries redress for wrongs committed by administrative authorities (whether by review of their decision, or action for damages or compensation) can be obtained only within the administrative hierarchy itself. In FRANCE there is a separate system of administrative law, administered by administrative courts, comprising thirty regional *Tribunaux Administratifs* headed by the *Conseil d'Etat*. There are special administrative courts which apply rules of procedure and substantive law different in many important respects from the ordinary civil law. These laws recognize or emphasise the difference between the administration and the individual, the over-riding interest of the State, and the difference between the normal civil action between individuals and those in which the State or a public authority is concerned. The general laws of tort and contract are modified to take account of these differences, and all claims which fall within the jurisdiction of the Administrative Courts are withdrawn from the jurisdiction of the Civil Courts.

Apart from France, even in those countries which have a separate system of administrative law and a *Conseil d'Etat*, the general rule is that actions for damages in tort or contract are tried before the Civil Courts, although it may be in certain cases an essential preliminary to obtain a judgment in an Administrative Court annulling a decision of a public authority before action can be brought in the Civil Court. In ENGLAND, the liability of the Crown and of all public authorities is governed by the same laws applicable to private individuals and of course all claims for damages are tried by the ordinary Courts.

In all countries the law relating to liability in tort and contract has been developed by way of decided cases. For historical reasons, in ENGLAND and IRELAND there is not one broad general principle of tortious liability, but a number of separate torts, such as Trespass, Defamation, Nuisance and (most important of all) Negligence, each having their rules governing liability. In the jurisdiction of FRANCE and the other continental countries liability in tort has developed on the principle of

'faute' (intentional wrong-doing or negligence) and in the case of France the additional ground of 'risk', liability is not restricted to nominate heads of liability.

Is this principle of 'risk' part of the jurisprudence of the other continental countries?

In certain of the continental countries a distinction is made between public contracts and private contracts, special rules applying to the former.

THE COURTS IN WHICH CLAIMS FOR DAMAGES AGAINST PUBLIC AUTHORITIES MUST BE BROUGHT

In FRANCE there exists the dual system of Administrative Courts on the one hand and Civil Courts on the other, the former hearing cases under the droit administratif, and the latter under the droit civil. Conflicts of jurisdiction resulting from the dichotomy between the two systems can be referred to the Tribunal des Conflits.

The Administrative Courts comprise the Conseil d'Etat and thirty Administrative Courts of first instance in the various regions. In addition there have been set up certain Administrative Tribunals having exclusive jurisdiction in certain specialised matters.

This dual system of law has always presented the problem of in which of the two sets of Courts must a claim be made. No difficulty arises if the case concerns for example a claim for the annulment of an administrative act (contentieux d'annulation) for *exces de pouvoir*, but there are many other cases in which a decision may be difficult. In the leading case of *Blanco (T.C. 8 February 1873)*, a case which concerned a claim for damages by a girl knocked down by a State-owned wagon, the Tribunal des Conflits, in deciding that the claim should be heard by the Conseil d'Etat, held that the test was: did the injuries result from the activities of a 'public service'. This criterion has not escaped criticism, and Professor Vedal has suggested that the test should be: does the case involve the 'public authority' (*puissance publique*). According to him the administrative judge is the normal judge in all matters of '*puissance publique*'. In general, where torts are committed by public authorities or claims are made under '*contrats administratif*', action must be brought before the Administrative Courts. All claims for damages arising out of road accidents now go to the Civil Courts even if a public authority vehicle is involved.

In ENGLAND and IRELAND where there is no separate system of civil and administrative law and no separate civil and administrative courts, this problem does not arise, and all actions brought by or against Public Authorities are brought before the ordinary Courts and are tried according to ordinary law.

In the post-war years, however, in England there has been a constantly developing body of administrative law, in the spheres of Town & Country Planning, Housing, Compulsory Purchase of Land, in the Health Service, Industrial Insurance and Social Security. This has led to a proliferation of Tribunals created by Statute, exercising a specialised jurisdiction in various fields. While there is no superior administrative Court, this network of specialised Tribunals so created is becoming more and more integrated into the general legal system, and their proceedings are subject to review by the High Courts. Many of these Tribunals have the power to award compensation against the State or public authorities. For example the Lands Tribunal has the power to award compensation for the compulsory purchase of land by a public authority. The procedure of these Tribunals generally follows the procedure of the ordinary Courts, save that technical rules of evidence are dispensed with. In many cases the Tribunals are developing their own case law.

In FRANCE there is not the same need to set up such Tribunals, since in France (and those systems which closely follow the French law) such problems can be handled by the ordinary Administrative Courts, controlled always by the Conseil d'Etat applying the relevant Statute law and les principes généraux du droit. However, even in France specialist Tribunals have been set up, such as for example Tribunals governing the grant of public assistance (aide sociale).

Between these two opposite extremes of France on the one hand and England and Ireland on the other the remaining jurisdictions fall to be considered.

In GERMANY there is a very highly developed system of administrative law and administrative courts, exercising mutually exclusive jurisdiction. The principal jurisdiction of the Administrative Courts is to pronounce on the validity of administrative acts, and the contentieux d'annulation of those Courts corresponds closely to the French 'recours pour excès de pouvoir'. But, unlike France, all claims for damages against public authorities or for indemnities must be brought before the Civil Courts, and these follow the civil law in deciding whether or not the public authority is liable.

In BELGIUM there is a Conseil d'Etat in addition to the ordinary Civil Courts. As in Germany, while the Conseil d'Etat has power to quash the administrative decision based on any of the cas d'ouvertures found in the French droit administratif, actions for damages in Tort or Contract must be brought before the Civil Courts and decided according to civil law. In a few cases however the Conseil d'Etat has power to advise the award of damages where the Plaintiff has suffered some exceptional injury and where no other remedy is provided by law. Further, the legislature has set up commissions exercising judicial functions to deal with claims for reparation, ie the commission set up in 1973 to deal with claims for indemnity for unjustifiable detention. Again, unlike France, any dispute between conflicting jurisdictions is resolved not by a Tribunal des Conflits, but by the Cour de Cassation, the highest Civil Court.

In DENMARK no separate system of Administrative Courts has been set up (although this is possible under the Constitution) and the Civil Courts exercise judicial control over the decisions made by public authorities and decide all claims for damages brought by or against them. In certain specialised fields of law, independent administrative Tribunals are empowered to decide questions of indemnity. For example, Valuation Boards decide questions of compensation in the case of compulsory purchase, as does the Lands Tribunal in England.

In the NETHERLANDS, jurisdiction over the acts of public authorities is shared between specialised administrative Tribunals, such as the Administrative Disputes Section, the Section for jurisdiction of the Conseil d'État, which makes recommendations to the Crown under the Council of State Act 1962, the Central Board of Appeals, etc, and the ordinary Courts exercising administrative jurisdiction specially conferred on them by Act of Parliament. The Civil Courts have a general jurisdiction in all matters to which the Government is a party, and have power to award damages for torts committed by public authorities, their servants or agents, and also to decide disputes concerning contracts between public authorities and private persons.

In LUXEMBOURG there are both the Civil Courts and a Conseil d'Etat. The Conseil d'Etat, following the French and Belgian models, has power to annul administrative decisions and to decide other matters specifically assigned to it by Statute, but otherwise the Civil Courts have exclusive jurisdiction over all cases concerning public authorities, including claims for damage in tort and contract.

In ITALY there exist side by side Civil and Administrative Courts. The latter have power to annul decisions of public authorities on much the same ground as the French Administrative Courts; a remedy is given by the Administrative Courts if the plaintiff's 'interests' are prejudiced by the act or decision of the administration, but if he claims that his private 'rights' have been infringed by a public authority then he must pursue his remedy in the Civil Courts and his claim will be decided by civil law. A distinction is made in Italian law between claims involving alleged infringements of 'interests' and those involving 'rights'. In practice all proceedings for the annulment of an administrative decision or act must be brought before one or other of the Administrative Courts, headed by the Consiglio di Stato, and all claims for damages by or against public authorities in the Civil Courts.

LIABILITY OF PUBLIC AUTHORITIES AND THEIR SERVANTS OR AGENTS IN TORT

In FRANCE liability to pay damages for civil wrongs may arise either from breach of contract (*la responsabilité contractuelle*) or from the commission of torts (*la responsabilité delictuelle* - including *délit* and *quasi-délits*. By '*délit*' is meant injury which is intended, and by '*quasi-délit*' is meant harm arising from negligence or risk).

The distinction lies not in the facts, since a breach of contract may contain all the elements of a civil wrong, but in the legal relationship of the parties. Where there is a failure to fulfil the obligations of a contract, the injured person must seek a contractual remedy only, for French law does not permit a person to combine contractual and delictual remedies.

However, the use of the word 'torts' should not be understood as implying that French law is restricted to nominate heads of liability, as in England or Ireland.

In the Civil Code '*responsabilité delictuelle*' is dealt with in Articles 1382-6.

Article 1382 provides that 'Every act whatever of human agency which causes damage to another obliges the person by whose fault that damage has occurred to remedy it'. Article 1383 lays down that everyone is responsible for the damage which he has caused not only by his intentional actions, but by his negligence or imprudence. Articles 1384, 5 and 6 deal with vicarious liability and *responsabilité du fait des choses*.

Although these Articles form part of the *droit civil*, the Administrative Courts have tended to develop their own rules by analogy with those of the *droit civil*. Thus, while Article 1382 makes a person liable to pay damages for '*faute*', the liability of the administration to pay damages is also based principally on '*faute*', by which is meant some defect or failure in the administration of the public service. To the basic liability for '*faute*' has been added liability based on '*risk*'. This head of liability has been developed almost entirely by decisions of the Courts in the same way that in England the decisions of the Courts have developed the law of torts.

In French Law '*responsabilité*' is generally taken to refer to delictual or quasi delictual liability.

In the case of *délits* (intentional harm) the essence of the *faute* lies in the deliberate intention to do harm, viewed subjectively. In the case of *quasi-délit* the harm done is not intended, but results from negligence or risk. Here *faute* must be defined in terms of an objective and abstract standard of conduct. In practice the Courts hold that there is a *faute*, where a person's conduct has not been that of a normally careful prudent man. It will be seen that this test approximates closely to the English test in the tort of negligence.

In the present century the Conseil d'Etat has developed an additional ground of liability based on the theory of 'risk' without 'faute'. The activities of the State, even when conducted without fault may in certain circumstances constitute the creation of a risk. If the 'risk' thus created results in damage to an individual then it is only just that the State should indemnify him. An alternative rationale for this ground of liability is to connect liability without fault to the fundamental principle of the equality of all citizens in bearing public burdens - the principle of "Egalité devant les charges publiques".

The general principles of jurisdiction of State liability for wrongs were laid down in the leading case of *Blanco* (T.C. 8 February 1873). In this case the Tribunal des Conflits decided that:

- (a) The State should be liable for the 'faute' of its servants.
- (b) Administrative liability should be separate and distinct from that of the droit civil.
- (c) All questions of administrative liability in tort should be decided exclusively by the Administrative Courts. In *Feutry* (T.C. 29 February 1908) the general liability of the State laid down in *Blanco* should be extended to all public authorities.

'Faute' may be either 'faute de service', that is to say either the malfunctioning of the public service and the fault of an employee committed in the scope of his public duty, or 'faute personnelle', where there was some personal fault on the part of the employee outside the scope of his official duties.

Where there is purely 'faute personnelle' the servant alone is liable to be sued in the Civil Courts. Where there is 'faute de service', the servant has an immunity from action, and the public authority must be sued in the Administrative Court. In many cases the litigant whose action rested principally on 'faute personnelle' might be left with a worthless claim, being unable to sue the public authority. To overcome this difficulty the Conseil d'Etat developed the doctrine of 'cumul'. If the facts justify the application of this doctrine, the Administrative Court may find that the damage was caused by two separate fautes - a faute personnelle and a faute de service, thus enabling action to be brought on the ground of faute de service before an Administrative Court which alone has jurisdiction to condemn a public authority to pay damages. This doctrine of cumul was first enunciated in *Anguet* (C.E. 3 February 1911), and was developed in *Lemonnier* (C.E. 26 July 1918). The limits of the doctrine were laid down in *Litzler* (C.E. 23 June 1954), where the Conseil d'Etat refused to apply cumul where a customs officer in uniform but off duty used his service revolver to commit a murder.

Where a public authority has been made to pay damages for a wrong committed by one of its servants it has a theoretical right to recover those damages from the servant.

If a public authority, being under a legal duty to act, fails to do so, or is guilty of unreasonable delay in acting then on general principles there is a 'faute' involving liability. If a public servant is deliberately guilty of wrong-doing in the course of his duty then (unless this is so flagrantly wrong that it amounts to a *voies de fait*, in which case it would be justiciable only before the Civil Courts), there is by definition a faute for which the public authority may be made liable in damages.

'Faute' as an all-embracing ground of liability runs through most continental systems of law.

In the Civil Code of LUXEMBOURG, Articles 1382. 3 and 4. there are almost precisely similar provisions governing tortious liability as in the Civil Code of France. Article 1383 provides that every person is liable

in damages for injuries caused by intentional acts and also by his negligence or imprudence. 'Faute' is the basis of liability.

By a decision of the Belgian Cour de Cassation, which would probably be followed by the Courts in Luxembourg, it has been held that the test as to the standard of care required of public authorities in carrying out their duties is what the individual is entitled to expect from a normally prudent public authority. Thus, if the individual who has suffered harm is able to prove that this harm resulted from an imprudent or negligent act of the administration, he can usually succeed in a claim for damages.

But in Luxembourg (unlike France) claims for damages in tort can only be brought against public authorities in the Civil Courts. The Conseil d'Etat has no jurisdiction, save in those matters specifically assigned to it by Statute. If a public authority takes a decision under a Statute (a decision which is *prima facie* legal) and this action causes damage to an individual, the latter can only claim damages in the Civil Courts, provided he first obtains the annulment of that decision in the Conseil d'Etat, on the ground of *excès de pouvoir* or *violation de la loi*, etc, so that the action taken under the annulled decision becomes a *faute*.

As in most continental countries there is a developed and developing case law on liability in tort.

The DUTCH Courts will hold the Government or other public authority liable in damages under Article 1401 of the Civil Code, if they commit tortious acts within the meaning of that Article. There are certain restrictions on the liability of public authorities which do not obtain in the cases of natural persons and of private entities such as limited liability companies. Claims for damages are brought before the ordinary Courts, although there are exceptional cases where an Administrative Court, on application being made, can make an award of damages.

Public authorities are liable for the wrongful acts of their servants and agents, but only in exceptional cases can the latter be made personally liable. Statutory authority which legalises what would otherwise be wrongful can be a defence to an action. A public authority can be made liable for non-exercise of its powers if it was required by law to exercise them. If a public authority exercises its powers *mala fide* it is almost always liable to pay damages to those injured by its acts.

In ITALY a tort (*fatto illecito*) is the violation of the right of an individual (the right not resulting from a contractual relationship between the parties but from general law) by an act which is either intentional or imprudent, incompetent, negligent or contrary to established Rules. Again there is the basic idea of *faute* as a general ground of liability.

Claims for damages in tort are brought before the Civil Courts, and public authorities enjoy no privileged position, but can be made liable for their acts or the acts of their servants or agents, acting within the scope of their duty.

Normally, only the public authority is sued, but by recent legislation Government servants can be sued personally for torts committed in the sphere of their employment, but only if they have acted intentionally or with gross negligence or incompetence.

If a public authority acts under its statutory powers and causes damage to an individual, action must be taken before an Administrative Court to annul the decision, and only if such decision is annulled can an action then be brought before a Civil Court for damages for the violation of a Civil right.

In DENMARK liability in tort is based on 'culpability'. The rules governing the liability of public authorities are based on the general civil law applicable to private individuals, and actions (or damages) are brought before the Civil Courts. It is impossible to give a comprehensive definition of 'culpability'. The acts or omissions of public authorities must be judged in the context of each particular case, in some cases a slight error being sufficient to establish liability while in others serious error must be proved. There must be a causal connection between the damage suffered and the act or omission complained of, and the duty that has been broken must be 'relevant to the person suffering the damage', that is to say, it must be a breach of a law which exists for his protection, and not a breach of a law for the protection of the public interests at large.

Public authorities can be made liable both for the failure of the administrative machinery and for the acts of their servants or agents, within the scope of their duties. While public servants can be made liable in damages for their tortious acts, in practice actions are brought against the public authority.

In GERMANY, Article 34 of the fundamental Law (the Federal Constitution) provides that, when a person charged with a public duty is in breach of that duty with regard to a third person, the State or other public authority employing him is responsible for his breach of duty. While there is a comprehensive system of Administrative Courts, their principal jurisdiction is to pronounce on the validity of administrative acts. Proceedings for damages against a public authority cannot be taken before the Administrative Courts, but are reserved for the Civil Courts. The latter follow the principles of civil law and hold the public authority liable only if a fault is established. The public authority will be liable if its servant has acted intentionally or negligently and damage has been caused to a third person. (See *Article 839 of the Civil Code*).

In ENGLAND and IRELAND, there is no one general principle governing liability in tort. Instead, for historical reasons, the Courts have over the centuries developed separate Torts, each with their own rules governing liability, such as Defamation, Trespass, Nuisance and Negligence. Of all the Torts, Negligence, the last to be developed, is the most important and approximates most closely to the continental theory of fault. It is still in process of development by the Courts of both countries. As in France and the other countries of the European Economic Community, the law of tort is almost entirely judge made.

In England, all public authorities are liable for the tortious acts or omissions of their servants or agents, committed within the scope of their duty. In Ireland, following the decision in *Byrne v. Ireland (1972) I.R. 241*, all public authorities, including the State itself, are liable in damages for injury caused by their torts, breaches of statutory duty or failure to fulfil obligations created by the constitution.

In both England and Ireland, if the public authority is acting under the authority of a Statute (provided that in Ireland the Statute is not invalid as being contrary to the Constitution), it is free from liability, since its act being legally authorised by Statute cannot be said to be tortious. But in both countries the public authority loses its immunity from an action for damages, if it carried out its statutory duties negligently.

In both countries the law governing tortious liability is very similar. Thus there must always be a causal connection between the act complained of and the damage caused. If a public authority has a duty, as opposed to a discretion, to act, failure to act may result in liability. Bad faith or delay in acting may well make a public authority liable.

In both England and Ireland, where a Statute expressly authorises the doing of an act which inevitably causes loss or damage, usually there are provisions for compensation to be paid. Thus, where a Statute authorised the compulsory purchase of property by a local authority for any purpose, compensation must be paid. In England (in default of agreement) the amount of such compensation will be assessed by the Lands Tribunal, and in Ireland by a Tribunal, in both cases the decisions of the Tribunals being subject to scrutiny by the High Court.

PUBLIC AUTHORITY LIABILITY IN CONTRACT

Whilst in most continental countries little distinction is made in principle between administrative contracts and other contracts, in FRANCE there is a sharp distinction between 'contrats administratifs' and contracts in which private individuals or limited liability companies only are concerned. The former are governed by the droit administratif, while the latter are subject to the provisions of the civil law.

The general principles governing the formation of a contract are the same in both cases, although in the case of contrats administratifs, there may be some additional formality required, such as the approval of the appropriate Minister. It is in the enforcement and execution of contrats administratifs that the Conseil d'Etat has worked out special principles which give express recognition to the overriding nature of the public interest.

The distinction between 'contrats administratifs' and other contracts is often difficult to draw because public authorities can enter into contracts which fall into either category, arising from the fact that increasingly they engage in commercial and industrial activities, hence the recognition of a new kind of public service — the "service public à caractère industriel et commercial". With regard to contracts within this sphere the Tribunal des Conflits has adopted the view that operating under much the same conditions as private enterprise, they fall within the competence of the Civil Courts.

Three guiding principles have been worked out by the Conseil d'Etat and the Tribunal des Conflits to decide if a contract should be classified as administrative, viz:

(a) one of the parties to the contract must be a public authority. This can be a 'Collectivité Locale' (such as a département), a nationalised industry (such as the Gaz de France) or a Government Department or other organ of the administration.

(b) The contract must be predominantly for the 'public service'.

These principles may be easy to state, but are often difficult to apply in practice, and as might be expected there is a great deal of case law on the subject. One test often applied is: Does the contract contain "des clauses exorbitantes"? Such "clauses exorbitantes" are essentially different in nature from those normally found in a private contract, and may stamp the character of the contract as unmistakably administrative.

In the enforcement of 'contrats administratif', the public interest is regarded by the Administrative Courts as predominant.

Administrative Courts make frequent use of their powers to appoint experts to determine disputed facts or "to take all useful measures" to ascertain the facts in dispute. This procedure, known as 'le référé administratif', is normally only used in cases of urgency.

In BELGIUM also there is a distinction between contracts where the individual and the public authority contract on equal terms, and administrative contracts where the public authority occupies a privileged position. The former are governed by the ordinary civil law. In the exceptional cases where the relationship between the State and its servants is governed by

contract (as distinct from a relationship depending on Statute law) all disputes are decided as in the private sector, and are heard by Labour Courts.

Administrative Contracts have their own special rules, according to the nature of the contract. These fall under the main headings:

- (a) Grants to supply public services, such as gas and electricity.
- (b) Contracts for public works, supplies and services.

In the remaining continental jurisdictions there is no such wide division between administrative and other contracts.

It is true that in the NETHERLANDS a distinction is drawn between 'public law contracts' and 'private law contracts', but those governed by administrative law are rare. The vast majority of contracts, whether entered into by public authorities or not, are within the jurisdiction of the Civil Courts, and the public authorities have no privileged position, although claims to such a position are made by them from time to time. Public authorities can only claim to occupy a special position in those contracts governed by public law, or in the case of private law contracts where there are statutory provisions to that effect.

In DENMARK, public authorities are liable under Civil Law according to the rules applicable to all contracts.

In LUXEMBOURG there is a distinction between administrative contracts properly so called (contracts for public works, concessions to supply public services, etc) and other contracts. So far as enforcement and execution of both kinds of contract are concerned, the civil law applies, subject in the former cases to certain exceptions, either expressly laid down by Statute or under *les principes généraux du droit administratif*.

The fundamental principles governing contractual liability in GERMANY are the same in the spheres of both private and public law, and all disputes come before the Civil Courts. The public authority is liable if 'fault' (by which is meant intentional fault or negligence or imprudence) is established. All disputes concerning the rights and obligations of public servants or members of the armed forces are heard by the Administrative Courts according to the rules of administrative law.

In ITALY, all claims against Public Authorities in contract must be brought before the Civil Courts on the ground that private 'rights' (as distinct from 'interests') are concerned. By Article 23 of the Constitution everyone must be free to sue in defence of his own rights, and by other provisions of the Constitution the administration can be made liable in damages if it violates rights arising under a contract. The Administrative Courts, however, do play some part in disputes under administrative contracts. In many contracts with a Government Department, the approval of a Minister to the contract is required to give it validity and he can only disapprove on certain specified grounds such as illegality or public interest. If his decision is questioned it must be before an Administrative Court. While there is technically no contractual relationship between the administration and its servants, all disputes between them (concerning for example, salary, promotion, the right to suitable work) must be heard by Administrative Courts.

In both ENGLAND and IRELAND there being no separate systems of administrative law, all claims under contracts with public authorities are heard by the ordinary courts and are tried according to ordinary law. This is not to say that in contracts with public authorities there may not be incorporated special conditions, such as for example in England Standard Conditions designed to maintain a fair standard of wages for Government employees, but such conditions are all subject to the normal rules of interpretation and enforcement by the Courts. Public authorities do not occupy any privileged position.

STATE IMMUNITY

In general all countries find it necessary for there to be immunity in three distinct spheres of activity - in the administration of justice, in its international relations with other countries, and within the legislative sphere.

(i) The Administration of Justice

In ENGLAND, in order to preserve the Independence of Judges (both of the superior and inferior Courts), no action for damages may be brought against a judge for acts done in his judicial capacity. This immunity extends also to certain quasi-judicial Tribunals, such as the Lands Tribunal.

In FRANCE, the administration of justice in both civil and criminal Courts (although an important part of 'la puissance publique') is withdrawn completely from the jurisdiction of the Administrative Courts, under the doctrine of the separation of powers. But this general principle is now subject to the provisions of a Law of the 5 July 1972, which requires the State to make reparation for injury caused by errors in the administration of justice - liability being limited to serious fault, a denial of justice, or personal fault of the Judge. No civil action may be brought against the Judge personally.

Admirers of "Maigret" will be aware of the distinction between the 'police administrative' and the 'police judiciaire', the latter being entirely under the control and discipline of the Civil Courts, which hear all claims for damages made against them.

In GERMANY, also to preserve the independence of the Judiciary, Judges have immunity from Civil actions for damages for acts done within the scope of their duties.

In LUXEMBOURG, no action may be brought against a Judge for mistakes committed by him, although the legislature is considering granting a right of indemnity to those injured by judicial error or wrongly convicted of crime. While at the moment there is no right to indemnity for those wrongly detained by order of a Juge d'instruction, the legislature is also considering a revision of the law. There is no right to damages for acts done by members of the 'police judiciaire', officers of the 'Ministère public', or of Juge d'instruction, provided those acts were reasonably necessary to arrive at the truth.

In BELGIUM, judges enjoy immunity from being sued, save for four cases specified in Article 1140 of the Judicial Code. These are:

- (a) Where there is fraud, whether in 'le cours de l'instruction', or at the time of judgment.
- (b) If 'le prise à partie' is expressly stated by law. These cases must be heard by the Cour de Cassation, and are very rare.
- (c) If the law expressly declares that the Judges are liable to pay damages.
- (d) If there has been a denial of justice.

(ii) Act of State

Acts of Government within the sphere of international relations would appear not to be justiciable in the Courts, at any rate in so far as they do not affect the rights of persons inside the realm. The doctrine of 'Act of State' appears to be at different stages of development in different countries.

Thus, in ENGLAND, the Courts have long given immunity for acts of the Government and its servants committed abroad, while firmly rejecting such immunity for acts done within the realm. The limits of Act of State have never been clearly defined, but it would appear that there must be two essential conditions:

- (a) the acts must be done outside the realm, and
- (b) the acts must be essentially different from those acts committed by a private individual and must fall within the sphere of public, and not private, law.

While there are no decided cases of Act of State in the IRISH Law Reports, it is thought that the Courts would follow the English authorities in rejecting the argument of State necessity, in so far as acts done within the realm are concerned.

In FRANCE, the international relations of the Government with other countries are outside the competence of the Courts, save that in so far as a Treaty affects a question of French domestic law it seems that an Administrative Court will equate the Treaty to a legislative act, and assume jurisdiction.

In GERMANY, While Article 19 AL 4 of the Fundamental Law provides for a right of action for anyone injured by a public authority, it is well recognised that within the sphere of international relations between Germany and other countries, the Courts will not intervene on the ground that those acts do not affect private rights or interests.

In ITALY, a rather different interpretation appears to be given to the phrase 'Act of State' (*atti politici*) or *actes de gouvernement*), and acts of State apply (probably) to actions taken by the Government outside the realm, and also within the realm, and that it is difficult to distinguish between acts of State and administrative decisions having important political consequences. Such acts are few and, as in most countries, the tendency is to limit them still further.

(iii) The Legislative Sphere

In FRANCE, proceedings in Parliament and the functioning of the two legislative assemblies, by reason of the doctrine of the separation of powers, cannot be subject of review either in the Civil or Administrative Courts. The same prohibition on judicial review extends to the relations between the President of the Republic with the Government, or with the Government and Parliament.

The same rule prevents the ITALIAN Administrative Courts from hearing disputes concerning membership of the Houses of Parliament, the results of general elections or administrative decisions reserved by law to Parliamentary Committees.

WHAT STEPS CAN BE TAKEN TO COMPEL PUBLIC AUTHORITIES TO PAY DAMAGES AWARDED AGAINST THEM

Let it be said at once that normally a public authority, when ordered by the Courts to pay a sum by way of damages or compensation, will pay without the necessity of compulsion. Should, however, a public authority refuse or delay in making payment then the rules by which they can be compelled to pay (if at all) differ from country to country.

In FRANCE, there is no way in which a judgment against a public authority can be legally enforced, although the law is now under review by Parliament. There is no machinery for ensuring that, on proceedings on a recours en indemnité, the public authority will pay the damages. However, non-payment of damages may be referred to the Commission of the Conseil d'Etat charged with the preparation of the annual report to the Government, and in the majority of cases this has the desired effect.

In BELGIUM and LUXEMBOURG, the property neither of the State nor of any other public authorities can be seized in execution in satisfaction of a judgment.

In ITALY, should the public authority not pay the damages, then the judgment creditor can either (a) sue the authority before the Civil Courts, or (b) commence an action before an Administrative Court for implementation of the judgment. This latter is open to doubt, following a decision in *Cassation Civil Sez. UN, 13 July 1979, No. 4071*. Real estate or other state property directly used for specific public purposes cannot be seized in satisfaction of a judgment. Further, an administrative judge can order a named public servant personally to take action to implement the judgment, and in extreme cases can make the public servant personally liable in damages and costs.

In DENMARK, although the position is not free from doubt, in the absence of reported cases and writers being divided in their opinions, it would seem that execution could only be levied on certain kinds of property owned by the Central or Local Government authorities.

In GERMANY, there are various methods open to a judgment creditor to enforce payment against a public authority, viz: (a) attachment of real property, (b) distress on chattels, (c) garnishee order, (d) fine. But before proceeding to order execution, the Court will inform the authority of the threatened execution, and give it time (not exceeding one month) to obey the judgment of the Court.

In the NETHERLANDS, execution may be levied on property of a public authority as in the case of a private individual, in ENGLAND and IRELAND, public authorities enjoy no privileged position and execution may be levied on all their property.