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Non-Contractual Liability for Breaches of EU Law

The Tension between Corrective and Distributive Justice

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Abstract

Corrective justice has been one of the most common arguments for justifying the aim and funtion of non-contractual liability for breaches of EU law. According to this approach, that liability is a mechanism to recompose the state of the art of an order composed of rights, liberties and duties, after some of its rules have been infringed. This paper examines the premises of that reasoning proving that the lack of clarity on how these premises are settled makes corrective justice explanation difficult to maintain. Instead, it shows that distributive justice criteria will be considered as an essential element of state liability in the EU sphere.

Keywords

European Court of Justice – European Law – Non-Contractual Liability

Introduction

> Government actors respond to political incentives; not financial ones – to votes; not dollar.
>
> Daryl Levinson[1]

§1. Corrective justice has been one of the most common arguments for justifying how liability works. According to this approach, liability is a mechanism to recompose the state of the art of a given order after some of its rules have been infringed. Even when the idea of order can be complex, it is common to use the argument that this order is composed of rights, liberties and duties both integrated in a relation considered just or fair.[2]

The requirement of a connection between rights, liberties and duties implies that corrective justice is applicable in transactional relations where different parties conduct their actions, in a voluntary or involuntary way, to a state of injustice, inflicting damages in the rights and liberties of the other party, and generating, by this way, disequilibrium on the referred order. The Law, as a means of concretizing justice, "*corrects* this injustice when it re-establishes the initial equality by depriving one party of the gain and restoring it to the other party".[3] The underlying argument of the dignity and equality of the persons involved in the relation is well known. Since parties must be considered one another as equals, the alteration of this equality generates the necessity, if equality and dignity are to be preserved, to correct this situation.

As it is possible to appreciate, corrective justice – at least in Weinrib's terms – always acts in an exchange between parties since it is a mechanism of reversing the active and passive poles of a relation in such a way that the "doer of injustice becomes the sufferer of law's remedy".[4] Thus, "correlativity" takes the role of a central element in the operation of this type of justice because both the position of the doer and the position of the sufferer are intelligible only in light of each other.[5]

At the same time, this idea of correlativity between parties (the doer-the sufferer) is also reflected in the structure of rights and duties, the latter, in turn, constitutive of the justice's order as previously referred. In fact, what justifies the liability restoration is the existence, on the one hand, of a right and, on the other, of a duty not to interfere with this right. This correlation explains both taking away the compensation from the doer and giving it to the sufferer. Because the plaintiff has a right, he is entitled to receive compensation, and because the defendant has a duty not to interfere with that right, he is forced to pay damages.

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[1] D. Levinson, "Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs", (2000) 67 *University of Chicago Law Review*, at p. 345.

[2] E. Weinrib, "Corrective justice in a nutshell" (2002) 52 *University of Toronto Law Journal*, at p. 352.

[3] *Ibidem.*, at p. 349.

[4] *Ibidem.*, at p. 350.

[5] See E. Weinrib "Correlativity, Personality, and the Emerging Consensus on Corrective Justice', (2001) 2 *Theoretical Inquiries in Law*, p. 107ff.

According to this view, corrective justice permits an autarkical relation where no external rationale can enter, besides the relation between parties, or between rights and duties. Therefore, this bidirectional link is sufficient to explain the justification of liability. This is the reason, as it has been held, why corrective justice justification is identified with the structure of private law while distributive justice responds mainly to the structure of political reasoning, where several external elements come into play.[6]

This paper will analyze the corrective justice rationale as an argument that justifies member state liability for breaches of EU Law. The argument will be developed through a very simple line of reasoning. Firstly, the premises that we need to assume concerning the inputs constituent of corrective justice will be explained, namely the existence of a certain structure of rights (and duties), and the existence of a mechanism for reconstituting that structure. Secondly, the problems derived from the intellectual process of assuming those inputs will be developed. The lack of clarity on how these inputs are settled, makes corrective justice explanation difficult to maintain. Thirdly, distributive justice criteria will be considered as an essential element of state liability in the EU sphere.

Justifying liability for breaches of EU Law with corrective justice

§2. Since the origins of the legal and judicial construction of the EU legal order, the way by which judicial reasoning justifies member state liability for breaches of EU Law has focused, directly or indirectly, on the idea of corrective justice. This explanation can usually be seen in two elements of the decisions of the courts. First of all, the European Court of Justice (ECJ) recognises and protects *rights* guaranteed by EU Law. Secondly, the ECJ understands that the way of protecting and enforcing those rights is through a *liability system*. By integrating these two elements in the justification of its decisions – rights and liability system – the court fulfils the requirements of corrective justice. On the one hand, the existence of a specific given order that the Court will recompose based on the synchronicity of the rights and duties allegedly stated by the European legal order and, on the other, the existence of a mechanism of reaction of the own legal order to its attacks, consisting of a remedy to recompose it.

§3. A rights-based discourse as a foundation of member state liability has been clearly developed hand in hand with the direct effect doctrine, which has been conceived as "the cornerstone of the whole edifice for the effectiveness of Community law".[7] In this direction, the principle of state liability was upheld in the *Francovich* case in very simple terms when the ECJ judged that "it is a principle of Community law that the Member States are obliged to pay compensation for harm caused to individuals by breaches of Community law for which they can be held responsible".[8] Clarifying this approach, the

[6] P. Cane, "Corrective Justice and Correlativity in Private Law" (1996) 16(3) *Oxford Journal of Legal Studies*, at p. 480.

[7] P. Pescatore, "Address on the Application of Community Law in each of the Member States, Reports of the Judicial and Academic Conference, 27-28 Sept. 1976", Luxembourg: Office for Official Publications of the European Communities, 1976, p. 16.

[8] Case C- 6/90 and C-9/90 *Andrea Francovich and Danila Bonifaci and others v. Italian Republic* [1991] ECR I-5357.

court understood that some conditions were required in order to give compensation. Community law (directives, in the *Francovich* case) "must grant rights" to individuals and the contents of those rights should be identified in the basis of the Community norms. In similar terms, it was clearly stated in the *Carbonari* case[9] that it is a requirement for configuring member state liability that "the rule of law infringed was intended to confer rights on individuals and the content of those rights can be identified". According to this jurisprudence, liability of member states was seen by the court as a means to enforce the rights that Community rules had supposedly established.

The motivations of the ECJ for favouring a decentralised way of enforcing EU Law – that is, permitting that any citizen seeks damages before any court – are well known, and can be summarised in a general option both to give citizens the possibility to question the conformity of national rules to European norms, and to enforce in a more expansive way the European legal order. In this line, the centralised review of member states acts (such as the action for infringement) was considered inefficient and too restrictive.[10]

Therefore, it is quite paradoxical that liability, as a mechanism to protect corrective justice, has been the driving force of the creation of European rights, and that these rights, in turn, have pushed the construction of a European legal order inspired by this type of justice. In this line, it is possible to perceive that the ECJ assumed that the way to enforce EU Law, or better, the interests and principles that this system supposedly protects, should be developed through an action for damages. As this action needs the existence of rights, the Court proceeds giving those principles and interests the physiognomy of rights. The process of enforcement, the Court seems to reason, needs rights because they are the real repositories of coercion, essential to make possible some process of enforcement. This rationale can explain that rules created with specific requirements of transposition later acquire a pedigree of rights-created norms. This was the reasoning underlying cases such as *El Corte Inglés,*[11] *Dillenkofer,*[12] *Bonifaci,*[13] *Palmisani,*[14] *Maso,*[15] *Rechberger*[16] and *Robins;*[17] through them, the application of a sanction to the failure or delay in transposing a directive was possible. The same idea can be found in cases of

[9] C-131/97 *Annalisa Carbonari and Others v. Università degli studi di Bologna, Ministero della Sanità, Ministero dell'Università e della Ricerca Scientifica and Ministero del Tesoro* [1999] ECR I-1103. In the same vein, see C-371/97 *Cinzia Gozza and Others v. Università degli Studi di Padova and Others* [2000] ECR 7881.

[10] See M. Dougan, *National Remedies before the Court of Justice*, Portland: Hart, 2004, p. 2ff.

[11] C-192/94 *El Corte Inglés SA v. Cristina Blázquez Rivero* [1996] ECR I-1281.

[12] C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94 *Erich Dillenkofer, Christian Erdmann, Hans-Jürgen Schulte, Anke Heuer, Werner, Ursula and Trosten Knor v. Bundesrepublik Deutschland* [1996] ECR I-4845.

[13] C-94/95 and C-95/95 *Danila Bonifaci and others and Wanda Berto and others v. Istituto nazionale della previdenza sociale* [1997] ECR I-3969.

[14] C-261/95 *Rosalba Palmisani v. Istituto nazionale della previdenza sociale* [1997] ECR I-4025.

[15] C-373/95 *Federica Maso and others and Graziano Gazzetta and others v. Istituto nazionale della previdenza sociale and Repubblica italiana* [1997] ECR I-4051.

[16] C-140/97 *Walter Rechberger, Renate Greindl, Hermann Hofmeister and Others v. Republik Österreich* [1999] ECR I-3499.

[17] C-278/05 *Carol Marilyn Robins and Others v. Secretary of State for Work and Pensions* [2007] ECR I-1053.

improper incorporation of directives such as *British Telecommunications*[18], *Denkavit*[19] or *Danske Slagterier*[20].

§4. On the other hand, the appeal to liability as an inherent mechanism to enforce those rights previously granted by EU Law is an argument sustained already in the opinion of the Advocate General Mischo in the discussion of the *Francovich* decision. In that opportunity he stated that "it is in principle for the legal system of each Member State to determine the legal procedure which will enable Community law to be fully effective, that State power is nevertheless limited by the very obligation of the Member States, under Community law, to ensure such effectiveness".[21] The *Francovich* decision was even clearer, when it ruled that "the full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain reparation when their rights are infringed by a breach of Community law for which a Member State can be held responsible".[22] The underlying premise of these arguments is that an action of reparation should be available for rights issues, since it is only in this way the axiom *ubi ius ibi remedium* can be effective.[23] But the relationship between rights and remedies has also been controversial, and even if it could be accepted that rights need actions for their self-defence it is not clear that liability should be the natural action to protect them. In fact, the way in which a legal order can implement a mode of ensuring the obligations imposed by it will depend on several factors such as the nature of the obligation, the cost of the enforcement, the relation between the public powers involved in the rights-duties couple and the type of court that applies the mode of ensuring, among others.[24]

In the *Francovich* case the main argument used to justify the ruling was the effectiveness of EU Law. Since *Brasserie*[25], the justification changes to the appeal of "general principles common to the member states", a concept taken from Article 288 EEC. The technique used by the court is well known. It is based on an idea of constitutionalisation of values or interests that the court prefigures as good or convenient. The ECJ, by reading the national legal order, pretends to discover some common foundation that can afterwards be applied precisely against these same national orders. In this particular case, the common principle of liability of the state for breaches of citizens' rights was applied.

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[18] C-392/93 *The Queen v. H. M. Treasury, ex parte British Telecommunications plc.* [1996] ECR I-1631.

[19] C-283/94, C-291/94 and C-292/94 *Denkavit International BV, VITIC Amsterdam BV* and *Voormeer BV v. Bundesamt für Finanzen* [1996] ECR I-5063.

[20] Case C-445/06 *Danske Slagterier v. Bundesrepublik Deutschland* [2009] ECR 2009.

[21] Opinion of Mr. Advocate General Mischo in the case *Andrea Francovich and Danila Bonifaci and others v. Italian Republic* [1991] ECR 5357.

[22] Case C- 6/90 and C-9/90 *Andrea Francovich and Danila Bonifaci and others v. Italian Republic* [1991] ECR I-5357.

[23] See, T. Tridimas, "Liability for breach of Community law: Growing up and mellowing down" (2001) 38 *Common Market Law Review*, at p. 301; W. van Gerven, "Of rights, remedies and procedures" (2000) 37 *Common Market Law Review*, at p. 503.

[24] See G. Bebr, *Development of Judicial Control of the European Communities*, The Hague: Martinus Nijhoff, 1981, at p. 279.

[25] Case C-46/93 and C-48/*93 Brasserie du Pêcheur SA v. Bundesrepublik Deutschland* and *The Queen v. Secretary of State for Transport, ex parte: Factortame Ltd and others* [1996] ECR I-1029.

The exercise of *reading* national orders has been problematic since its origins, because it is not so clear – and this opacity seems to be the most notable feature of this exercise – where or what the court looks at. Some scholars understand that the focus of the action of reading national orders regarding liability issues must be the administrative liability present today in almost every country in the world.[26] In fact, the evolution of administrative liability law has followed a common pattern within European countries.

To the paradigm "the king can do no wrongs", there has followed several national statutes that establish a complete and complex system of state liability. However, inside these regulations there are different sorts of state activities that can cause damages. Negligent actions and illegal administrative acts are the most common causes that permit the state to be considered liable. On the other hand, it is exceptional that unconstitutional statutes can cause state liability. In some countries, for instance, for causing liability statutes must be contrary to the equal allocation of public duties (*egalité devant les charges publiques*), whereas in others it is binding an official declaration of unconstitutionality of the statute to ask damages.[27] The oscillation of the system of liability for unconstitutional statutes explains the fact of considering, for configuring member state liability for breaches of EU law, a more uniform regulation of liability within member states, which is liability for illegal administrative acts. Therefore, there has been assimilation between the categories of national statutes that contravene EU law and administrative acts that contravene legal national statutes.[28]

Nevertheless, one of the most developed answers to this problem is the consideration of these breaches as constitutional torts. As Lee puts it: "since the constitution, like Community law, typically binds all State organs including legislature and judiciary, and grants rights to individuals against the State, it is not difficult to imagine a system of liability in which the violation of constitutional rights by any State organ could result in State liability for the harm caused".[29] Thus, despite the fact that the majority of European countries have rejected a system of liability for unconstitutional statutes, constitutional torts as a way to sanction the legal breaches committed by states agencies appears as the most suitable explanation of *Francovich* liability.

§5. Finally, the last stone in the edifice of corrective justice as justification of state liability consists in solving the problems regarding application of this theory to public matters. Indeed, the theorisation of corrective justice has been developed more deeply in private

[26] In *Brasserie*, for instance, the court stated that "[t]he principle of non-contractual liability of the Community expressly laid down in Article 215 of the Treaty is simply an expression of the general principle familiar to the legal systems of the member states that an unlawful act or omission gives rise to an obligation to make good the damage caused. That provision also reflects the obligation *on public authorities* to make good the damage caused in the performance of their duties".

[27] For the first, see the case of France. P. Senkovic, *L'évolution de la responsabilité de l'Etat législateur sous l'influence du droit communautaire*, Bruxelles: Bruylant, 2000, at p. 196ff. For the second, see the case of Germany since the decision of 15 July 1981 (BVerfGE, 58, 1982). H. Maurer, *Allgemeines Verwaltungsrecht*, 12th edition, München: Beck, 1999, at p. 679ff.

[28] I. B. Lee, "In search of a Theory of State Liability in the European Union" (1999) 9 *Harvard Jean Monnet Working Paper*, at p. 19.

[29] *Ibidem.*, at p. 20.

law than in public law and the application of the former to the latter is not without controversy. But the way to overcome this obstacle is precisely by denying the differentiation between both types of liabilities. As Medina argues, the differences between both liabilities (private and public) do not involve a real problem since they lack a strong justification and the current evolution "is in a great measure a process of convergence in which differences tend to fade".[30]

Justification problems of corrective justice

§6. Based on the aforementioned arguments, corrective justice adequately justifies a compensation process when rights are violated. Accordingly, the existence of rights and the need for liability as a way to protect those rights, are the key pillars upon which corrective justice is constructed as the explanation of member state liability. Following our plan, we will review driving forces more critically.

§7. The problem of the creation of rights by the European legal order is a familiar difficulty in the debate around liability. In fact, even Lee recognises that the important part of the problems derived from this creation since "the Court of Justice's insistence that Community law is about 'individual rights' reflect, in large part, the Court's commitment to the underlying goals of Community law". "However" – continues Lee – "it also reflects the rhetorical value of rights".[31]

The objections appear at the very moment when this problem was confronted. In fact, it is common to say that rights are created by the European legal order because EU rules have direct effect.[32] But when we approximate to the notion of direct effect it is asserted that direct effect is precisely "the capacity of a Community law provision to create rights for individuals".[33] Thus, creation of rights and direct effect mutually depend on one another to explain their nature. On such a weak basis, this idea of producing rights in people's patrimony represent an old problem in the European environment that has been strongly discussed mainly through the clarification of what types of rights the European rules could produce.[34] In this line, some have used the so called Hohfeldian analytical

[30] "That is why one can even say that the modern theory of liability in Europe – which is largely based on the notion of corrective justice – has been shaped to a greater or less extent by public lawyers. So, if we apply the corrective justice approach to member state liability we are not transposing a private law solution. We are applying a solution whose origins are 'public' and that is very coherent with societies organized according to the rule of law". L. Medina, "The theoretical Basis of member state liability for infringement of Community law", in R. Letelier and A. J. Menéndez (eds) *The Sinews of Peace. Democratising the Political Economy of the European Union*, ARENA Report No. 5, 2009, at p. 327. Oslo: ARENA.

[31] I. B. Lee, *supra*, note 28, at p. 20.

[32] See case 13/68 *SpA Salgoil v. Italian Ministry of Foreign Trade*, Rome [1968] ECR 453.

[33] This is a concept in a narrow sense, S. Prechal, "Member State Liability and Direct Effect: What's the Difference After All?" (2006) 17(2) *European Business Law Review*, at p. 304. In the same vein, see R. Barents, "Some remarks on the – Horizontal – Effect of Directives, in D. O'Keeffe and H. G. Schermers (eds) *Essays in European Law and Integration*, Devender: Kluwer, 1982, p. 98.

[34] See S. Prechal, *Directives in EC Law*, Oxford: Oxford University Press, 2005, p. 99ff, 106.

framework to understand what the court intends when it appeals to rights.[35] Others, on the contrary, have criticised this approach.[36] This conflict, however, is not only present in European Law but is part of a general discussion of the concept of subjective rights inside public law.[37]

The ECJ has constantly omitted to clarify how the language of rights is used in its judgments. In some cases it avoids the topic considering it an evident matter, while in others it relies on the preamble and the intention lay down therein. In other cases, it only states that the creation of rights for the purpose of establishing state liability depends on the specific and relevant position of the parties.[38] This uncertainty has accompanied the creation of rights since *van Gend en Loos*, probably the birth of the practice of "discovering" rights, even when, as a few have claimed, this creation seems to have been in some sense accidental.[39] Thus, in some cases directives clearly produce rights,[40] whereas in others rights cannot be deduced so easily,[41] and in a third group of situations rights are given but under certain specific and restrictive conditions.[42]

In this scenario of ambiguities the configuration of the order that needs to be recomposed arises and grows. Thus, the main premise of corrective justice is constructed by the ECJ in a week and haphazard way. But, despite this shortcoming, the explanation of corrective justice as the foundation of state liability persists on appealing to the rhetorical argument that only in this way citizens are treated with dignity and not as objects of social relations. As put by Jeffries, when clearing up the foundation of state liability: "Rights recognized under the Constitution state conditions under which the actions of the government can be united with the freedom of the individual".[43] However, when the construction itself of those rights is carried out without a recognisable method or parameter, and behind the back of the democratic forces, the dignity of those citizens becomes rhetorical and vacuous.
This formal objection, of course, is not the most relevant protest in this matter. The judicial creation of rights and its implication in the democratic game is a problem in itself,

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[35] See C. Hilson and T. A. Downes, 'Making sense of Rights: Community Rights in E.C. Law' (1999) 24(2) *European Law Review*, p. 121. To this Hohfeldian approach see A. Harel, "Theory of Rights" in M. Golding and A. Edmundson (eds) *The Blackwell Guide to the Philosophy of Law and Legal Theory*, Oxford: Blackwell, 2005, p. 192ff.

[36] See T. Eilmansberger, "The Relationship between Rights and Remedies in EC law: In search of the Missing Link", (2004) 41(5) *Common Market Law Review*, p. 1199.

[37] See E. Schulev-Steindl, *Subjektive Rechte. Eine rechtstheoretische und dogmatische Analyse am Beispiel des Verwaltungsrechts*, Wien: Springer, 2008.

[38] S. Prechal, *supra*, note 33, at p. 304.

[39] T. Eilmansberger, "The Relationship between Rights and Remedies in EC Law: In search of the Missing Link", (2004) 41(5) *Common Market Law Review*, at p. 1202ff.

[40] See C-190/94 *Erich Dillenkofer, Christian Erdmann, Hans-Jürgen Schulte, Anke Heuer, Werner, Ursula and Trosten Knor v. Bundesrepublik Deutschland* [1996] ECR I-4845.

[41] See C-222/02 *Peter Paul* [2004] ECR 9425.

[42] See C-127/95 *Norbrook* [1998] ECR 1531.

[43] "Respecting the rights of individuals requires limitations on the use of government power, and these are captured in the familiar prohibitions of constitutional law". J. Jeffries, "Compensation for Constitutional Torts: Reflection on the Significance of Fault" (1990) 88 *Michigan Law Review*, at p. 94.

it has its own debate and its treatment exceeds this paper.[44] Instead, we will focus only on the formal objection related to the main arguments of corrective justice rationale.

§8. On the other hand, even if there are problems in the construction of the right-based argument, the truth is that there are more objections against the idea of liability being a necessary mechanism for correcting rights when conferred and then breached. Firstly, liability is not the best way to enforce rights above all in constitutional wrongs; and secondly the premise that liability must exist in a right-based structure is not a correct one. The first objection lies in the problem of justification of state liability as a social instrument, and the second one refers to the straightforward problem of the necessity of liability.

§9. When we think about why we need a liability system or, in other words, what is its justification, the deterrence theory is the most salient answer. According to this theory, the aim of liability systems is to deter some actions or omissions socially perceived as wrongs.[45] This is so whether deterrence is combined with corrective justice in a mixed formula for explaining liability, as Schwartz does,[46] or being used only as an effect of the operation of corrective justice, as Weinrib proposes.[47] And the justification of liability in deterrence terms applies even when the justice's reasoning is right-based, since the later also aims at deterring some action or omission by generating incentives to do something and to omit other conducts.[48]

Concretising this argument to the European liability system, the explanation based on the deterrence theory would say that member states could be tempted to privilege their nationals through policies contrary to the EU Law. Therefore, and as only measures beneficial for the Union as a whole must be undertaken, the breaches of European rules produces, on the one hand, an illegal enrichment in the offender country, and on the other hand, damages in the rest of the EU member states.[49] Liability acts in this way as a technique of internalising these "not assumed costs" preserving the initial equilibrium among member states.[50] Moreover, this compulsory internalisation would not only produce the re-equilibrium but would also generate a deterrence effect on public authorities, since they will lack of incentives to breach community law in the future. Clearly, this core argument is efficient-based. It rests on the premise that "as a private

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[44] See J. Waldron, *The Dignity of Legislation*, Cambridge: Cambridge University Press, 1999: see also J. Waldron, *Law and Disagreement*, Oxford: Clarendon, 1999.

[45] Deterrence effect is one of the most important effects and justification of liability systems. See, S. Perry, "Tort Law", in D. Patterson (ed.), *A Companion to Philosophy of Law and Legal Theory*, Oxford: Blackwell, 1996, p. 61ff. In the same vein, see the traditional view applied to Government in E. Posner, *Economic Analysis of Law*, 5 ed., New York, NY: Aspen, 1998, p. 64; and M. Heller and J. Krier, "Deterrence and Distribution in the Law of Takings" (1999) 112 *Harvard Law Review*, at p. 997.

[46] G. Schwartz, "Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice" (1997) 75 *Texas Law Review*, at p. 1801ff.

[47] E. Weinrib, "Deterrence and Corrective Justice" (2002) 50 *UCLA Law Review*, at p. 621ff.

[48] In any case, incentives are part of a general conception of the law serving as reason for actions and to conduct human behavior. See C. Redondo, *Reasons for actions and the Law*, Dordrecht: Kluwer, 1999, at p. 97ff.

[49] This is the reasoning of Lee. See I. B. Lee, *supra*, note 28, at p. 37.

[50] See S. Perry, *supra*, note 45, p. 59ff.

actor will not weigh externalised public cost as private costs, government will not take full account of the costs of takings unless it is forced to pay money from the treasury".[51] Compensation, thus, would be a way to compel the Government to plan its actions considering their monetary consequences and to take the most efficient route.

However, if this process of internalisation/deterrence can be clear in private relations, it is not simple to extend this logic when the main actor is a public office or a Parliament. Indeed, if the justification of liability is deterrence, it should be presupposed that the imposition of monetary compensation is a sufficient incentive to deter these actions that can be considered contrary to rights. But the latter premise can be put in doubt since governmental actors respond mainly to political, not market, incentives. Indeed, as several researches put it, the calculus that government agencies must implement in this matter has complexities that private enterprises do not have. In fact, when one of the elements that public agencies should consider is social benefits, the way to convert these to a financial unity for comparing them with possible compensations for torts is a very intricate task[52] and, as Levinson states, "we should not assume that government will internalise social costs just because it is forced to make a budgetary outlay".[53] In addition, we do not have merely a problem of economic valuation of social benefits. When one of the actors responds not only to economic incentives but to political ones, the relation of correlativity becomes impossible to be stated just in economic terms. Political preferences differ from market preferences because they reflect not only *homo economicus* options but they include altruist choices and individual and collective aspirations.[54]

Furthermore, deterrence effect is based on the possible motivating force of compensation for the wrongdoer to avoid damages. In a personal relation, this power can be strongly perceived since the parties are relatively similar in patrimonies and the compensation could represent an amount wanted to be avoided. But when the wealth of one of the parties is the public budget, the incidence of the compensation's decision in state behaviour could be insignificant and the force of compensation likely to be dissolved in the bureaucratic imprint of public decision-making.

On the other hand, as the early EU Law has taught us, compensation is not the only way to enforce rights. In fact, the so-called "public enforcement" – i.e. the use of governmental agents to detect and to sanction violators of legal rules[55] – stated in article 226 EEC[56], is a

[51] See D. Levinson, *supra,* note 1, at p. 349.

[52] *Ibidem.*, p. 350.

[53] "The only way to predict the effects of constitutional cost remedies is to convert the financial costs they impose into political costs. This may be possible, but only by constructing models of government decisionmaking that are capable of exchanging economic costs and benefits into political currency". *Ibidem*, at. p. 347.

[54] "Citizen in a democratic polity might act to embody in law not the preferences that they hold as private consumers, but instead what might be described as collective judgments, including aspirations or considered reflections. Measures of this sort are product of deliberative processes on the part of citizens and representatives. In that process, people do not simply determine what the 'want'. The resulting measures cannot be understood as an attempt to aggregate or trade off private preferences". C. Sunstein, *Free Markets and Social Justice*, Oxford: Oxford University Press, 1997, p. 21ff.

[55] A. M. Polinsky and S. Shavell, "The Theory of Public Enforcement" in A. M. Polinsky and S. Shavell (eds) *Handbook of Law and Economics*, Volume 1, Amsterdam: North Holland, 2007, at p. 405.

strong instrument to protect a vast number of rights, in the same way, for instance, as criminal or environmental responsibility protects several and defined public goods.[57]

The already mentioned objections to the efficiency of liability systems can justify that in the case of wrongs committed by states, the institutional or public enforcement can be far more efficient in the task of evaluating and deterring the breaches to EU Law.[58] In the same vein, political incentives or civil service mechanisms can be better in the deterrence task.[59]

§10. A second problem of corrective justice rationale is that it is far from clear that each assignation of rights must include a liability system as a way to enforce them. Indeed it is possible to affirm that when liability takes place there are rights involved, but rights do not necessarily need a liability system to justify its coercible character. However, as referred to above, it is very common that the argument *ubi jus ibi remedium* pretends to be the base of the right/remedy relation. But, as Eilmansberger has pointed out, it is very probable that in this scheme remedies are the ones that absorb the breaches of rights and, at the end, they would be the real creators of those rights.[60] The latter can be unproblematic in national legal orders because the legitimacy of enforcement mechanisms can be reduced at the end of the day to the will of the national Parliaments. Nevertheless, concerning EU the question is more complex. As the same author holds: "given the basic division of competences in the field of individual rights protection, according to which community rights are to be enforced by national remedies, the question as to whether rights determine remedies or remedies determine rights obtains particular importance; it appears to translate into the question of which legal order assumes the commanding position, and thus ultimately decides the fate of individual Community rights".[61]

Finally, corrective justice argument presents difficulties when the compensation needs concurrently other element different to the mere breach of the law, which is, in *Francovich* liability, the requirement of fault. Here, to the ambiguity of the process of creation of rights, the problems involved in the definition of fault need to be added. In our case and since *Brasserie*, the breach must be sufficiently serious and it is so when the member state

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[56] This rule, which continues to have the original wording, provides that "if the Commission considers that a Member State has failed to fulfil an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations [...] If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice". In equal terms, article 170 (now 227) established the same action, but entitled member states to make use of it.

[57] For that reason, it is unsupported the argument that the Treaty contained no provisions concerning the consequences of breaches of Community Law by member states and that the liability rule was only conceived through a method of Treaty interpretation pursuant to article 164 of the Treaty. P. Craig "Once Upon a Time in the West: Direct Effect and the Federalization of EEC law", (1992) 12(4) *Oxford Journal of Legal Studies*, at p. 78.

[58] See in this line B. van Roosebeke, *State liability for breaches of European Law: An economic analysis*, Wiesbaden: Deutscher Universitäts-Verlag, 2006, at p. 203ff.

[59] J. Jeffries "In Praise of the Eleventh Amendment and Section 1983", (1998) 84 *Virginia Law Review*, p. 72ff.

[60] T. Eilmansberger, *supra*, note 39, at. p. 1236.

[61] T. Eilmansberger, *supra*, note 39, at. p. 1237.

or the Community institution concerned "manifestly and gravely disregarded the limits on its discretion". As it is possible to see, this requirement has been linked with the extension of the discretionary powers of the state or the Community. In this respect, the ECJ argued in the *Brasserie* that the factors which the competent court may take into consideration for analysing the act of the state and the EU rule "include the clarity and precision of the rule breached, the measure of discretion left by that rule to the national or Community authorities, whether the infringement and the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable, the fact that the position taken by a Community institution may have contributed towards the omission, and the adoption or retention of national measures or practices contrary to Community law".

This requirement of sufficiently serious breach and specially the way that it has been understood by the court, reveals that the current system of liability held by the ECJ is based on an idea of fault, and if this is true, the justification of liability in corrective justice continues to be weak. Indeed, when it is not clear that some breaches lead to a compensatory obligation because they need a subjective element in addition, the most relevant decision is not the corrective one settled in the decision that gives damages. Instead, the crucial decisions are, on the one hand, the determination that breaches of EU law by member states will be repaired through a compensation, and, on the other hand, what kind of fault and, consequently, what kind of breach to the duty of care causes liability. These two answers are clearly not governed by corrective justice since there is no previous interrelation between parties that permits us to find an answer and because the answers require strong distributive components.[62]

Constructing orders with distributive justice criteria

§11. Corrective justice could function well if the order that aims to repair could be conceived with some degree of clarity. On the contrary, when it is a fact that the definition of that order depends on a wide and complex range of standards of negligence fixed by the courts, or on the determination of what kind of interests or values will be catalogued as rights, or on the application of a specific method to enforce those rights, it is a fiction to continue to affirm that there is a previous order that must be recomposed and that liability is only an operational way to correct the disorder. On that regard, it is a biased viewpoint to explain the foundation of member states liability only by corrective justice mechanism.

But it is not a semantic question to understand that the basis of state liability is corrective justice or a different criterion. Supporting the corrective justice thesis implies several judgements that are worthy of attention. The most common one, as we have mentioned above, is that corrective justice embodies a "juridical" answer to the problems of wrongs that constitutes an iron-clad argument against the political discourse. According to this line of reasoning, the existence of a relation between two parties based on the idea of

[62] In the same vein, see P. Cane "Corrective Justice and Correlativity in Private Law" (1996) 16(3) *Oxford Journal of Legal Studies*, at p. 481.

reciprocity leads to understanding that the answer promoted by corrective justice is a mere application of that reciprocity. This interpretation pretends to install inside the legal discourse a neutral reply that carries a scientific and uncontaminated judgement about rights and liberties.[63]

However, as we have seen, decisions concerning liability as well as others related to judicial review are precisely the way to build that order, liability acting as the driving force of the construction of European rights. When we observe that judicial decisions on liability can be understood not only as a way to enforce democratic agreements but to construct contents that have a functioning similar to those deals, this process of construction takes the main place in the discussion about the procedure of public decision-making. Moreover, it can be held that rights creation will be a factor that impacts democratic legitimacy of public decision-making inside the EU. Indeed, the main conflicts between Constitutional courts and the ECJ reveal a quite paradoxical situation. Both courts expect to protect corrective justice because both base their jurisdiction on being the "guardians" of rights. But if we look at this scenario with some caution, this fight of rights is a battle between orders created especially for the fight. The main issue here is not the reconstitution of rights but the specific order of those rights generated by each court.

Having this panorama in mind, it is not anymore possible to deny the strong presence of distributive justice criteria in the construction of the main elements that intervene in a relation of compensation by breaches of EU Law. By this idea of distributive criteria I understand the set of elements concerned with "problems of *distributing* resources, opportunities, profits and advantages, roles and offices, responsibilities, taxes and burdens" among the members of a given community.[64]

The distributive criteria that build the order can be seen with special clearness in two topics: in the incidence of fault in the granting of compensation and in the consequences of the decision of liability.

§12. It is not sufficient to have an act or omission that contravenes a European rule that grants rights to citizens. As argued previously, the contravention must be qualified by the court as a "sufficiently serious breach", a qualification which invokes a clear approach to the idea of fault.[65] To give damages, it is necessary that the state has violated EU Law in a clear and serious way. In this environment, corrective justice justification has problems when fault occures inside the relation of compensation. Indeed, in this relation there is not only an approximation to some distortion in an order allegedly established, but an interpretation of some action or omission as good or bad, correct or incorrect. To say that the breach must be sufficiently serious means that it should have some magnitude that entails a contravention to interests and values in a strong and not

[63] See E. Weinrib, *The Idea of Private Law*, Cambridge: Harvard University Press, 1995, p. 210-4.

[64] J. Finnis, *Natural Law and Natural Rights*, Oxford: Clarendon, 1980, at p. 166.

[65] C-46/93 and C-48/93 *Brasserie du Pêcheur SA v. Bundesrepublik Deutschland* and *The Queen v. Secretary of State for Transport, ex parte: Factortame Ltd and others* [1996] ECR I-1029); see also P. Craig and G. de Búrca, *EU Law*, 3rd edition, Oxford: Oxford University Press, 2003, at p. 266.

superficial way. In this vein, the Aristotelian view of corrective justice according to which there is "no difference whether it is a good person who has defrauded a bad or a bad person a good, nor whether it is a good or bad person that has committed adultery"[66], has no application here. On the contrary, in the case of a sufficiently serious breach, the court has to analyse several and diffuse elements of member states actions or omissions, and has to compare them to decide if they fix with an also ambiguous idea of fault.

Thus, the process of adjusting the state conduct to this requirement of seriousness is closely related with the establishment of some duty of care that the member state is obliged to fulfil. Moreover, if this element is related with the administration of the discretionary powers of the state, it implies at the end of the day some construction of a duty of care that the state must accomplish in its task of administration. Two interesting applications of distributive criteria can be developed from this line of reasoning.

First of all, the fixation of the duty of care, and through it, the determination of the rights protected, has been understood inside the interpretativistic dogma by which the work of the judge is reduced to some exercise of correcting breaches of rules, where both breaches and rules are configured after norms are filled with contents. This explanation is understandable. Judges need to appeal to rules when they give reasons for supporting their decisions, since the major part of their legitimacy derives from the assumption that they merely apply or execute rules. This is why nowadays attempts to justify judicial decisions on sole justice reasons are not generally accepted, at least in continental countries. And this is the reason behind the fact that courts make use of interpretativistic tools for solving cases. Accordingly, case decisions appear as a matter of discovering the response previously given by rules. This "discovering paradigm" or interpretativistic dogma forces the adoption of a specific perspective in the task of solving cases. In fact, the use of a mechanism to evaluate the consequences of judgments as public decisions, for example, is a difficult possibility in this scenario because public interests in game are diffuse and the interpretation is based only on the concrete rules of the legal order and not on wider matters that impact in public welfare affairs. In simple terms, the concreteness of the case solution and the application of rules displace the abstractedness of communitarian interests. But only the basis of a certain institution, its *raison d'être*, is capable of offering answers to concrete problems. And in this way, the mere application of a corrective justice model built specially for private relations fails. The Dicey paradigm of the state as a normal citizen, i.e. devoid of privileges, has clearly influenced this way of thinking. But, if we believe that there are powerful reasons to defend both the "speciality" of state liability and its regulation by a specific law called Administrative Law (see *arrêt Blanco*), we must start by assuming that the understanding of this matter as a two part interrelation produces a lack of a complete theory capable of including all the interests, values and elements that interact within public compensations.

Secondly, if we assume that the construction of a duty of care is not only a question of interpretation of some wording, the execution of this process of construction entails the application of distributive justice criteria. In fact, tort liability could be analysed from a

[66] The law of corrective justice, according to Aristotle, "looks only to the difference made by the injury, and treats the parties as equals, if one is committing injustice, and the other suffering it – that is, if one has harmed, and the other been harmed", Aristotle, *Nicomachean Ethics*, 1132a.

double perspective. From the standpoint of the defendant, the design of the liability system entails the establishment of a burden. From the claimant's perspective, on the other hand, it is a resource and benefit.[67] Thus, when courts establish the degree of fault, or in other terms, the kind of breach that causes liability, it defines the measure of the burden and the pattern of dimension of those resources and benefits. In this regard, corrective justice acts only as a formal criterion because it supposes that the judge chooses among clear answers provided by the legal system. But when the role of judges cannot be perceived as mere executors of rules or when we assume their role in constructing or creating answers not given straightforward by rules, there is no formal pattern with which to solve cases. In these cases, substantive criteria are needed and these are precisely provided by criteria of distributive justice. Thus, those answers always entail a distribution of opportunities, advantages, taxes and burdens[68] and when one of the parties in the relation is the state, this distribution always takes a form of a judicial allocation of public resources and public duties.

The effects of this change in the understanding of liability produce, according to Cane, two main challenges. On the one hand the necessity "to pay much more explicit attention to theories of distributive justice as they apply to legal liabilities and the interest they protect". On the other, it obliges to delineate in a better way the "roles of the courts and the other branches of government in expressing distributive judgment through rule-making"[69]. These judgments generated in the area of private law are even more suitable when applied to public matters, especially in the areas of competence of Community law where judges nowadays have assumed a protagonist role in generating public responses without taking much attention in their legitimacy to do so.

§13. The use of criteria of distributive justice can hardly be perceived when examining the economic consequences of liability judgments in public budgets. Obviously, each monetary condemnation always generates a diminishing on public resources. However, both the jurisprudential generation of rights and the non-legal establishing of burdens of duties also involve an imposition of charges on the state budget. This carries the problem, as noted above, that the process of internalisation of these charges as disincentives by the state does not always provoke a reaction that enhances the efficiency of their own resources internalising the message implied in those compensations.

On the other hand, both the process of creation of rights and the generation of burdens of duties pursue the optimisation of some values or interests such as primacy of Community law itself, elimination of trade barriers, equalisation of conditions of welfare, establishment of a common status of European citizenship, among others, all of these conceived as relevant by the ECJ. However, even when those interests could be conflicting, the political process does not always agree with their installation. Indeed,

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[67] P. Cane, "Distributive Justice and Tort Law" (2001) *New Zealand Law Review*, at p. 404.

[68] See J.J. Fedtke "State Liability in Times of Budgetary Crisis", in H. Koziol and B. C. Steininger (eds), *European Tort Law 2005,* Wien: Springer, 2006, at p. 51ff.

[69] There are two ways to deal with the last consequence, according to Cane: "Either courts must be barred (or must disqualify themselves), as a matter of jurisdiction, from dealing with cases that raise distributive issues that are thought more appropriately dealt with by another branch of government, or steps must be taken to make good the 'democratic deficit' under which courts labour", P. Cane, *supra*, note 67, at p. 420.

most of the time those values imply some specific political option that wants to triumph in the debate of the ideas without entering the arena of discussion and incorporating deceivingly this political choice in the legal framework.[70]

To conclude

§14. The argument of corrective justice fulfils a relevant role in the justification of member state liability. It serves above all for validating the judicial responses that the ECJ gives on this topic pretending to provide a *blindage* to the court in the method applied in solving these cases. As we have seen above, this method hides behind a very formal cuirasse given by corrective justice rationale, the substantial discussions which remain in shadow. What are the contents and the legitimacy of the agreements that member states have reached in this complex process of integration? What are the values or interests that Europe wants to transform in rights and what are the mechanisms for reinforcing those rights? All of these questions require strong valuations that appeal to distributive justice elements. The incorporation of these political choices into judicial reasoning could be complex and controversial, but as it is a fact in the current way to decide public matters, the analysis and transparency of them is an essential requirement in the process of reconstituting democracy in Europe.

[70] The judicial preference for some values against others, the alteration of democratic legitimacy of the ECJ and the distributive consequences of its decisions can be seen in other types of cases such as *Martinez Sala* and *Bambaust*. See A. J. Menéndez, "European Citizenship after Martínez Sala and Baumbast: Has European Law become more Human but less Social?", ARENA Working Paper No. 11, 2009, Oslo: ARENA. Available at: <http://www.arena.uio.no/publications/working-papers2009/papers/WP11_09_Online.pdf>.

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