

Michigan Law Review

Volume 66 | Issue 4

1968

The Max-Planck-Institute: Liability of the State for Illegal Conduct of its Organs

Pierre Mathijsen

Service Juridique de la Commission des Communautés Européennes

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Comparative and Foreign Law Commons](#), and the [Rule of Law Commons](#)

Recommended Citation

Pierre Mathijsen, *The Max-Planck-Institute: Liability of the State for Illegal Conduct of its Organs*, 66 MICH. L. REV. 823 (1968).

Available at: <https://repository.law.umich.edu/mlr/vol66/iss4/14>

This Review is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

LIABILITY OF THE STATE FOR ILLEGAL CONDUCT OF ITS ORGANS. By *The Max-Planck-Institut für Ausländisches Öffentliches Recht und Völkerrecht*. Köln, Germany: Carl Heymanns Verlag KG. Pp. xxiii, 899.

The Max-Planck-Institute for Foreign Public Law and International Law presents in this volume twenty-seven reports prepared for an international colloquium held at Heidelberg in July 1964. Twenty of these reports describe and discuss the law of state liability in more than twenty different states, mostly European but including also the United States, Australia, Japan, Latin America and South Africa. The purpose of the colloquium was "to proceed with the comparative studies of problems of public law" which started in 1960 with a colloquium on the "Guarantee, Limitation and Requisition of Private Property," followed by a second colloquium in 1962 concerned with "Constitutional Review in the World To-day." The basic material for such comparative studies is to be found in the national legal systems of as many countries as possible, at least insofar as they can offer an interesting contribution to the solution of the problem under study. The task of the Institute was therefore in the first place to select a group of states and gather the necessary information, which efforts have produced the numerous reports on the law of state liability in different states which fill about four-fifths of the volume under review.

These national surveys constitute the raw material upon which the actual comparative study was built. Indeed, the value of this volume lies in the fact that the Max-Planck-Institute not only gathered a significant quantity of information from competent sources but actually put it to use in several comparative studies by Jaenicke and the staff members of the Institute. These comparative studies will be examined later in this review in some detail, but it is essential to start with a brief analysis of the way in which the basic material was gathered.

The national reports were written by an expert (university professor, judge, or lawyer) from the particular state under discussion on the basis of a questionnaire formulated by the Institute. This questionnaire dealt primarily with nine subjects: the concept of state liability, the conditions of substantive law for liability, liability for certain typical activities, exclusion and limitation of liability, compensation, procedural law for claims, liability for legislative acts, liability for activities of the judiciary, and finally the personal liability of persons acting on behalf of the state.

Of particular importance were the definitions given by the drafters of this questionnaire to key terms such as "illegal conduct." The latter was defined so as to include only acts or omissions that

deviate from conduct prescribed or authorized by law (p. 8). If "law" were to be taken in the sense of "statute" [as in fact it was some years ago in certain countries (p. 491)], this definition would be far too restrictive; however, from the German and French texts and from the remarks made by Mosler at the beginning of the book it becomes clear that in this definition the term "law" has a very broad meaning and includes any written or unwritten rule which imposes obligations upon the state. Thus the report on the French legal system mentions that an act is "*illicite*" in the first place when it is contrary to the obligation of efficiency (*bon fonctionnement*) in the administration and, only second, when it violates statutory obligations (p. 151). Under Dutch law the distinction between acts that violate written law (legal rules) and acts that are incompatible with suitable care (p. 491)—that is, the standards of conduct not imposed by statute or administrative regulation but by what one could call "decency"—is not to be confounded with the distinction between common law and statute [which determines illegality in the United States (p. 685)], since in the latter case the obligation is more or less clearly "formulated"; in the case of "decency" this is not generally so.

The use of a questionnaire for the gathering of the basic material obviously has great advantages. Yet it can create somewhat artificial divisions and, in certain cases, exclude particular but important aspects of a given national system. With this questionnaire, however, enough latitude was left to the contributors to deal with specific problems. Whatever the drawback, the invaluable advantage of the questionnaire system is, in the first place, that it makes it possible to obtain information on well-defined issues while excluding information on those which appear less relevant; in the second place—and this is essential for a comparative law study—the actual "comparing" of different national solutions for a given problem becomes practicable.

As was mentioned before, the great merit of the present publication is not so much that it has gathered and made available an imposing amount of well-ordered material but that it has undertaken a comparative study of certain aspects of the question of state liability. By doing this, the Institute hopes not merely to contribute to comparative law in general, but actually to accomplish a practical task, namely, to provide the courts, primarily the international courts, with a definition of certain "general principles of law." As Mosler recalls in his introduction, the provisions of the European Communities' Treaties (articles 215 of the Economic Community and 188 of the Euratom Treaty) were chosen as a starting point. Under these provisions the Communities are required to make reparation for damage caused by their institutions or by their employees in the performance of their duties "in accordance with the general principles common to the laws of the Member States." The application of

these provisions by the organs of the Community, especially by the Court of Justice, presupposes the knowledge and the comparison of the law of state liability in force in the six member states. Thus, apart from their intrinsic value, the results of the comparative description of national legal systems provide practical advantages for the application of law by the Court of Justice of the European Communities, and, since the material gathered by the Institute goes far beyond the Community Member States, it also presents practical advantages for the International Court of Justice which is bound by its Statute to apply the "general principles of law."

Without questioning in the least the quality of the questionnaire and of the national reports based thereon, the practitioner of international law and of comparative law (who in the eyes of the Institute is to be the main beneficiary of this publication) is bound to wonder whether the objective of the colloquium, as it was defined in the questionnaire, was not in fact overambitious. Did the organizers of the colloquium really think that state liability as a whole could be treated in twenty-to-fifty-page reports in such a way as to permit the drawing of general conclusions in the form of "principles" of law? When one examines the headings of the nine subdivisions of the questionnaire, one is inclined to suggest that each one of them alone offered sufficient material for at least one colloquium. Bound as they were by the questionnaire but necessarily limited as to space, the drafters of the national surveys could do no more than give a general and broad picture of the respective national legal systems, and these reports therefore constitute, thanks to their high quality, invaluable contributions to a first approach to the problem of state liability. But to use this raw material as a sufficient basis for defining general principles of law to be applied by courts seems a quite different matter. It might be useful in this respect to quote a passage from a judgment of the European Court of Justice regarding this matter. In the case *Algera v. Assembly*, the court held that the treaty did not provide a solution for the problem with which it was faced and stated that it was therefore "obliged to solve it by basing itself upon the rules of law recognized by the statutes, the doctrine and the case-law of the Member States" (Recueil 111, p. 115). In other words, each particular problem calls for a study of *all* available national sources before an attempt can be made to formulate a rule of law. Knowing the practice of the Court of Justice, it would appear that the material gathered in the different national reports published by the Institute would not constitute a sufficient basis for defining general principles of law concerning all the subjects referred to in the questionnaire. The Institute itself is obviously conscious of this difficulty and, as will be seen below, the attempt to formulate general rules was limited to a very few subjects (p. 859).

Because of the limited scope of the national reports the compara-

tive studies carried out by the Institute could not encompass all the aspects of state liability defined in the questionnaire. On the other hand, whatever the drawbacks of a questionnaire which introduces more or less artificial subdivisions, the latter are a *conditio sine qua non* for any comparative work. The study of the national reports revealed that some questions were less suitable for comparison while others seemed less fundamental for an understanding of the problem under study. Consequently, only four subjects were chosen for discussion at the colloquium, and comparative reports on these subjects were prepared by members of the Institute. These comparative reports constitute, without doubt, the most valuable contribution of the book.

The first comparative report by Steinberger (pp. 753-67) examines the illegal conduct of state organs as a basic element of state liability. The author notes in the first place that state liability can only exist when certain basic conditions are fulfilled: absence of immunity, existence of a damage, absence of legal grounds for imputing the damage to the victim, responsibility of the state, and faulty action of the organ. However interesting, such findings seem much too general to be more than a very first approach to the problem, although the reader must remember that the sole aim of the reports prepared by the Institute's staff was to introduce the discussion. Nevertheless, it is to be regretted that so much assembled basic material did not permit a more thorough approach of the few questions which were singled out for discussion.

Essential for the problem under consideration is the relationship between the state and the organ, and in this respect the author of the report finds that a person or institution acts on behalf of the state only when there exists an employment or agency relationship, temporary or permanent. Furthermore, all the legal systems examined in the national reports require a nexus between the discharge of a function on behalf of the state and the causing of damage. Also interesting is the author's conclusion that the legal consequences are the same in systems where state liability is considered a question of public administrative law and where it is treated as a private law matter.

Steinberger further examines the crucial question of the grounds for illegality of acts causing a damage. As was pointed out at the beginning of this review, there was no doubt in the minds of the drafters of the questionnaire as to the inclusive meaning of the term "law," which was intended to deal with violations not only of statutes but also of as yet undefined general obligations. On the other hand, however, it appears that in all the national legal systems examined such violations only result in liability for the state when the object of the obligation is to protect the interests of the victim. In common-

law countries this requirement is called a "breach of duty towards the victim." In this connection, the author briefly mentions the question of "*détournement de pouvoir*," and here also one can only regret that nothing was said about this typical continental aspect of administrative law.

As to the question of fault, Steinberger finds it impossible to draw a general conclusion, since the various systems differ widely. Such a conclusion, however, might not be so far off in the future if the tendency toward strict liability, which can be seen in many legal systems, develops further. The author wonders whether the requirement of fault as an element of state liability is still justifiable in our modern world; this comparative essay thus ends by opening wide projects for future development.

The second comparative report concerns the exclusion of state liability for acts of the administration and of the judiciary (pp. 768-75). The author notes that liability for acts of government (policy-making decisions) is excluded in very few states, including France and the United States, where judicial control over such acts is considered detrimental to efficient government. Moreover, with very few exceptions, the liability of the state is not excluded for acts of a military nature (sole exception: the United States) and sovereign acts of the administration (police, public education, and so forth). On the other hand, the great majority of states do exclude liability for acts of the judiciary.

A third, very short comparative report concerns the liability of the state for legislative acts. As the author points out, this kind of liability can, of course, only exist where the courts are empowered to examine the legality of statutes. In most cases, however, courts are only competent with regard to administrative regulations based on laws; damage caused by such administrative acts comes within the scope of state liability. In fact, only in Greece is liability of the state for damage caused by statutes clearly recognized; on the other hand, liability for illegal administrative acts is widely admitted.

In a fourth report, Bleckmann attempts to draw some conclusions with regard to the nature and extent of reparation. It appears that generally speaking only financial reparation is provided, although there are cases of restitution *in natura*. As to the extent of the reparation, the author notes that most legal systems exclude indirect damages. The question of causation of the damage by the illegal conduct of the state's organ is only briefly mentioned. Although this question is essential with regard to the possibility of obtaining compensation, it is not discussed in any detail. As for immaterial damage, the solution varies from state to state, and a general principle is impossible to elicit. Finally, Bleckmann also notes that reparation of indirect damages is provided for in four states and excluded in a

number of others and in the European Communities. He adds that "this finding is absolutely useless since one can give, on the basis of the national reports, at least three different definitions of the term direct" (p. 781).

Without implying that a similar conclusion necessarily applies to all the results of comparative studies of this kind, one is led to wonder, after reading the comparative essays made on the basis of the twenty national reports, whether the aim the organizers of the colloquium were pursuing is, in fact, attainable. In the final report of this volume, Jaenicke defines this aim once again as a practical rather than a theoretical one, that is, an indirect normative function consisting in supplementing the incompleteness of a legal system by reference to the general principles of law contained in other systems (p. 859). Insofar as it explicitly attempts to define "general principles of law" on the basis of the material gathered for and during the discussions, Jaenicke's report fulfills an essential function. There is no doubt that it is possible to come to a conclusion on specific questions when it appears from all the national reports that, for example, liability for legislative acts is generally excluded. In such a case it seems justifiable to speak of a general legal principle. But these cases are extremely few.

For all the other questions one has to look for the *ratio legis* upon which the various rules are based, and it is only when there appears to be concordance of the motives that one can venture to speak about general rules. Jaenicke attempts to apply this rule to certain aspects of state liability and proposes a certain number of general principles (pp. 868, 872, and 877). Yet if the method used to arrive at these conclusions seems perfectly acceptable, a certain doubt remains as to the basic material and the problems attempted to be solved. After reading the conclusions of the colloquium and examining the national reports, one comes to the conclusion that the subject under discussion is actually much too vast, and that the national report is therefore necessarily somewhat too superficial to allow drawing the kind of conclusions contained in the last report. With this reservation in mind, and under the condition that the reader is familiar with German, French, as well as English, legal terminology, one can only be thankful to the Max-Planck-Institute for having put at the disposal of international lawyers such valuable and well classified material which undoubtedly will encourage further study.

*Pierre Mathijsen,
Service Juridique de la
Commission des Communautés
Européennes.*