

CHAPTER 9

IS THERE A PLACE FOR PRIVATE LAW PRINCIPLES IN COMMUNITY LAW?

by

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The purpose of this contribution is to invite those who read it to look with fresh eyes at "the general principles common to the laws of the Member States" referred to in Article 215. Up to now, the Court has been content to state principles of its own which may be sufficient for decision of the cases in hand but are not wholly free from verbal infelicity and have not escaped criticism on this and other grounds. Insofar as there has been any search for appropriate principles in the laws of Member States, it seems to have been restricted to the corpus of public or administrative law. It has, moreover, been assumed that there must be a single set of principles which is capable of being applied to all the cases that may arise under Articles 178 and 215. It is suggested with some diffidence that this approach might now be reconsidered.

Dr. Bebr states¹ that the original proposal was to include Article 40 of the ECSC Treaty in the EEC Treaty, but because the ECSC Treaty was in French, some delegations feared this would imply the incorporation of French law. Therefore, as he put it at the colloquium, "Article 215 is a diplomatic formula concealing a disagreement". This adds point to Advocate General Roemer's observation in *Plaumann* that, in its consideration of cases under Article 40 ECSC, "the Court has, rightly I think, avoided a close reliance on French law".² The Advocate General was nonetheless prepared to state categorically that "reference to the national law of a Member State ... can *only* mean a reference to the national law on administrative liability and not to the general law on compensation".³

To a British lawyer brought up on Dicey's view of the place (or non-place) of *droit administratif* in the common law system, the proposition that there can be a national law on administrative liability without reference to the general law on compensation is largely, if not wholly, meaningless. Dicey contended that the United Kingdom had no need of *droit administratif* precisely because the acts and omissions of the administrator are, and ought to be, judged by the same courts and according to the same criteria as the acts of the citizen. The common law may now be moving towards acceptance of a more formalised distinction between public and private law, but the judgments of the English courts in the *French turkeys* case⁴ show that the private law principles of civil liability can still be (and regularly are) applied to the acts of the British administration.⁵

It is not suggested that other Member States or the Community should now adopt the common law approach to administrative liability. The point is rather that lawyers bred in the traditions of at least one Member State (and perhaps more) would find it quite natural to search in the corpus of private law for principles to govern the liability of the Community. In the original Community of Six there may have been justifiable fears that one particular national system would come to occupy a dominant position. In the Community of Twelve we should treat the laws of the Member States, embracing so many traditions, as a treasure house of solutions to difficult problems.

Two examples can be given to illustrate the point. The first concerns the questions raised by most of the cases under Article 178 and some of the additional questions raised by Professor Schermers in his opening speech. To the present writer, who came to Community law from the practice of civil advocacy, these questions are old friends. Most of them have been discussed for centuries in the jurisprudence and doctrine of private law in relation to the principle of liability known to civil lawyers as Aquilian liability:⁶ What kind of loss merits compensation? Must there be positive patrimonial loss (*damnum emergens*) or is it sufficient that there has been a loss of expectation of gain (*lucrum cessans*)? Must the loss go beyond what is to be expected in the ordinary course of human affairs - must it be "uncovenanted"? Must the act complained of be unlawful in itself, or will there be liability where the act, even if lawful in itself, is foreseeably likely to cause loss to an identifiable individual or group of individuals? Can there be liability for an omission as well as for a positive act? Must the act or omission be "blameworthy" (*culpa*) and, if so, must the degree of blameworthiness be "serious" (*culpa lata* or *crassa negligentia*)? Must the loss be the direct causal result of the act or omission in question, or will an indirect causal relationship suffice? Does fault on the part of the claimant exclude liability or merely go to reduce the amount of compensation? How should liability be apportioned between joint wrongdoers - *pro rata* in relation to their number or *pro rata* in relation to their share of the blame? Are joint wrongdoers liable *singuli in solidum* and, if so, should the one who has paid be entitled to claim a contribution or indemnity from the others?

These are questions which arise day and daily in the civil courts throughout Europe, and the Latin words used to encapsulate the principle of Aquilian liability - *damnum iniuria datum* or *damnum culpa datum* focus many of the answers. *Damnum* draws attention to the idea of uncovenanted loss - loss for which equity⁷ demands compensation as opposed to loss which must be regarded as an ordinary risk of commercial life. *Iniuria* and *culpa* import the idea that equity calls for compensation because the act complained of was "un-right" (*unrecht*) or blameworthy, and it will not escape blame simply because, technically speaking, it was not unlawful. *Datum* makes it clear that causal connection is an essential element in liability.

Three Latin words do not solve all the problems raised by Articles 178 and 215. But analysis of the underlying concepts in the context of private law has already been carried to a high degree of sophistication and refine-

ment because the increasing sophistication of life is always creating new problems in the field of civil liability and the courts of every Member State have to resolve them. Not every Member State will have approached or resolved the problems in the same way. This can only make a study of national law all the more fruitful as a source of possible solutions for Community law.

The second illustration concerns the question raised, but not decided, in *Biovilac*⁸ - whether the German doctrine of the *Sonderopfer* or the French doctrine of *égalité devant les charges publiques* form part of Community law. The clue to a Community approach to these doctrines is suggested by Mr. Bronkhorst's explanation of the origins of the Dutch law on liability for legal acts.⁹ He refers to a decision of the Court of Friesland in 1611 ordering the payment of compensation for a legal administrative act on the basis of the *Lex Rhodia de Iactu*. The *Lex Rhodia* is known to mercantile lawyers as the source of the law of general average: "If goods are thrown overboard in order to lighten the ship, the loss sustained for the general good should be repaired by a general contribution".¹⁰ Stair, the father of Scots law, who studied in Leiden at the end of the seventeenth century, treated the *Lex Rhodia* as an aspect of the quasi-contractual obligation of recompense¹¹ - that is to say, as an application of the general principle expressed in the maxim *nemo debet locupletari ex aliena iactura*.

It is clear that neither the French doctrine of *égalité devant les charges publiques* nor the German doctrine of the *Sonderopfer* is *as such* "common to the laws of the Member States". On the other hand, the equitable principle *nemo debet locupletari* does find a place, in one form or another, in all developed legal systems including both the common law systems and the civil law systems. The formulation and the application of the principle may not be the same but, as Advocate General Roemer also remarked: "In comparative law it is generally found that even closely related legal orders frequently go their separate ways in their legal mechanisms for solving a problem, yet on the whole the results are the same".¹²

We can predict that the Court of Justice is unlikely to adopt and apply specific doctrines of French or German administrative law since there is no consensus about those doctrines *in that form*. There may, however, be a case brought before the Court where equity will demand recompense for an individual or group of individuals who have been required to make an inordinate sacrifice for the general benefit of the Community. Would it not be reasonable, in such circumstances, for the Court to return to the *Lex Rhodia* and find a basis for asserting the liability of the Community in the principle of equity, common to the Member States, which it reflects?

If the general tenor of the argument is accepted so far, it should be noted that the principle of Aquilian liability and the equitable principle *nemo debet locupletari* belong to quite different chapters of the law. Indeed, when one uses the categories of private law as a basis of analysis, it becomes apparent that the Court's jurisdiction under Articles 178 and 215 may be very wide indeed. Shortly put, if the first paragraph of Article 215 deals with contractual liability, the second paragraph is capable of embracing every other form of liability - everything that a civil lawyer would

categorise as delict, quasi-delict or quasi-contract and in addition (as Professor Neville Brown pointed out at the Colloquium) liability arising from the concept of trust or fiduciary obligation.

If nothing else, it is hoped that these reflections add point to the comparison, drawn in 1975 by the President of the Court, between the non-contractual liability of the Community and an early nineteenth century map of Africa: "The coast is shown; we see the deltas of the great rivers; but where they lead and where they have their sources are as yet uncharted".¹³

NOTES

- * Salvesen Professor of European Institutions and Director of the Centre of European Governmental Studies at the University of Edinburgh.
1. See in this book at p. 50.
 2. Case 25/62, *Plaumann v. Commission*, [1963] E.C.R. 95 at 117.
 3. *Ibid.* at 116, emphasis added.
 4. *Bourgoin v. M.A.F.F.*, [1986] Q.B. 716; (1985) 1 C.M.L.R. 528; (1986) 1 C.M.L.R. 267; (1987) 1 C.M.L.R. 169. See the contribution of Barav in this book, at pp. 161 *et seq.*
 5. The Scottish legal profession would have been deprived, over many years, of a lucrative source of income if the municipalities of Glasgow and Edinburgh had not been civilly liable for injury caused by tripping on an uneven pavement! Professor Schermers states that this would be impossible in mainland Europe (see Introduction, at p. xii).
 6. The same or similar principles appears in Arts. 1382 and 1383 of the French Civil Code, Art. 823 of the BGB and, under Scottish influence, in the modern English law of negligence.
 7. "Equity" is used here and elsewhere in this paper in its ordinary sense rather than the technical English sense.
 8. Case 59/83, *Biovilac v. E.E.C.*, [1984] E.C.R., 4057.
 9. At p. 17 of this book.
 10. Paulus *ad D.14.2.1.*
 11. Stair, *Institutions of the Law of Scotland*, I.viii.8; cf. Erskine, *Institute of the Law of Scotland*, III.i.11 and III.iii.55.
 12. *Plaumann*, *supra* note 2, at 116-7.
 13. Lord Mackenzie Stuart, "The Non-contractual Liability of the EEC", 12 CML Rev. (1975), 493 at 512.