Robert Schuman Centre

"Francovich" and the Problem of the Disobedient State

CAROL HARLOW

RSC No. 96/62

EUI WORKING PAPERS

EUROPEAN UNIVERSITY INSTITUTE

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EUROPEAN UNIVERSITY INSTITUTE, FLORENCE

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BADIA FIESOLANA, SAN DOMENICO (FI)

Printed in Italy in December 1996
European University Institute
Badia Fiesolana
I – 50016 San Domenico (FI)
Italy

Abstract: *

This paper is an attempt to evaluate the rapidly expanding line of jurisprudence which derives from *Francovich and Bonifaci v Italian Republic* (Cases 6, 9/90). The paper argues that there is a serious mismatch between the priorities of the EC and national legal orders and that the impact of the superior on national legal systems may be both unexpected and detrimental. Section I argues: that the theoretical underpinnings for state liability in EC law are in fact weak and raise objections of principle; that 'infection' of national liability systems by the new principle is both inevitable and problematic; and that damage may be caused to the EC liability system through 'cross-infection'. Section II argues that in the modern state, balance between the Rule of Law doctrine and principles of political and democratic supremacy are both hard to attain and inevitably the subject of controversy. This problem is heightened within the Community by the existence of competing legislative systems, lack of clarity over sovereignty and worries over democratic deficit. The contribution of Francovich to the resolution of these problems is largely negative.

* Professor of Public Law at the London School of Economics. This article was made possible through the support of Professor Yves Mény and the Robert Schumann Centre of the European University Institute. The author also wishes to thank Professor Sabino Cassese and Dr. della Cananea for arranging a seminar in Rome where the ideas could be discussed, as well as Armin von Bogdandy, Peter Cane, Luis Diez Picazo, Trevor Hartley and Richard Rawlings for correcting errors and stimulating rethinking on many points.

I Introduction

This paper is an attempt to evaluate the rapidly expanding line of jurisprudence deriving from *Francovich and Bonifaci v Italian Republic*[1], a case which has been the subject of so much comment as to require apology for any more[2]. Its starting-point is an observation by Dehousse[3] concerning the interlock between the national and EC legal orders. Dehousse contends that the two systems not only confront problems from a different angle but that their ultimate objectives also differ. In these circumstances the impact of the superior legal order on national legal systems may be both unexpected and detrimental; in short, a mismatch results. Dehousse is studiously neutral as to *quality*; he does not suggest at any point that the rules or objectives of one system are 'wrong' and of the other 'right'. Clearly, however, if this were to be the case, any mismatch would be more damaging.

This paper also considers a second discordance, familiar this time within national constitutions. In the modern state, the balance between the Rule of Law doctrine and principles of political and democratic supremacy may be hard to attain and is a subject of controversy. This problem is heightened within the Community by the existence of competing legislative systems, lack of clarity over sovereignty and concerns over democratic deficit[4]. All these frictions, I shall argue, are likely to be intensified by the introduction into disputes of the threat of legal liability of component units.

The ECJ operates within a distinctive ideology - using this term strictly in its technical and value-free sense to convey a set of 'taken-for-granted, largely unexamined, common sense, and highly generalized assumptions about the nature of law which inform attitudes to law'[5]. The Community is a liberal economic polity and the EC legal order is necessarily based on a liberal economic philosophy. It reflects the ideologies of property, liberty and the Rule of Law. Less predictably, it is also emerging as a legal order rooted in legal positivism

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1 Joined Cases 6, 9/90 *Francovich and Bonafaci v Italy* [1991] ECR I-5357.

2 Caranta, 'Judicial Protection against Member States: A New Jus Commune Takes Shape', (1995) 32 *CML Rev.* 703 provides a short bibliography at note 24.

3 Dehousse, 'Comparing National and EC Law: The Problem of the Level of Analysis', (1994) 42 *Am. J. of Comp Law* 761, 765-7.

4 See Weiler, 'The Community System: The Dual Character of Supranationalism', (1981) 1 *YEL* 267 and *Idem*, 'The Transformation of Europe', (1991) 100 *Yale LJ* 2403; Weiler, Haltern, Mayer, 'European Democracy and its Critique', (1995) 18 *W. Eur Pol.* 1; Curtin, 'The Constitutional Structure of the Union: A Europe of Bits and Pieces', (1993) 30 *CML Rev.* 17.

5 R. Cotterell, *Law's Community. Legal Theory in Sociological Perspective* (Clarendon, 1995) p 253.

and in a nineteenth-century 'command' model of law[6]. These tendencies have fostered a belief that it is both proper to use EC law to promote and entrench a climate of free enterprise and improper to challenge these supposedly ideologically neutral objectives[7]. The dominant ideology is also self-avowedly integrationist: Judge Mancini has famously talked of integrationism as a 'genetic code transmitted to the court by the founding fathers'[8]. My paper argues that this particular vision of law and of law's purposes not only threatens the EC legal order but can weaken its constitution and political institutions. To express this in rational choice terminology, I shall describe the ECJ as 'selfish' in imposing its doctrine of supranational liability on national systems. Just as national courts are under the Article 5 EC obligation of solidarity to develop the law in such a way as to 'facilitate the achievement of the Community's tasks', so too the ECJ owes a corresponding obligation in respect of the national legal systems which act as its pillars. May puts this more strongly; as guardian of the EC legal order, it is the ECJ's function to act as 'conscious initiator of discussion with national courts, the Member State governments and jurists in general in the search for authority in the law'[9]. In short, a constructive relationship between the Community organs demands dialogue rather than command and understanding rather than sanction.

In Section I of this paper, I shall argue that the theoretical underpinnings for state liability in the Community are in fact weak and raise objections of principle. But although the imprecise concepts and inexplicit language of the judgments merit a critical linguistic analysis, this paper is not an exercise in analytical jurisprudence. Indeed, the account of the cases which follows is just sufficient to enable a reader unfamiliar with them to follow the argument. Justifying a theoretical approach, an American scholar has observed[10] that the fashionable questions of the day are instrumentalist: 'What social value does the rule of liability further in this case? Does it advance a desirable goal, such as compensation, deterrence, risk'distribution, or minimization of accident costs?' This assumption runs counter to the prevailing tenor of EC legal doctrine[11]. Much

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6 Shapiro, 'Comparative Law and Comparative Politics', (1980) 53 *S. Calif. Law Rev.* 461.

7 See von Mestmacker, 'On the Legitimacy of European Law', (1994) 58 *RabelsZ* 617; I. Ward, '(Pre) conceptions in European Law', (1996) 23 *J. of Law and Soc.* 198.

8 Mancini and Keeling, 'Democracy and the European Court of Justice', (1994) 57 *MLR* 175 186. See also Wincott, 'The Role of Law or the Rule of the Court of Justice? An Institutional Account of Judicial Politics in the EC', (1995) 2 *J. of Eur. Pub. Policy* 583, 584.

9 C. May, *The Function of Judicial Decision in European Economic Integration* (Martinus Nijhoff, 1972) p 417. See also Maher, 'National Courts as European Community Courts', (1994) 14 *Legal Studies* 226.

10 Fletcher, 'Fairness and Utility in Tort Theory', (1972) 85 *Harv. LR* 587.

11 See F. Snyder, *New Directions in European Community Law* (Weidenfeld and Nicolson, 1990) p 1; Shaw, 'European Legal Studies in Crisis? Towards a New

of what has been written about *Francovich* already falls clearly within the category of analytic jurisprudence, focusing primarily on the implications of the decision for EC law[12]. Little regard has been paid to the way in which liability systems actually operate, to practical difficulties of implementation or to the impact on national legal systems. The way is open for an instrumentalist approach.

In Section II, I shall argue on the one hand that 'infection' of national liability systems by the new principle is both inevitable and problematic and, on the other, that damage may be caused to the EC liability system through 'cross-infection'. Before *Francovich* it was widely assumed[13] that the extra-contractual liability[14] of Member States was a matter for national law, governed exclusively by national legal systems, and that the charge of the ECJ was solely Community liability. The arrangements were governed by Article 178 EC, which gives competence to the ECJ to decide 'disputes relating to compensation for damage' according to the principles contained in Article 215 EC. The novelty of *Francovich* lay in the fact that this assumption was overturned. It is no part of my argument, however, that the ECJ lacked competence to enter a field previously reserved for national law; like *Van Gend en Loos*, *Francovich* is treated as water under the bridge. Expediency, and not legitimacy, is the target of this critique.

Briefly, because the decision is so well known, *Francovich* concerned the liability of Member States for non-implementation of directives. The case was the aftermath of a failure by Italy to implement EEC Directive 80/97, designed to secure a protected position for workers in the event of their employer's insolvency. This omission had already been the subject of Art. 169 proceedings by the Commission in which Italy had been condemned[15] but, at the date of the

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Dynamic', *EUI Working Paper RSC* No 95/23, also published in (1996) 16 *Oxford J. of Legal Studies* 231.

12 See e.g., Caranta, 'Governmental Liability after Francovich', (1993) 52 *Cambridge LJ* 272; Green and Barav, 'National Damages in the National Courts for Breach of Community Law', (1986) 6 *YEL* 55; Simon, 'Droit communautaire et responsabilité de la puissance publique, Glissements progressifs ou révolution tranquille', (1993) 39 *AJDA* 235; Schockweiler, 'Le régime de la responsabilité du fait d'actes juridiques dans la CE', (1990) 26 *RTDE* 27.

13 Case 13/68 *Salgoil v Italy* [1968] ECR 661; Case 158/80 *Rewe* [1981] ECR 1805; A. Ward, 'Effective Legal Sanctions in EC Law: A Moving Boundary in the Division of Competence', (1995) 1 *ELJ* 205, 206-8. But see Green and Barav, *op cit* n 12, citing C 6/60 *Humblet v Belgium* [1960] ECR 559. See also Case 60/75 *Russo v AIMA* [1976] ELR 45; Case 33/76 *Rewe* [1976] ELR 1989; Case 199/82 *San Giorgio* [1983] ELR 3595. And see Curtin, 'Directives: The Effectiveness of Judicial Protection of Individual Rights', (1990) 27 *CML Rev.* 709, 727-9.

14 In this paper the European term 'extra-contractual liability' and the Anglo-American 'tort law' are treated as roughly equivalent, which, on closer examination and for jurisprudential and analytic purposes, would not necessarily be the case. For reasons of space, the paper cannot cover restitution, which falls outside the term 'tort'.

15 Case 22/87 *Commission v Italy* [1989] ECR 143.

action, remained unimplemented. The applicants, left with arrears of unpaid salary on the insolvency of their respective employers, turned and sued the Italian State for damages. Convinced that no remedy was available in Italian law, two Italian courts seised of the question made an Article 177 reference to the Court of Justice (ECJ). Drawing on the solidarity principle of Article 5 EC, the ECJ returned the answer that, even though this directive had no direct effect, the State could be liable in damages. The preconditions for liability were said to be that:

i) the directive in question must be intended to confer rights on individuals;
ii) the content of the rights must be clearly spelt out in the directive;
iii) there must be a causal link between the failure to implement the directive and the loss suffered.

For several years after *Francovich* there was a golden silence[16]. I shall argue that unusually (since the nature of the judicial process renders it difficult for courts to withdraw from inopportune jurisprudence) an ideal opportunity arose after Maastricht to jettison *Francovich* with all its problems[17]; and that it was unfortunate that the opportunity was rejected. To the contrary, when earlier this year the ECJ finally ruled in a cluster of Article 177 references which had been pending for some time, it chose decisively to affirm the controversial *Francovich* principle.

In *Brasserie du Pecheur*[18], a claim was filed against Germany in respect of speculative loss of profit resulting from a German law on the purity of beer, previously annulled by the ECJ[19]. In *Factortame (No 4)*, the saga of the Spanish fishermen was resumed with a £30 million claim against the United Kingdom for loss of profits allegedly occasioned by the activation of a licensing scheme for fishing vessels previously annulled by the ECJ[20]. In both cases, the loss flowed from invalid national legislation but, in contrast to *Francovich*, the complaint concerned faulty or inadequate implementation rather than total failure to implement. In a variant on these claims, a group of consumers who had suffered loss through the insolvency of travel agencies claimed compensation in the form of lost payments and deposits, on the ground that Germany had failed to

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16 Relevant cases include: Case 91/92 *Faccini Dori v Recreb* [1994] ELR I-3325; Case 334/92 *Wagner Miret* [1993] ECR I-6911 noted Tridimas, 'Horizontal Effects of Directives: a Missed Opportunity', (1994) 19 EL Rev. 621.

17 On which see Craig, '*Francovich*, Remedies and the Scope of Damages Liability', (1993) 109 *Law Quarterly Review* 595; Ross, 'Beyond *Francovich*', (1993) 56 *MLR* 55.

18 Joined Cases 46/93 and 48/93 *Brasserie du Pecheur SA v Germany* (hereafter *Brasserie*), *R v Transport Secretary ex p. Factortame (No 4)* (hereafter *Factortame*) [1996] 2 WLR 506. (Judgment of 5 March 1996).

19 Case 178/84 *Commission v Germany* [1987] ECR 1227.

20 Case 246/89 *Commission v United Kingdom* [1989] ECR 3125; Case 246/89 *Commission v United Kingdom* [1991] ECR I-4585.

transpose EEC Directive 90/314 on package travel and tours within the relevant time limit[21].

Again briefly, the ECJ held in a joint judgment in *Brasserie and Factortame (No 4)* that national legal systems must provide an opportunity to recover compensation for loss caused to individuals whether by failure to implement EC law or by incorrect implementation. It was for national legal systems to provide the means of reparation, subject to the usual requirement that conditions for liability must not be less favourable than is normal in domestic cases and that reparation must not be impossible or excessively difficult to obtain. The circumstances in which the obligation accrued were said to be:

i) that the rule of law infringed must be intended to confer rights on individuals;
ii) the breach must be sufficiently serious;
iii)there must be a direct causal link between the act/omission and the damage.

This formulation exactly mirrors the so-called *Schoppenstedt* formula[22], which has emerged as the governing principle of Community liability under Article 215 EC in cases of loss resulting from use of rule-making powers. It thus creates a link between national and EC jurisprudence which did not previously exist. According to the *Schoppenstedt* formula, the extra-contractual liability of the Community in respect of legislative actions rests on 'a sufficiently serious breach of a superior rule of law for the protection of an individual'.

To continue the catalogue, in *Lomas*[23], MAFF, acting on limited evidence of violations and contrary to Article 34 EC, had systematically refused export licences for movement of live beasts to Spanish abatoirs, giving as its reason that conditions in Spanish abatoirs fell short of the standards required by EEC Directive 74/577. Here Spain had transposed the Directive, though without providing sanctions for breach. The question was posed whether in these circumstances a Member State might utilise Article 36 EC to limit exports and, if not, whether compensation would be payable. The ECJ found that recourse to Article 36 EC was not possible in these circumstances and, repeating the *Factortame* formula, that there must be a prospect of compensation for loss caused. The distinction between the cases lay in the fact that the first set concerned regulatory action, while *Lomas* involved potentially unlawful or invalid administrative action.

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21 Joined Cases 178,179, 188, 190/94 *Dillenkofer v Germany*. The Opinion of AG Tesauro recommending liability was delivered on 28 November 1995; judgment has not yet been delivered.

22 See Case 5/71 *Zückerfabrik Schoppenstedt v Council* [1971] ECR 975. For comment and explanation see T.C. Hartley, *The Foundations of European Community Law* (Clarendon, 3rd. ed, 1994) pp 486-498.

23 Case 5/94 *Hedley Lomas v Ministry of Agriculture and Fisheries (MAFF)* 23 May 1996 (hereafter *Lomas*).

Telecom[24] offered an opportunity for guidance on the vague and tenuous requirement of a 'sufficiently serious breach' of EC law. According to AG Tesauro, such a breach would occur where:

i) clear, precise obligations have not been complied with;
ii) there is interpretative guidance from the ECJ on 'doubtful legal situations';
iii) the national authorities' interpretation is 'manifestly wrong'.

The point in issue was the transposition into UK law of the public procurement directives, notably Article 8(1) of EEC Council Directive 90/531, transposed into UK law by the Utilities Supply and Works Contacts Regulations 1992. In one proceeding, the applicant challenged the correctness of the transposition and claimed damages for consequential loss. The ECJ ruled that the affair fell in principle within *Brasserie*. Unusually, because application of the rule would normally lie within the area of appreciation of the national court, it went on to hold that it possessed sufficient information to find against liability. In so doing, the Court tied the emerging jurisprudence still more firmly to its Art 215 jurisprudence, ruling that:

> 'A restrictive approach to state liability is justified in such a situation, for the reasons already given by the court to justify the strict approach to non-contractual liability of Community institutions or member states when exercising legislative functions in areas covered by Community law where the institution or state *has a wide discretion* - in particular, the concern to ensure that the exercise of legislative functions is not hindered by the prospect of actions for damages whenever the general interest requires the institutions or member states to adopt measures which may adversely affect individual interests...'[25]

My thesis is, in short, a dual one. I shall argue first that the case for Member State liability rests on weak theoretical foundations and that its imposition is capable of damaging the delicate Community political structure. Secondly, I shall argue that the fault lines between the liability systems of national and EC legal orders, previously satisfactory, have been violently disrupted and redrawn in the wrong place.

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24 Case 392/93 *R v Treasury ex p British Telecommunications* [1996] 3 WLR 203 (herafter *Telecom*). See also the later joined Cases T-481, 484/93 *Vereniging van Exporteurs in Levende Varkens v Commission* (13 December 1995).

25 Para. 40 (emphasis added), citing Joined Cases 83, 94/76, 4, 15, 40/77 *Bayerische HNL Vermehrungsbetriebe GmbH v Council and Commission* [1978] ECR 1209 and *Brasserie*, para 45. And see now, Case T-571/93 *Lefebvre freres et soeurs and others v Commission* (Commission delay in submitting proposal for regulation insufficient to found liability).

II The Court's Perspective

A Liability as Sanction

It would be fair to summarise the ECJ's strategy for an effective legal order, initiated by the doctrine of direct effect[26], as centred on the development of rights under EC law justiciable in established national courts. This is seen as stimulating 'individual citizens' to validate their rights in citizen enforcement actions, generating a sort of unofficial police force to boost Commission manpower.

At the outset, we should dismiss the vision of a squad of citizen policemen engaged in law enforcement. There are, of course, actions fought by individuals or groups of individuals. *Marshall* falls into this category; *Francovich*, *Dillenkofer*, and *Faccini Dori* may. In the field of environmental law, we find a developing pattern derived from human rights law, where a number of specialist organisations (NGOs) dedicated to the enforcement of human rights conventions through courts operate; in Article 119 cases, their place has largely been assumed by state-funded agencies[27]. Whether or not these groups and agencies can be said to represent 'citizens' is a moot point but they do embody the private enforcement machinery to which the ECJ apparently aspires. This is not to imply, however, that the model of 'politics through law' espoused by the ECJ is best pursued through the medium of the action for damages; for reasons outlined in a later section, there is much to be said in favour of judicial review as the standard procedure, with annulment or declaratory orders as the standard remedy, in this type of citizen enforcement[28]. In other areas, citizen enforcement is in any event a fantasy. In her study of Community liability, Fines[29] shows, for example, that an overwhelming majority of actions against the Community are brought by corporations and that the litigation typically involves licences and other economic

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26 Which will not be pursued here: see Hartley, *op cit*, n 22, pp 195-233; de Burca, 'Giving Effect to European Community Directives', (1992) 55 *MLR* 215; Plaza Martin, 'Furthering the Effectiveness of EC Directives and the Judicial Protection of Individual Rights Thereunder', (1994) 43 *Int. and Comp. LQ* 26.

27 C. Harlow and R. Rawlings, *Pressure Through Law* (Routledge, 1992) Ch 6 (generally and on the EOC). And see Sands, 'European Community Environmental Law: Legislation, the European Court of Justice and Common-Interest Groups', (1990) 53 *MLR* 685.

28 See per Parker and Nourse LJJ, contra Oliver LJ, in *Bourgoin v Ministry of Agriculture and Fisheries (MAFF)* [1986] QB 716.

29 F. Fines, *Etude de la Responsabilité Extra-Contractuelle de la Communauté* (LGDJ, 1988) Annex II, pp 426-449. See also Harding, 'Who Goes to Court in Europe? An Analysis of Litigation against the European Community', (1992) 17 *EL Rev.* 105.

interests. Their dominant position in litigation raises questions as to what sort of rights EC law really protects (see below).

What *Francovich* added to the Court's armoury was the power of sanction[30]. There can be little doubt that sanction forms a large constituent of the decision. Caranta's excellent analysis[31] notes the references both to '*effet utile*' and 'effective judicial protection', observing that the latter is 'to be used more to exact obedience from Member States than to protect citizens'. Van Gerven[32] refers to liability as a 'sanction, within the framework of the specific Community rule that it purports to make effective'. Schockweiler[33] emphasises that reparation is not the only, perhaps not even the most important, issue:

> '.. il ne s'agit pas seulement de sanctionner l'atteinte que l'Etat a portée au patrimoine du particulier, sujet de l'ordre juridique communautaire, mais également l'atteinte que l'Etat en question a portée à cet ordre juridique en tant que tel'.

For Mestmacker[34], the ECJ was inspired to develop its radical jurisprudence 'by its all too familiar knowledge of that very world in which international agreements lacking a normative framework - lacking a direct effect on supremacy - have such a limited impact'. Other commentators express satisfaction with remedies which go much further than classic international law to protect Treaty rights against 'the inertia and resistance of member states'[35]. The problem of the disobedient state is self-evidently common in international law which has, in the postwar period, been arduously grappling with it, trying out remedies very similar to those now being acquired for the ECJ[36]. It is significant that the problems have engaged the attention of the International Law Commission since 1953 without their having reached any particularly satisfactory conclusion, driving one scholar to deny any intellectual basis for the idea of State

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30 Steiner, 'From Direct Effects to *Francovich*: Shifting Means of Enforcement of Community Law', (1993) 18 *EL Rev.* 3.

31 *Op cit*, n 2 at 710, 755.

32 Van Gerven, 'Bridging the Gap Between Community and National Laws: Towards a Principle of Homogeneity in the Field of Legal Remedies?', (1995) 32 *CML Rev.* 679, 694 (discussing quantum of damages).

33 Schockweiler, 'La responsabilité de l'autorité nationale en cas de violation du droit communautaire', (1992) 28 *RTDE* 27, 42 (emphasis added).

34 Mestmacker, *op cit*, n 7, 617, 624.

35 In this sense, e.g., Boulouis and Chevallier, *Les Grands Arrêts de la Justice Européenne* (Dalloz, 1994) note at p 33; Szyszczak, '"Making Europe More Relevant to its Citizens": Effective Legal Process'. (1996) 21 *EL Rev.* (forthcoming). And see Steiner, *op cit*, n 30.

36 Higgins, 'Accountability and Liability: The Law of State Responsibility' in *Problems and Progress, International Law and How We Use It*, The Hague Lectures, (Clarendon, 1994). See further M. Spinedi and B. Simma (eds), *United Nations Codification of State Responsibility* (Oceana, 1987).

responsibility[37]. Many of the areas of dispute - the rules concerning agency; the relationship of wrongfulness to harm; whether liability requires fault; whether it extends to acts of sovereignty or commercial transactions - are precisely those which have been singled out as most troublesome by critics of *Francovich*. The ambit of liability is limited and parallels classic domestic principles of tort/delict in covering cases of physical maltreatment and direct 'taking' of property (see below). Especially problematic are the question of liability for *commercial* transactions[38] and the relationship between delict/tort and the emerging concept of international criminality[39]. In international law, compensation is not typically punitive[40]; indeed, it is even a matter of controversy whether punitive damages are permissible. Gray, for instance, adopts the reasoning of many tort scholars in contending that such awards 'result in a victim receiving more than compensation for his injury'[41]. She relegates the subject for discussion as 'part of the wider debate over the possibility or desirability of international criminal responsibility'. One might be permitted to wonder whether it was wise to import into EC law this highly controversial remedy, characterised by vagueness ('it should mean something rather precise, but has over recent years come increasingly to mean everything'[42]) with all its manifold problems.

It is probable that French administrative law, in which liability undoubtedly contains an element of sanction[43], provided the pattern for the ECJ's sanctions theory of liability. Before this road was travelled, however, attention should have been paid to the special position of the French Conseil d'Etat[44]. The Conseil is something more than a court; it is both the conscience of the executive, responsible for determining equitable claims (see below) and possesses

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37 Allott, 'State Responsibility and the Unmaking of International Law', (1988) 29 *Harv. Inter. L.J* 1.

38 See Fox, 'State Responsibility and Tort Proceedings against a Foreign State in Municipal Courts', (1989) 20 *Netherlands Yearbook of International Law* 3; Higgins, *op cit*, n 36, p 152 queries this limitation.

39 Higgins, *op cit*, n 36, pp 165-8 and Art 19 (1) of the ILC Draft Articles.

40 Bing Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Grotius, 1987) pp 47-8.

41 C. Gray, *Judicial Remedies in International Law* (Clarendon, 1987) p 26.

42 Higgins, *op cit,* n 36, p168.

43 See de Latournerie, 'The Law of France', in Bell and Bradley (eds), Governmental Liability: a Comparative Study (UKNCCL, 1992); Lochak, 'Réflexion sur les fonctions sociales de la responsabilité administrative', in J. Chevallier (ed.), *Le droit administratif en mutation* (PUF, 1993); Josse, 'L'exécution forcée des décisions du juge administratif par la mise en jeu de la responsabilité pécuniaire du service public', (1953) *Etudes et Documents du Conseil d'Etat* 50. On sanctions theories generally, see now, CE 11 March 1994 *CSA c. "La Cinq"* RDP 1995.517 note Blanquer.

44 See M-C. Kessler, *Le Conseil d'Etat* (Armand Colin, 1968); J-P Negrin, *Le Conseil d'Etat et la vie publique en France depuis 1958* (PUF, 1968).

regulatory functions in respect of administrative authorities[45]. A partial explanation for its sanctions theory of administrative liability undoubtedly lies in its lack of mandatory remedies[46]. Its legendary problems with delay and with implementation of judgments, especially by local authorities[47], are also relevant. Latournerie explains[48] that compensation orders permit the Conseil d'Etat to take 'the necessary steps on the victim's behalf to authorise payment of the sum by the State, *because of its powers of budgetary control over such bodies*'.

Like the French administrative jurisdiction on which it is patterned, the ECJ possesses no mandatory remedies. Yet its role, as defined in Article 164 EC, perhaps implies something more than a classical declaratory and platonic statement of the law, since the article stipulates that the ECJ 'shall ensure that in the interpretation of this Treaty the law is observed'. Although the temptation to disregard the rulings of a court without mandatory remedies is fairly obvious, no widespread problem of disobedience has been identified[49]. At the time of *Francovich*, however, Italy certainly had a bad record for transposing directives[50].

In other respects, the ECJ possesses none of the characteristics of the French Conseil d'Etat. It has been called 'a dependent legal order' in that it relies for its enforcement on the legal orders of the Member States' [51]. It is unlikely that

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45 Questiaux, 'Administration and the Rule of Law: The Preventive Role of the French Conseil d'Etat', [1995] *Public Law* 247.

46 It is more correct to say that the Conseil d'Etat deprived itself of mandatory remedies: see CE 27 Jan. 1933 *Le Loir* Rec 136 concl. Detton; CE 4 Nov. 1983 *Noulard* Rec. 451. Its unwillingness to address injunctions to an organ of the state or administrative authority may derive from its historical evolution as an advisory body or from the wording of the celebrated Law of 16-24 August 1790 to which it ultimately owes its existence. Since 1995, the Conseil has possessed injunctive powers: see, Law No. 95-125, 8 Feb. 1995 relative a l'organisation des juridictions et a la procedure civile, penale et administrative, noted (critically) by Fraisseix, RDP 1053, 1069.

47 See, for an extreme example, CE 17 May 1985 *Mme Menneret* Rec. 149 concl. Pauti, the first example of use by the Conseil of its new powers of *astreinte* (punitive use of damages as a fine).

48 Bell and Bradley, *op cit*, n 43, p 223 (emphasis added). It is noteworthy that the Conseil has needed to set up a *Commission du Rapport* to monitor implementation of judgments.

49 At the time of the *Francovich* application in 1990, 83 judgments were outstanding, about one-third of which involved Italy. At the end of 1992, however, there were only 10 cases where the ECJ handed down a second judgment for non-compliance: 10th Annual Report to European Parliament on the application of Community law: 1993 OJ C233/207, Annex V.

50 Now largely rectified by the 'La Pergola' Law in 1989, which provides new and more effective implementation procedures: see Furlong, 'The Italian Parliament and European Integration: Responsibilities, Failures and Successes', (1995) 1 *J. of Legislative Studies* 35, 36, 40-42.

51 Bridge, 'Procedural Aspects of the Enforcement of the EC Law through the Legal Systems of the Member States', (1984) 9 *EL Rev.* 28.

any State would directly refuse to comply with a judgment in damages; studies of relative effectiveness would, however, be interesting. There are so many escape routes for a recalcitrant State to explore. Several of the Member States have been condemned in the Court of Human Rights for excessive delay in state liability cases[52]. The *Francovich* saga has not yet reached a final conclusion[53]; aged seventy-six, after sixteen years of litigation Ms. Marshall received damages; the *Factortame* saga dates back to 1988... So long as procedure remains in the hands of the national courts, there will always be room for manoeuvre. This is perhaps why AG Leger foresees deeper inroads by the ECJ into procedure[54]. But at the end of the day, no system of state liability can be truly mandatory. The problem is circular; unenforceable or unenforced rulings bring the legal system into disrepute (the problem of *Francovich*); mandatory orders or punitive damages are substituted; the slur is greater from unenforced commands than from platonic, declaratory judgments; thus the problem simply escalates. In the legendary language of President Andrew Jackson, 'John Marshall has made his decision, now let him enforce it'[55]!

Apparently justifiable in terms of the fault principle captured in the terms 'tort' and 'delict'[56], there are other reasons why penal theories of civil liability are out of fashion. The sole author to fashion a full-blown punitive/deterrent theory of state liability is Schuck[57], who argues that awards of damages put indirect pressure on senior administrators to eliminate wrong-doing lower in the administrative hierarchy in order to relieve pressure on their budgets. If it seems uncontroversial to Schuck for liability to play a central role in disciplining administration, it must be remembered that he writes from within a system which makes excessive use of punitive and exemplary damages in tort law[58], to a degree

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52 Notably, *H v France* (1989) 12 EHRR 74; *Edition Periscope v France* (1992) 14 EHRR 597; *Neves and Silva v Portugal* (27 April 1989, Series A No 153). *Bavaona v Portugal* (8 July 1987, Series A No 122) suggests wilful obstruction by the authorities in a case of wrongful arrest.

53 Case 479/93 *Francovich v Italy* (action to annul Decree-Law No 80/1992) transposing Council Directive EEC 80/987 concerning employers' insolvency.

54 Opinion, *Lomas*.

55 Allegedly after *Worcester v State of Georgia* (1832) 31 US 515. The story, which may be apocryphal, gained currency in the wake of *Brown v Board of Education of Topeka* (1954) 347 US 483, notably imperfectly implemented: see further, McKay, '"With All Deliberate Speed": A Study of School Desegregation', (1965) 31 *New York Univ. Law Rev.* 991.

56 Tunc, 'Tort Law and the Moral Law', (1972) 30 *Cambridge Law J.* 247; Fletcher, *op cit*, n 10; and generally, I. Englard, *The Philosophy of Tort Law* (Dartmouth, 1993).

57 P. Schuck, *Suing Government, Citizen Remedies for Official Wrongs* (Yale University Press, 1983).

58 J. Fleming, *The American Tort Process* (Clarendon, 1987) pp 214-24. Factors explaining the escalation of punitive damages in the US include: the absence of provision for costs and medi-care and the use of juries in civil cases.

which would certainly be unacceptable in European systems[59]. Common law systems still accept a limited principle of punitive damages. English law finds them notably problematic and abolition is on the agenda - except, perhaps, in traditional cases of police malfeasance[60]. The objection to punitive damages is Gray's 'golden handshake' or 'windfall' argument that the plaintiff receives more compensation than is necessary to restore the *status quo ante*, supposedly the measure of civil damages. This anomaly, which seems to breach the equality principle, has caused much resentment in English law actions, where large awards of punitive damages in libel actions so disfavoured harder-hit accident victims as to necessitate statutory intervention to restore a measure of equality[61]. On the other hand, because a primary goal of tort/delict is to secure compensation for victims, penal theories of liability often result in punishing acts which do not seem particularly culpable.

We all know of cases where state officials have used public powers and public office for ends wholly external to the purposes for which they have been granted[62], but these are covered in all systems by fault liability. In the much-debated *Bourgoin* case[63], where MAFF was accused of turning powers granted for purposes of public health to economic ends in imposing a ban on the import of French turkeys, there would have been liability if bad faith on the part of MAFF had been proved. The same must be true of *Factortame* or *Lomas*. But how is the blame to be apportioned? Vicarious and corporate liability are accepted inside compensatory regimes of civil liability; they pose difficult problems for criminal law, more closely linked to culpability and intention[64]. To impose sanctions for the acts of subordinates, of which the authorities may be unaware, is awkward. To remove the requirement of fault and substitute no-fault

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59 For a notable example of German refusal to recognise an American punitive damages award, see *Bündesgerichtshof* [1992] ILPr 602.

60 In English law, punitive/exemplary damages are reserved for cases (i) where the defendant deliberately disobeys the law and (ii) abuse of state power, in practice usually police malfeasance: see, *Rookes v. Barnard* [1964] AC 1129; *A.B. v South West Water Services* [1993] 1 All ER 609 noted Pipe, 'Exemplary Damages After Camelford', (1994) 57 *MLR* 91 (who favours such awards). On reform, see Law Commission, *Aggravated, Exemplary and Restitutionary Damages*, Law Com. No. 132 (HMSO, 1993). A Law Commission survey found opinion divided on the practice.

61 Sec. 8 (2) Courts and Legal Services Act 1988 and *Rantzen v. Mirror Group Newspapers* [1993] 3 WLR 953. See below for the similar consequences of *Marshall (No 2)*.

62 The classic case is the Canadian case of *Roncarelli v Duplessis* (1959) 16 DLR (2d) 689, interesting in this context because it links the common law with French administrative liability through the Quebec civil code.

63 B*ourgoin v Ministry of Agriculture and Fisheries (MAFF)* [1986] QB 716. After winning the preliminary point of law in the Court of Appeal, the Government settled before trial, allegedly to avoid an authoritative precedent from the House of Lords.

64 See, however, Clarkson, 'Kicking Corporate Bodies and Damning their Souls', (1996) 59 *MLR* 557 (who favours corporate liability for manslaughter).

liability, as EC law apparently does[65], renders punitive liability untenable; indeed, it puts the ECJ in danger of breaching the fundamental principle *nulla poena sine culpa*.

Perhaps then we should follow Schuck in thinking of deterrence. Steiner certainly believes that[66]:

> 'the prospect of liability to *all* parties suffering damage as a result of their failures to implement Community law would provide States with a powerful incentive to comply with their Community obligations'.

Everything suggests, however, that we are talking here of conduct which cannot be deterred[67]. 'In the deterrence model, education and information should warn the tortfeasor when the sting will be applied'[68]. Only then can he make a rational choice to elect another course of conduct. The problem is to target the actor sufficiently closely. It is of little use, for example, to punish a Member State for non-implementation when, as is the case in Belgium, regional entities which cannot be coerced are to blame; indeed, to argue the contrary is to undercut the national constitutional order[69].

In the majority of cases, failure to implement is inadvertent. EC legislation has been widely criticised as 'voluminous, obscure, complex and inaccessible'[70]; it is EC legislation rather than German beer standards (see *Brasserie*) that is impure. Pleas for reform emanate from the heights of the Edinburgh European Council[71]. 'Disobedience' may come to depend on an unpredictable interpretation put on provisions by the ECJ. Hartley[72] cites examples of rulings

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65 Hartley, *op cit*, n 22, p 468 argues that all Community liability is no-fault liability; Curtin, *op cit*, n 13 at 709 calls it 'risk' liability.

66 *Op cit*, n 30 at 3, 9. Contrast Chayes and Handler, 'On Compliance', (1993) 47 *Int. Organisations* 175, 185-6, 204-5; Baxter, 'Enterprise Liability, Public and Private', (1978) 42 *Law and Contemporary Problems* 45, 46.

67 Cohen, 'Regulating Regulators: The Legal Environment of the State', (1990) 40 *Univ. of Toronto LJ* 213. The efficacy of tort law generally as a deterrent is controversial: see Dewees and Trebilcock, 'The Efficacy of the Tort System and its Alternatives: A Review of the Empirical Evidence', (1992) 30 *Osgoode Hall LJ* 57.

68 Sugarman, 'Doing Away with Tort Law', (1985) 73 *Cal. Law Rev.* 548, 564.

69 de Winter and Laurent, 'The Belgian Parliament and European Integration', (1995) 1 *J. of Legislative Studies* 75, 87. I am not arguing that the State cannot be *responsible* as it is in international law, simply that it cannot be *deterred*.

70 Burns, 'Better Lawmaking? An Evaluation of Law Reform in the European Community', paper presented to Hart Workhop, 'Lawmaking in the European Union', London, July 1996 (forthcoming); Barendts, 'The Quality of Community Legislation', (1994) 1 *Maas. J.* 101.

71 Resolution on Drafting Quality, OJ C 166 (17.6.93). And see, Declarations, 'Making New Community Legislation Clearer and Simpler', 'Making Existing Community Legislation More Accessible', 12 EC Bull. 18 (1992).

72 Hartley, 'The European Court, Judicial Objectivity and the Constitution of the European Union', (1996) 112 *LQR* 95.

which fall outside or run entirely counter to written texts. Fisheries experts agree that the ECJ has pursued an unexpectedly activist line over fisheries policy, the subject of the *Factortame* saga. The ECJ has been accused of law-making, when a Commission proposal 'became law, even though enough members in the Council (including Britain) voted against it to defeat its passage as a directive'[73] and, in promoting Community policies at the expense of the Member States, the ECJ has been accused of proceeding by 'drawing the broadest, most concrete and *communautaire* conclusions from provisions of the EEC Treaty which are notable for their generality and vagueness'[74]. Warner, on the other hand, points to the difficulty of the judicial task in interpreting law which may be (deliberately) vague and ambiguous[75]. If it is hard for the Court, it is harder for national draftsmen to manoeuvre within such inchoate parameters, to anticipate shifting boundaries or aberrant decisions. This point is tacitly conceded in the 'wide discretion' formula of *Telecom*. Not only does this vague formula point to the likelihood of a rich and nuanced jurisprudence from national courts[76] but it cuts the ground from under sanctions and deterrence arguments. Perhaps this is why the ECJ is shifting on to the high moral ground of rights.

B Rights-based Liability

In a passage from *Francovich* not noted for its lucidity[77], it was said 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 compensation when their rights are infringed by a breach of Community law for which a Member State can be held responsible'.

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73 Garrett and Weingast, 'Ideas, Interests, and Institutions: Constructing the European Community's Internal Market', in J. Goldstein and R. Keohane (eds), *Ideas and Foreign Policy: Beliefs, Institutions and Political Change* (Cornell University Press, 1993) pp 195-6. See also Case 246/89 *Commission v United Kingdom* [1989] ECR 3125. And see, J. Farnell and J. Elles, *In Search of a Community Fisheries Policy* (Gower, 1984).

74 R. Churchill, *EEC Fisheries Law* (Martinus Nijhoff Publishers, 1987) p 45.

75 Warner, 'European Community Legislation: The View from Luxembourg', (1982) *Statute Law Rev.* 134.

76 See now, *R. v. Home Secretary ex p. Gallagher* CA (10 June 1996), the first judgment applying the new principles from a British court where the Home Secretary was held not liable for a decision taken under the Prevention of Terrorism (Temporary Provisions) Act 1989 to exclude the plaintiff from the mainland of Britain. The decision was flawed by a minor procedural error which was held insufficiently grave to establish liability. Predictably, much play was made both with the tests of 'area of legislative discretion' and 'sufficient seriousness'.

77 *Francovich*, para 33, 4.

Redolent of the language of rights, the Opinion of AG Tesauro in *Brasserie*[78] searches for a rights-based solution within the structural framework of EC law. Tesauro characterises rights-based liability as 'civilised'. He sees it as the inevitable result of the emergence of 'the state governed by the rule of law' and as representing 'a shift of emphasis, at least in the more advanced legal systems, from the conduct of the perpetrator of the damage to the rights of the injured party'.

The American academic, Rosenberg[79], has suggested a 'rights-based' theory of tortious liability centred around the principle that those who benefit from an undertaking should bear a commensurate share of its burdens so that there is 'no unjustified sacrifice of some for others'. This formulation mirrors the French principle of *égalité devant les charges publics* (see below). It differs little from the theory of state liability constructed by Professors Cohen and Smith[80] on the basis of 'social entitlement', equality, and collective or mutual insurance. It echoes, but does not go as far as, Professor Patrick Atiyah's general theory of accident compensation based on social insurance[81]. The beauty of these theories is that they are all propounded by academics.

Far-reaching and hard to distinguish from the general welfare function of the modern State[82], they lock courts into 'tragic choices' (Calabresi's famous phrase) over the allocation of resources - a function strictly reserved in western constitutional theory for executive and legislature. The issues are not made easier by the presentation of polycentric problems as claims by 'individuals' in what Chayes terms the 'bi-polar lawsuit'[83]. The jurist Lon Fuller insisted that awarding compensation in a polycentric or 'on-going venture' moves a court infallibly from an adjudicative to an administrative function[84]. For slightly different reasons, Epstein[85] warns against compensation, both for economic loss and for invasions

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78 Opinion, para 12. A somewhat similar conclusion, to the disadvantage of English law, was reached by Lord Wilberforce in *Hoffmann-La Roche v Trade Secretary* [1975] AC 295.

79 Rosenberg, 'The Causal Connection in Mass Exposure Cases: A Public Law Vision of the Tort System'. (1984) 97 *Harv.Law Rev.* 851 at note 107.

80 Cohen and Smith, 'Entitlement and the Body Politic: Rethinking Negligence in Public Law', (1986) 64 *Can. Bar Rev.* 1; Cohen, 'Responding to Government Failure', (1995) 6 *National J. of Constitutional Law* 23.

81 See P. Cane and P.S. Atiyah, *Accidents, Compensation and the Law* (Weidenfeld and Nicolson, 6th ed, 1993).

82 See Bishop, 'The Rational Strength of the Private Law Model', (1990) 40 *Univ. of Toronto LJ* 663; Deswarte, 'Droits sociaux et Etat de droit', (1995) *RDP* 951.

83 Chayes, 'The Role of the Judge in Public Law Litigation', (1976) 89 *Harv LR* 1281.

84 Cited in Allison, 'The Procedural Reason for Judicial Restraint', [1994] *Public Law* 452, 459. See also Fuller, 'The Forms and Limits of Adjudication', (1978) 92 *Harv. Law Rev.* 353.

85 R. Epstein, *Simple Rules for a Complex World* (Harvard University Press, 1995) p 109.

of constitutional rights, on the ground that they involve too great a conflict of interest:

> 'To give legal protection against these forms of harms is to undertake an enormous expansion of the legal system. People's sympathies in individual cases might incline many to start down this road even if they are not quite sure how far they are willing to go. But the temptation should be resisted: for these types of harms, the only correct legal response is the simple one of no compensation'.

This passage contains clues as to why a rights-based system of liability for the Community is sure to prove problematic. The genesis of EC rights in the 'four freedoms' plus the strictly delimited Community competence confines their ambit, a restriction which Article J 1(2) TEU cannot by itself dissolve[86]. With the possible exception of free movement, EC rights have emerged as primarily economic in character; indeed, I have already argued that property/economic values nourish an ideology of EC law. A grave danger necessarily arises of serious clashes of value. Judicial protection of property triggers conflict with government over valid economic and welfare policies - a common experience where property rights are entrenched or treated as 'fundamental' and a problem of *droits acquis* which may well escalate as the pendulum swings away from privatising conservative regimes. Property was, for example, a late entrant to the European Convention on Human Rights (ECHR), by reason of concern that it would fetter programmes of nationalisation and public works. Compensation for expropriation of property, a fixed point in European legal systems (see below), had to be written in subsequently by the judges[87]. The Strasbourg Court has in practice shown itself circumspect, permitting the nationalisation of property subject to statutory compensation and allowing a wide margin of appreciation to the State, prohibiting only 'manifest unfairnes'[88].

Lenaerts warns[89] against introducing 'rights discourse' into the Community; rights might then 'no longer be handy tools for integration but vehicles of division and disintegration'. The warning is strengthened if rights adjudication arises obliquely, a process known to public lawyers as 'collateral

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86 See, de Burca, 'The Language of Rights and European Integration', in J. Shaw and G. More, *New Legal Dynamics of European Union* (OUP, 1996).

87 Frowein, 'The Protection of Property', in R. St J. MacDonald, F. Matscher and H. Petzold (eds), *The European System for the Protection of Human Rights* (Martinus Nijhoff Publishers, 1993). Note that the Herman Committee wanted a protected property right based on the 'takings' clause: see, Title I, Article 7, Clause J of the Draft Bill of EC Rights, Draft Report on the Constitution of the European Union, September 1993, DOC EN\pr\234\234101 PE 203,601/rev.

88 *Lithgow and others v United Kingdom* [1986] 8 EHRR 329.

89 Lenaerts, 'Fundamental Rights to Be Included in a Community Catalogue', (1991) 16 *EL Rev.* 367, 389-40. And see Bellamy, 'The Constitution of Europe: Rights or Democracy?', in R. Bellamy, V. Buffachi and D. Castiglione (eds), *Democracy and Constitutional Culture in the Union of Europe* (Lothian Foundation, 1995).

review'[90]. The point is particularly apposite to cases where economic interests (as we shall see, only occasionally characterised as rights) clash with rights perceived as more 'fundamental', more central to, or typical of, human rights discourse. It is not that property is not valued; attitudes to taxation or the rise of consumerism show how far, in a secular and mercenary age, this is the case. It is just that, when they come into conflict with rights of personality, they frequently prove to have a weak hold on the public imagination. One reason may be because they seem to pit powerful, vested, economic and commercial interests against an individual, human and moral dimension. The dilemma is aptly symbolised in the titles to several comments on the 'Irish abortion case'[91]. Here the discreet oblique ruling of the ECJ so offended Irish sensibilities that it led directly to Treaty amendment in Protocol No. 17; What would the effect have been had an opposite, though perfectly plausible, ruling been enhanced by a finding of liability for loss of profit suffered by foreign abortion clinics? This is nonetheless the *Lomas* scenario, where deep resentment will be generated at the (perceived) subordination of animal welfare to EC economic policy [92].

Ample support for circumspection comes from the practice and experience of constitutional courts. Even the Strasbourg Court of Human Rights, an international tribunal without mandatory remedies, has shown itself circumspect with compensation, except where this is the only adequate remedy; it has restricted the ambit of compensation and requires a previous finding of a violation before compensation is awarded[93]. There is little trace of the use by federal Supreme or Constitutional Courts of damages as a sanction for state/provincial non-compliance with federal government law or policy. The US Supreme Court frowns on the use of damages as a remedy for unconstitutional

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90 The warning has seldom been better conveyed than per Lord Diplock in the celebrated English decision of *Home Office v Dorset Yacht Co. Ltd.* [1970] AC 1004.

91 Case 159/90 *SPUC v Grogan* [1991] ECR I-4685. See Coppel and O'Neill, 'The European Court of Justice: Taking Rights Seriously', (1992) 12 *Legal Studies* 227; Phelan, 'Right to Life of the Unborn v. Promotion of Trade and Services: The European Court of Justice and the Normative Shaping of the European Union', (1992) 55 *MLR* 670; O'Leary, 'The Court of Justice as a Reluctant Constitutional Adjudicator: An Examination of the Abortion Information Case', (1992) 17 *EL Rev.* 138.

92 Wilkins, 'Banishing Animal Cruelty in Europe', (1992) 2 *European Voice* 14 blames the Commission for 'not doing much about' animal welfare. See also Simmonds, 'The Role of the European Community', in R. Ryder (ed), *Animal Welfare and the Environment* (Duckworth, 1992). The House of Commons Agriculture Select Committee, *Animals in Transit* (HC 45, 1990-I) p 7, notes 'the people's fears' of domination by Brussels on this issue. See also, *R v Coventry County Council ex p. Phoenix Aviation* [1995] 3 All ER 37 where, significantly, both the National Farmers Union and Compassion in World Farming asked and were permitted to intervene.

93 D. Harris, M. O'Boyle, C. Warbrick, *Law of the European Convention on Human Rights* (Butterworths, 1995) pp 215-6; Mas, 'Right to Compensation under Article 50', in MacDonald, Matscher and Petzold, *op cit*, n 87.

activity[94]. The 'no taking' principle, which protects private persons against expropriation of property, is accorded constitutional status by the Fifth Amendment, yet is subject to a notably restrictive interpretation through concern that public development could otherwise be stultified[95]. New powers under s. 24 (1) of the Canadian Charter of Rights 1982 to provide remedies have attracted the comment that 'the task of defining the scope of damages for constitutional wrongs involves careful calibration of a wide range of considerations and factors' and is likely to beget 'a complex web of principles and rules'. They have in practice been treated with reserve by the Canadian Supreme Court[96]. The compensation function of the German Constitutional Court (see below) has brought conflict with the civil courts, with whom jurisdiction in state liability cases is shared[97]. In Italy, where Article 81 of the Constitution encapsulates the rights of government and parliament to control public expenditure, even the oblique effects of judicial review decisions on public finances have been judicially recognised and are a matter for study and concern; at a judicial colloquium, Zagrebelsky advised the Court to eschew the area, which it had neither the resources nor competence to tackle[98].

At first the ECJ showed similar caution. In *Defrenne v Sabena*[99], the first ruling that the discrimination provisions of Article 119 EC were directly effective, it employed the tactic of 'prospective overruling', enabling governments and employers in the Member States to avoid huge sums in

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94 J. Mashaw, R. Merrill, P. Shane, *Administrative Law: The American Public Law System, Cases and Materials* (West Publishing, 3rd ed, 1992) p 992 ff; Katz, 'The Jurisprudence of Remedies: Constitutional Legality and Law of Torts in Bell v. Hood', (1968) 117 *U. of Pennsylvania Law. Rev.* 1.

95 Michelman, 'Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law', (1967) 80 *Harv. LR.*, 1165. Significantly, Ely Jr., 'That Due Satisfaction May Be Made: The Fifth Amendment and the Origins of the Compensation Principle', (1992) 36 *Am. J. of Legal History* 1 traces the origins of the 'no taking' principle to seventeenth-century *legislative* practice.

96 Mullan, 'Damages for Violation of Constitutional Rights - A False Spring?', (1995) 6 *National J. of Constitutional Law* 105 (citations from 126). *Shipton v A-G* [1994] 3 NZLR 667 noted Smillie (1995) 111 LQR 209 is apparently exceptional in creating a 'new' constitutional tort of breaching the New Zealand Bill of Rights but turns out on examination to concern the ancient, common law tort of wrongful arrest.

97 Rufner, 'Basic Elements of German Law on State Liability', in Bell and Bradley *op. cit.* n. 43, pp 260-2. But see Schefeld, 'Appunti sulle consequenze finanziari della giurisprudenza costituzionale in Germania', in Corte Costituzionale, *Le sentenze della Corte Costituzionale e l'Art. 81, U.C., della Costituzione* (Giuffre, 1993) p 63. The dispute over the constitutionality of the *Staatshaftungsgesetz* (state liability law) centred on the question of compensation for invasion of constitutional rights: see Decision 19 October 1982, *Entscheideungen*, vol 61, p 149.

98 Zagrebelsky, 'Problemi in ordine ai costi delle sentenze costituzionali', in *Corte Costituzionale*, *op cit*, n 97, p 110.

99 Case 43/75 [1976] ECR 455.

retrospective compensation. Later, in *Marshall (No 2)*[100], the ECJ invalidated a statutory limitation on damages in gender discrimination cases, precluding governments from imposing prior restraints on the quantum of compensation (arguably both a legitimate and sensible response from government[101]). The full financial effect was felt in the UK in a series of actions brought under EC law by female members of the armed forces dismissed because of pregnancy, prior to, but in clear breach of, the Court of Justice's ruling in *Dekker*[102]. *Marshall* necessitated enhanced compensation; by 1994, 3,918 claims had been disposed of and £16 million paid out in compensation, rising to £55 million by 1996[103] - no mean sum even in the perspective of a state welfare budget! It is not wholly irrelevant that the affair attracted a great deal of unfavourable publicity; war veterans' organisations reminded the public that young women who had chosen to rear a family, and many of whom had found new employment, were receiving much greater sums in damages than the pensions awarded to seriously incapacitated war victims or their widows. And since the Treaty covers only gender equality, the decision had the incidental effect of introducing a grave inequality into UK law, as the ruling did not bite in race discrimination cases. This injustice, subsequently removed by legislation, points to a reason (discussed further in Section II) why EC liability doctrines are likely to impact on domestic systems, unable to resist pressure to level domestic law up to the standard set by Eurorights. Conversely, it suggests that the ECJ would have been wise to seriously consider adopting the American version of prospective overruling, where the new rule bites only on cases arising *after* the judgment which establishes it. This prudent course of action, expressly rejected in ***Brasserie,*** is presently high on the political agenda (below).

Rulings with serious financial consequences may produce a serious 'whiplash' effect, a point made by Craig after *Francovich*[104]. Again, unfavourable reactions to Article 119 jurisprudence is rumoured to have some bearing on UK reluctance to sign up to the Social Chapter. Meehan believes that[105]:

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100 Case 271/91 *Marshall v SW Hampshire Area Health Authority (No 2)* [1993] 3 CMLR 293, 3 WLR 1054 noted Curtin, Case Law, (1994) 31 *CML Rev.* 631. In response to *Marshall*, the statutory limit was removed by SI 1993/2798.

101 See, *The Doctrine of the Shield of the Crown*, Report by the Senate Standing Committee on Legal and Constitutional Affairs (Australian Federal Government, 1992) p 41.

102 Case 177/88 *Dekker v Stichting Vormingscentrum voor Jong Volwassen* [1990] ECR I-3941.

103 See *R v Defence Secretary ex p Leale and Lane and the EEC* (unreported), noted Fredman (1995) 111 *LQR* 220, 222. The legislation also imposed a statutory time limit, invalidated by Case 208/90 *Emmott v Minister of Social Welfare* [1991] ECR I-4869.

104 Craig, '*Francovich*, Remedies and the Scope of Damages Liability', *loc. cit.* n 17.

105 E. Meehan, *Citizenship and the European Community* (Sage, 1993) p 140.

'By making social policy more expensive (...) the Court may or may not have politicised itself but it has politicised the policy field: or at least moved it from the realm of low politics, where according to all but the most recent analyses, agreements are easy to reach, to the realm of high politics where they are not'.

A sensible 'rights-based' response to the problem of *Francovich* would have been to fashion a discrete remedy at EC level and ideally administered by the CFI for breach of a right protected by EC law. Such a solution would more accurately reflect the wording of Article 178 EC, which speaks of '*compensation* for damage'. It would acknowledge a tradition which stretches back, according to Judge Edward[106], to the Aquilian concept of 'uncovenanted loss - loss for which equity demands compensation as opposed to loss which must be regarded as an ordinary risk of commercial life'. The principle is found in every Member State: the provisions of Articles 14 and 34 of the German *Grundgestz* or Basic Law, for example, bestow on the Constitutional Court *compensation* powers for expropriation of property and for 'violation of obligation in the exercise of public office'[107]. The French principle of *égalité devant les charges publiques* is essentially equitable in character[108]. Developed by the Conseil d'Etat in an exceptional nineteenth-century case of Act of State, where the Conseil openly admitted that informal settlement was really the appropriate remedy[109], the maxim has since been utilised in a handful of cases as a category of last resort. Its equitable character is underlined by the requirement of special damage or hardship (*dommage anormal*)[110]; in contrast to true liability, the emphasis lies on the subject's loss rather than the actor's fault or the unlawfulness of the act. Applied recently in a well-known case (*Sté Alivar*) involving failure to correctly transpose an EC directive, the principle may have led the ECJ into temptation. According to critics, it illustrates one of the least attractive features of 'collateral

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106 Edward, 'Is There a Place for Private Law Principles in Community Law?', in H.G. Schermers, D. Curtin and T. Heukell, *Institutional Dynamics of European Integration* (Martinus Nijhoff Publishers, 1994) p 122.

107 See, Rufner, 'Basic Elements of German Law on State Liability', in Bell and Bradley, *op. cit.* n 43, p. 249. The jurisdiction is not exclusive. See also, the 'taking' principle (above).

108 Amelsek, 'La responsabilité sans faute des personnes publiques d'après la jurisprudence administrative', in *Recueil d'études en hommage à Charles Eisenmann* (Editions Cujas, 1975) p 233; Gilli, 'La "responsabilité d'équité" de la puissance publique', Dall. 1971 chr. 125. And see, P. Delvolve, *Le principe d'égalité devant les charges publiques* (LGDJ, 1962).

109 CE 30 Nov 1923 *Couitéas*, Sirey 1923 III p. 57 n. Hauriou concl. Rivet.

110 For fuller exposition, see, notes under: CE 1 January 1938 *Sté anonyme des produits laitiers 'La Fleurette'* Rec 25; CE (Ass) 30 March 1966 *Cie générale d'énergie radio-éléctrique* Rec 257, RDP 1966.774 concl. Bernard; CE (Ass) 23 March 1984 *Min du Commerce c/ Sté Alivar,* 40 AJDA 1984.396 n. Genevois, in M. Long, P. Weil, G. Braibant, P. Delvolvé and B. Genevois, *Les grands arrêts de la jurisprudence administrative* (Sirey, 9th ed, 1990).

review': it effectively excludes any 'review' of fault or legality, allowing instead the French State to 'purchase illegality'[111]. For reasons discussed further in Section II[112], this is a major problem of state liability.

The adjective has in any case already been applied to the ECJ's Article 215 jurisprudence by Schermers[113]:

> 'The way the formula has been applied comes very close to *ex aequo et bono*, the Court of Justice creating the law on non-contractual liability in the way it considers best...'

An equitable solution would help to explain the striking disparities in the jurisprudence; equity is not necessarily bound by precedent.

III Changing the Fault Lines

In his Opinion in *Lomas*, AG Leger stressed the separateness of Community liability from that of the Member States[114]. The motive was partly a wish to preserve the Court's hitherto restrictive jurisprudence under Article 215 EC, more especially in cases concerning general acts of a legislative character[115]. Like Leger, Steiner postulates Member State liability for wrongful transposition of directives on the ground that, 'in implementing these rights into national law both the legislative and the executive bodies of Member States *are acting in an essentially administrative capacity*'[116]. Yet she strangely goes on to exempt the Community from liability for cryptic reasons of 'policy considerations'!

We can dispose simply of this point, more relevant to the subject-matter of the previous section. The possibility of joint and concurrent liability existed long before *Francovich*[117]; it is implicit in provision for joint EC/Member State

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111 CE (Ass) 23 March 1984 *Min du Commerce c/ Sté Alivar,* 40 AJDA 1984.396 n. Genevois. For the same reason, the case is heavily criticised by Green and Barav, *op cit*, n 12. Concerned by the stringent conditions of liability, D. Simon, AJDA 1993.235, 242 queries whether no-fault liability amounts to an effective protection of Community rights.

112 And see Harlow, 'State Liability: Problem Without a Solution', (1996) 6 *National Journal of Constitutional Law* 67.

113 'Introduction' in Schermers, Curtin and Heukell, *op cit*, n 106, pp.x-xi.

114 *Lomas*, Opinion paras. 101,2 and 142,3. In *Brasserie*, AG Tesauro is more circumspect, calling the argument 'not completely baseless' (paras. 61, 67).

115 For an overview, see Hartley, *op cit,* n 22, pp 470-507. And see Bronkhorst, 'The Valid Legislative Act as a Cause of Liability of the Communities', in Schermers, Curtin and Heukell, *op cit*, n 106, p 13.

116 *Op cit*, n 30, 3, 16 (emphasis added). She is citing AG Mishco, *Francovich* para. 47, describing the function of national legislatures in implementing directives as 'similar to an administration under an obligation to implement a law'.

117 Hartley, *op cit*, n 22, pp 498-507 and *Idem*, 'Concurrent Liability in EEC Law: A Critical Review of Cases', (1977) 3 *EL Rev*. 249.

programmes, in the prevailing pattern of indirect administration and in the growth of executive agencies. Several commentators think that the Community should and could be vicariously liable for the acts of some national agencies[118]. The likelihood is that a door half-open to arguments of agency and vicarious liability has been kicked wide open. As noted, language used in *Francovich* pointed in this direction and the linked liability formula of *Brasserie* and *Schoppenstedt* renders the nexus more visible. Even recursory actions by Member States are now not beyond the bounds of possibility[119]. Member States found liable in damages might seek to join regions or local authorities or turn against the Commission or EC agencies in actions for negligent advice. A real anxiety may underlie the Court's restrictive ruling in *Telecom*.

Anxiety is visible too in the persistent characterisation of *Francovich* as a rule of *state* liability[120], the emphasis being once again on divisibility. The fact that several of the cases (*Francovich*, *Brasserie*, *Factortame*) involve the State acting in a *legislative* capacity underlines the special character of the liability; the implication is that private bodies are in this respect impotent, hence incapable of incurring this type of liability. However, this is to ignore the way in which legal systems function and precedent expands liability.

Although courts perceive the legal system as their special preserve and within their control, law is also consumer-driven. Perhaps because of their previous life as practitioners, British judges are extremely alert to this pressure. Reference is constantly made to the danger of 'floodgates', a metaphor for opening the legal system to a torrent of claims[121]. Often derided by academics, this perspective is both realistic and sensible.

First observed in the United States, litigation mania is now well-advanced both in the United Kingdom, where legal aid and the growth of third-party insurance have acted as incentives, and on the continent of Europe, especially Germany, where litigation is facilitated by the practice of legal liability insurance[122]. The modern response to a transient feeling of annoyance is to

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118 Scoffoni, 'Le contentieux des organismes nationaux chargés en France de l'application des politiques communautaires', (1990) 26 *Cahiers de droit européen* 574, 599 ff. Oliver, 'Joint Liability of the Community and Member States', in Schermers, Curtin and Heukell, *op cit*, n 106, pp 125, 128 was prophesying potential conflict of laws problems but noted procedural obstacles.

119 Oliver, *op cit*, n 118, pp128-9.

120 Opinions, *Brasserie* and *Lomas*.

121 H. Rasmussen, *Thirty Years of Community Law* (European Commission, 1983) p 185 ff. asserts that too liberal damages rules had to be curtailed after a 'flood' of collateral review cases in the ECJ: see now, C T-167/94 *Detlef Nolle v Council* (18 August 1995). See also Jones, 'The Non Contractual Liability of the EEC and the Availability of an Alternative Remedy in the National Courts', (1981) *Legal Issues of European Integration* 1, 3 (noting the ECJ's dislike of 'collateral review' via Arts 178 and 215).

122 See Galanter, 'Law Abounding: Legalisation around the North Atlantic', (1996) 55 *MLR* 1 and references there cited; Markesinis, 'Comparative Law - A Subject in

telephone one's lawyer. We have seen the rapid rise of the mass tort action, while consumer litigation, medical malpractice suits, actions against the police have all multiplied. In child abuse cases, public authorities face suits from children, parents and foster parents; pupils and teachers regularly sue education authorities, while sporting events too often end in actions for assault and battery. However inefficent it is shown to be, the tort system has to some extent become an alternative to first-party insurance[123]. Civil liability has developed into a crude system of loss distribution in which the aim is to throw losses, especially economic, on to someone else's shoulders. It is also increasingly victim-oriented. In contract, the maxim *caveat emptor* is disappearing; in tort, there is a distinct feeling that someone who suffers a loss 'ought' to receive compensation for it.

Doctrinally, the change is reflected in terms of a 'right' to security[124] or in efforts to explain all tortious liability in terms of the mutual assurance principle (above). The case law typically brings concessions to the risk principle, a form of enterprise liability whereby enterprises supposedly bear the cost of accidents caused by their activities[125]. We see too liability extending to new forms of loss: beyond physical to psychological injury thence, in medical cases, to loss of a chance of recovery; beyond property to economic loss, thence to loss of profit and speculative loss of profit or a chance to make profit. Schuck[126] has conveniently epitomised typical doctrinal developments:

> 'Courts have enlarged the concept of 'action,' a traditional prerequisite for liability, to encompass inaction. In this way, they have placed individuals under a legal duty to help strangers in many situations, thereby hauling new kinds of relationships (and non-relationships) into the net of legal liability. They have accorded legal protection to new categories of interests (...). They have extended the domain in time and space over which defendants' duties apply by imposing responsibility for risks that eventuate long after dependents acted and, in some toxic tort cases, for risks that were scientifically unknowable at that time. They have accepted relatively weak chains of causation (...). They have routinely ignored or overridden express contractual limitations on tort liability, as well as implicit agreements by parties to allocate risk between themselves. They have abandoned or severely curtailed longstanding charitable, governmental, and familial immunities from tort liability'.

Search of an Audience', (1990) 53 *MLR* 1. For what is known about litigiousness, see Galanter, 'Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About our Allegedly Contentious and Litigious Society', (1983) 31 *UCLA Law Rev.* 4; Kritzer, 'Propensity to Sue in England and the United States of America: Blaming and Claiming in Tort Cases', (1991) 18 *Law and Soc. Rev.* 400.

123 On the link between insurance and tort law, see now Stapleton, 'Tort, Insurance and Ideology', (1995) 58 *MLR* 820 and references there cited.

124 G. Cornu, *Etude comparée de la responsabilité délictuelle en droit privé et en droit public* (Editions Matot-Braine, 1951) p 271.

125 See the classic piece by Calabresi, `Some Thoughts on Risk Distribution and the Law of Torts', (1961) 70 *Yale Law Journal* 499. On the inefficiency of this theory when applied to the state see Cohen, 'Regulating Regulators: The Legal Environment of the State', (1990) 40 *Univ. of Toronto LJ* 213, 245 ff.

126 Schuck, 'The New Ideology of Tort Law', (1988) 92 *The Public Interest* 93.

Doctrinal developments of this kind reflect perplexity over the role of the civil liability system in modern societies, but also growing pressure upon it. By making insulation and separateness difficult, this bears on *Francovich*. And when rights under EC and national law get out of kilter, we have a further catalyst for harmonisation. This has already led to a major change in the English law of restitution[127] while, in the light of *Brasserie*, the French Conseil d'Etat is currently considering lifting its restriction of 'abnormal loss' in *égalité* cases.

Variant rules and standards of liability can also be exploited by litigants in a sophisticated process of 'forum-shopping' for the most favourable outcome. Forum-shopping is especially tempting in the multinational EC legal system, where the typical litigant is a multinational enterprise with access to the best legal advice and experience of the American legal system[128]. It can also be used to good effect inside national legal systems, with the public/private divide a ripe target. A single illustration can make the points succinctly.

The affair of 'contaminated blood' crosses national frontiers and, like the earlier Thalidomide tragedy, has given rise to litigation in several European countries. The problem arose after blood used in transfusions was contaminated by the HIV virus. It took a period of time for scientific knowledge to identify the phenomenon and devise tests to eliminate it. In consequence, some people were infected by the HIV virus, a proportion of whom developed AIDS. Haemophiliacs, because of their dependence on transfusions, were disproportionately affected.

In France, where both civil and administrative courts handle liability cases, a serious problem of variant liability standards obtains. In cases of medical liability, the administrative tribunals apply three separate standards: fault, grave fault, and occasionally risk. In the first haemophilia cases, grave fault combined with a high standard of proof of causation was imposed by the Paris administrative tribunal, a decision overturned on appeal by the Conseil d'Etat, substituting simple fault. But civil and administrative liability had now got out of line; influenced by the rules on products liability, the former had moved to risk liability. Arguing for an end to the divergence, the government commissioner succinctly put the general case for uniform rules: whether part of the public or private sectors, the centres administering transfusion were part of a single, inter-dependent public service, in which the patient had no hand in choosing the product. Persuaded, the Conseil d'Etat 'levelled up' to risk[129], neatly illustrating

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127 *Woolwich Equitable Building Society v Inland Revenue Commissioners (No 2)* [1993] AC 70 noted Hill, 'Restitution from Public Authorities and the Treasury's Position: *Woolwich Equitable Building Society v IRC*' [1993] *Public Law* 856. For the EC rule, see Case 199/82 *San Giorgio* [1983] ECR 3595.

128 See Rawlings, 'The Euro-law Game: Some Deductions from a Saga', (1993) 20 *J. of Law and Society* 309.

129 See respectively, Paris Cour administratif d'appel, 16 June 1992 *Ministère des Affaires Sociales et de l'Intégration c MZ* 48 AJDA 1992.678 n. Richer and CE 9 April 1993

the interplay between parallel systems. Even this solution cannot be final, as the liability of the transfusion service now differs from that of other analagous medical services; the new fault-line opens the way for private health centres and suppliers to recoup losses at the expense of the State, undoubtedly prompting future litigation.

The partial nature of the judicial remedy must also be noted. Only a handful of victims recovered damages and it took eleven years to arrive at this outcome; at least one victim was dead and France had been condemned before the Strasbourg Court of Human Rights for undue delay[130] - hardly a striking vindication of the Rule of Law principle. As in Germany and the United Kingdom, it was left to the French legislature to devise a more complete solution[131].

Expansive notions of causation or imputability, doctrines central to tortious/delictual liability[132], also mitigate against insulation. Modern tort law typically goes much further than traditional vicarious liability or *faute de service*, both devices for transferring financial responsibility from employee to employer, enterprise or state service. It is sufficient to endorse Schuck's picture of 'relatively weak chains of causation' and to note a steady tendency to extend responsibility to actors remote from the central incident or decision. Litigation strategies are encouraged in which the goal is simply to fix liability on the actor with the 'deepest pockets'. Naturally, government is often cast in the role of insurer.

In the privatised and 'contracted-out' State, both the State and its partners normally act under the ultimate authority of the legislature. In this respect, the State's position is indistinguishable from that of private sector comparators. Even where the powers of the latter derive technically from contract, franchise or licence, they are usually also the subject of regulation. (This is clearly visible, for example, in the telecommunications and media industries.) A state service is often no different in kind from one contracted out to a private company; the postal service is characteristically a commercial service whether or not it is run

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G, D, B. AJDA 1993.381, chr. Mague et Touvet p. 336. See also, Morancais-Demeester, 'Contamination du sida: responsabilités et indemnisation' D 1992 chr. 189. For the full legal and medical ramifications, see the conclusions in CE (Ass.) 26 May 1995 *Consorts N'Guyen, M. Jouan, Consorts Pavan* 11 *Rev. fran. de droit adm.* 1995.748 concl. Dael.

130 *X v France* (1992) 14 *EHHR* 483.

131 Law of 30 December 1991. And see generally Gannac and Frydman, 'Contexte et prolongements de la responsabilité administrative dans l'affaire dite du "sang contaminé"', (1994) 10 *Rev. fran. de droit admin.* 541. In Germany, a mix of state liability and legislation was used: G. Bruggemeier, *Staatshaftung fur HIV-kontaminierte Blütprodukte* (Nomos, 1994). Note a possible impact of *Marshall (No 2)* on these solutions.

132 On which see, H. Hart and T. Honore, *Causation in the Law* (Clarendon Press, 2nd ed, 1985).

(i) on a non-profit basis (ii) as a commercial enterprise (iii) by a government department (iv) by an independent agency or (v) by the private sector. Clinical judgment does not differ whether the patient pays or is paid for[133]. It is increasingly hard to argue that liability should expand and retract as services cross the public/private boundary[134]. Again, in the privatised State, where regulation is becoming the State's second most important function (the most important being to direct the economy), self-regulation provides an ironic twist to the nineteenth-century view of the State's sovereign legislative functions. Statutory agencies with supervisory functions proliferate. A decade of 'rolling back the boundaries of the State' and 're-inventing government' has inextricably tangled public and private sectors, rendering the 'public/private' distinction unreliable as a guide to liability. The process of blurring the boundary plus the effects of parallelism leave the State in a vulnerable position at the end of long liability chains.

In the Community, we have seen that the Commission is heavily engaged in consumer protection and the Products Liability Directive (EEC 85/374) indicates its concern for consumer protection; *Dillenkofer* shows, however, that both State and commerce play leading roles. The Community has growing responsibilities in the field of health and safety and both the Commission and the new Medicines Evaluation Agency are involved in regulation of the pharmaceutical industry, though parallel control systems exist at national level. In a regulatory capacity, it could easily have been implicated in the affair of 'contaminated blood'.

At the core of *Francovich* liability, however, lies the thorny issue of economic loss, problematic because - to borrow a famous phrase from the American Justice Cardozo - it raises the spectre of 'liability in an indeterminate amount for an indeterminate time to an indeterminate class'. It is not fortuitous that the property concept has not been extended to embrace administrative law's 'new property' of licences, welfare benefits and franchises for which Charles Reich long ago claimed the law's protection [135]. Sensibly, many systems look askance at speculative losses, such as planning blight, loss of business through public works or other loss caused through planning controls[136]. The ECJ's own

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133 On which see the important House of Lords case: *M. (A Minor) v Newham LBC* [1994] 2 WLR 554.

134 Lochak, 'Réfléxion sur les fonctions sociales de la responsabilite administrative', in J. Chevallier (ed.), *Le Droit Administratif en Mutation* (PUF, 1993) p 275; Freedland, 'Government by Contract and Public Law', [1994] *Public Law* 86.

135 Reich, 'The New Property', (1964) 73 *Yale LJ* 733.

136 See, for Italy, Clarich, 'The Liability of Public Authorities in Italian Law', Bell and Bradley, p. 245; Caranta, *op cit*, n 12, 272. For Germany, Rufner, in, Bell and Bradley, *op. cit.* n 43, p 249. For Sweden, see Kleinemann, 'The Indemnity Liability of the Public Legal Entity - Public-Law Regulation with Private Law Means' [1992] *Scandinavian Studies in Law* 145. For the US, see the 'taking' cases, *supra* n 95. For the UK, see P. Cane, *Tort Law and Economic Interests* (Clarendon Press, 1991).

parsimony is notorious. In *Kampffmeyer*[137], where the Commission had authorised safeguard measures on maize importation which were held unlawful, a grain dealer applied for licences and was wrongfully excluded. The Community was held liable in principle but the ECJ confined damages to loss of profits for contracts *already concluded*, excluding liability for speculative contracts. Noting the fact that the applicants had lodged 'an abnormally large number of applications for import licences' - they were, in other words, speculating on a known risk and had 'avoided any commercial risk to themselves' - the ECJ awarded only 10 per cent of the loss of profits.

In operating the *Schoppenstedt* formula, the ECJ has also shown awareness of the character of its clientele, using its powers of compensation so parsimoniously that only eight successful outcomes are recorded. In the *CNTA* case[138], where an applicant requested compensation for changes in the exchange rate, the Court remarked astringently that 'the system of compensation cannot be considered to be tantamount to a guarantee for traders against the risks of alteration of exchange'. The exceptional case might be if a given system were to mislead traders into not covering the risk for themselves.

Judicial caution here is both correct and understandable. Onerous compensation provisions seriously hamper the ability of public authorities to engage in public works and, as argued in the last section, they limit measures of economic planning and impinge on core governmental functions. In a commercial environment, the liability/no-liability equation is best calculated in terms of the transaction costs which enterprises have to bear. As with other transaction costs, attempts will be made whenever possible to transfer losses to other parties. Once again, the State's apparently inexhaustible resources are an irresistible magnet for litigants. As Epstein warns, economic losses should be left to the market, since losses and gains from the economic system are too uncertain; arguably, indeed, they *form part of* the market. And Schermers[139] argues that the victims of wrongful acts committed by the Community are often traders who are well aware of Community competences. The risks they take in dealing with the Community are 'normal' and 'the loss caused by such errors is part of business and compensated by the prices charged'. The challenge is to devise solutions which force these powerful actors to carry their own transaction costs. To translate this into the language of economists, a rational no-liability rule combines with a need to keep public and private liability in step. The door opened in *Francovich* should have been firmly slammed!

A less negative way to view 'levelling up' would be as a tentative step towards harmonisation. But if, as van Gerven predictably believes[140],

137 Joined Cases 5, 7, 13-24/66 *Kampffmeyer v Commission* [1967] ECR 245.

138 Case 74/74 *CNTA v Commission* [1975] ECR 533.

139 Schermers, Curtin and Heukell, *op cit*, n 106, p xi.

140 Van Gerven, 'Non-contractual Liability of Member States, Community Institutions and Individuals for Breaches of Community Law with a View to a Common Law for

harmonisation of liability rules is a desideratum, then we need to go about it more consciously. It is notable that the United States, whose legal systems are relatively homogeneous, have not proceeded beyond a voluntary *Restatement*. Again, it is significant that, when the Commission proposed an EC harmonisation of liability for non-transposition of directives, the proposal was declined[141].

The legal systems of the Member States differ in important respects[142]. There is the conspicuous common law/civil law divide. The public/private boundary falls in different places: in some Member States, all liability is treated under private law, in others a special, public law system applies, others again are mixed. In some administrative law systems damages play a central role, while others prioritise mandatory remedies. A few may favour collateral review, yet for a majority it poses serious problems, involving a transfer of the key powers of review from public to private tribunals[143]. To disrupt one element may seriously weaken the very system of national law on which the ECJ relies for enforcement. We find too that, although fault provides the basis of non-contractual liability in all European legal systems[144], a few legal systems, notably France, have moved far towards strict liability[145]. In the Community, this trend is illustrated by several directives, notably EEC 85/374 concerning liability for defective products or the new environmental directives, designed to 'make the polluter pay'. Or stepping across the contract/tort boundary, we find directives on the protection of

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Europe', (1995) 1 *Maas. J.* 6; *Idem*, 'The Case-law of the European Court of Justice and National Courts as a Contribution to the Europeanisation of Private Law', (1995) 3 *Eur. Rev. of Private Law,* pp 367-378. And see, Hartlief, 'Towards a European Private Law? A Review Essay', (1995) 1 *Maas. J.* 166, 175, discussing the possibility of a Restatement.

141 At Maastricht: see, EC Bull, Supp 2/91. See also the views of Member States argued by Germany, the Netherlands and Ireland before the ECJ in *Brasserie*, Opinion para. 24.

142 Fromont, 'La justice administrative en Europe: Convergences', in, G. Teboul *et al* (eds), *Mélanges René Chapus* (Montchrestien, 1992), convincingly argues that the latter are converging. But see Legrand, 'European Legal Systems Are Not Converging', (1996) 45 *ICLQ* 52.

143 I owe this point to Professor Cassese. Italy is particularly affected, see Clarich, *op cit*, n 138; Daniele, 'Après l'arrêt Granital: Droit communautaire et droit national dans la jurisprudence récente de la cour constitutionnelle', (1992) 28 *Cahiers de droit européen* 1; Gaja, 'New Developments in a Continuing Story: The Relationship between EEC Law and Italian Law', (1990) 27 *CML Rev.* 83. A variant of the problem arises in Luxembourg and Belgium.

144 Edward, *op cit*, n 106, p 122.

145 H. Mazeaud *et al*, *Leçons de Droit Civil*, Vol. II, *Obligations: Théorie générale*, (Montchrestien, 8th ed, 1991) p 420. For an English language explanation for Germany, see B. Markesinis, *The German Law of Torts, A Comparative Introduction* (Clarendon Press, 2nd ed, 1990). See also, Caranta, *op cit*, n 2 at 718.

consumers in contract law[146]. As Joerges, speaking of intervention by the Community legislator, explains[147]:

> The compulsory incorporation of 'foreign' concepts (...) affects deeper structures of private law systems. Every legal concept, every dogmatic construction, every line of legal argument operates in pre-determined traditional contexts. Legislative acts of national parliaments remain rooted in these contexts, even when they are perceived as destructive interventions. Moreover, they are still subject to control by case law, which is formulated with the objective of maintaining coherence within private law.

To probe this a little more deeply, law is a cultural artifact[148] rooted in a shared community experience and reflecting the community's cultural identity and ethical values. Unhappy law reform can jar with societal and constitutional arrangements. Law also embodies political beliefs - views on distributive justice or property expropriation - and structures - the welfare state or constitutional adjudication. EC law, however, is particularly the culture of an elite group[149]. This is why the clash of cultures through interference with tradition may produce a particularly strong 'whiplash' effect. Not only national courts but also national legislatures have conveyed precisely such warnings[150]!

IV Conclusion: Misreading the Rule of Law

The Rule of Law is a noble ideal but one which, unrestrained, is capable of degenerating into an ideology of law courts. In some legal cultures, the ideology has taken such a strong hold that it can overwhelm competitors[151]; Article 6

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146 EEC 93/13 Directive on Unfair Terms in Consumer Contracts. See Collins, 'Good Faith in European Contract Law', (1994) 14 *Oxford J. of Legal Studies* 229.

147 Joerges, 'The Europeanization of Private Law as a Rationalization Process and as a Contest of Disciplines - An Analysis of the Directive on Unfair Terms in Consumer Contracts', (1995) 3 *Eur. Rev. of Private Law* 175, 183.

148 Nelken, 'Disclosing/Invoking Legal Culture: An Introduction', (1995) 4 *Social and Legal Studies* 435; Collins, 'European Private Law and the Cultural Identity of States', (1995) 3 *Eur. Rev. of Private Law* 353.

149 Cappelletti, 'Introduction', in M. Cappelletti (ed.), *New Perspectives for a Common Law of Europe* (Sijthoff, 1978).

150 Many examples are recorded in *Working Papers* for the project *The European Court and National Courts: Doctrine and Jurisprudence: Legal Change in its Social Context* (directed Slaughter/Shapiro/Stone/Weiler) EUI RSC, 1995, especially the German report by J. Kokott. See also Voss, 'The National Perception of the CFI and the ECJ', (1993) 30 *CML Rev.* 1120, 1133. And see below.

151 See, Blair, 'Law and Politics in West Germany', (1978) 26 *Political Studies* 348, 352. And see, Rufner, in Bell and Bradley, *op. cit.*, n 43, p. 252: 'The idea that there could be any state activity which may not be challenged in court is alien to German law'. See also van Dijk, 'Access to Court' in Macdonald, Matscher and Petzold, *op cit*, n 87, p 379 arguing that 'effective judicial control' should be accepted as an implication of the Rule of Law.

ECHR, which postulates 'an independent and impartial *tribunal*' for the determination of civil rights and obligations, manifests this court-centred ideology. I have tried to show how, in locking the Community into national systems of liability, the ECJ may be creating an illusion of remedy where few remedies are in practice found. *Factortame* is an illustration of the 'Eurosaga' or litigation marathon[152], in which the outcome seldom justifies the expenditure of time and resources. Yet we know that the ECJ judgment in *Factortame (No 4)* provoked further writs in suits worth many millions of pounds. Is this the sort of society we want? As Schermers puts it[153]:

> 'All citizens profit from an orderly society and it seems justified that they may be required to make sacrifices for this general benefit (...). To a certain extent such sacrifices are normal and are made without compensation (...). In the United States of America it is quite normal to sue (...) whilst in Europe this is usually impossible. The American approach leads to an avalanche of lawsuits involving great expenditure. If we look at the whole field of liability, including private parties, if we consider the extremely high insurance premiums which must be paid by those who are sued, such as doctors, then it seems clear that we prefer the European system in which suits for liability are more exceptional'.

Article 13 ECHR, on the other hand, postulates only an 'effective remedy before a national authority'[154]. In many societies, claims for compensation are recognised which are not judicially enforceable. In the United Kingdom, for example, the practice of regular *ex gratia* compensation antedates the arrival of state (Crown) liability by some decades[155]. Today the rules are enforced through the parliamentary ombudsman, who has recently presided over regularisation of the practice[156]. Significantly too, he has just successfully disposed of a forerunner to the developing BSE crisis[157]. Similar practices exist in other countries: the Scandanavian countries are known for their strong ombudsmen[158] and the Dutch

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152 See for explanation, Harding, *op cit*, n 29, 105.

153 'Introduction', in Schermers, Curtin and Heukell, *op cit*, n 106, p xii.

154 For the somewhat complex principles applied in the interpretation of this article, see, Harris, O'Boyle and Warbrick, *op cit*, n 93, pp 449-458.

155 See, C. Harlow, *Compensation and Government Torts* (Sweet & Maxwell, 1982).

156 The First Report of the Select Committee on the Parliamentary Commissioner for Administration, 'Maladministration and Redress', HC 112 (1994) contains a codification of practice available publicly.

157 'Compensation to Farmers for Slaughtered Poultry' HC 519 (1992-3). No EC law point arose.

158 On the ombudsman as an effective remedy, see *Leander v. Sweden* (1987) 9 EHRR 433, where the point I am making in the text is reflected in the Court's finding that the ombudsman's opinions 'command by tradition great respect in Swedish society and in practice are usually followed'. The Court has also ruled, however, that complaint to an ombudsman does not amount to an 'effective domestic remedy', at least for purposes of exhaustion of remedy: Application 11192/84 *Montion v France,* 52 DR 227 (1987).

have a long tradition of administrative justice[159]. Perhaps this is a function for the European ombudsman? With its backlog problems, the ECJ should show more interest in alternative dispute resolution. By focusing on *procedure* rather than dogma, it could encourage effective remedies in a pluralist cultural context, playing to national strengths.

The Rule of Law is a great ideal; it must be remembered, however, that its maturation in modern constitutional theory took place during a period before the flowering of fully representative government[160]. Unrestrained, it is capable of blocking democratic evolution. AG Leger has described judicial enforcement as supporting and advancing the integration of Europe *regardless of the uncertainties of European politics*[161]. Is this either true or desirable?

The Community is a complex, culturally diverse, political entity, whose exacting functions are difficult to complete. It is inevitable that policies are hard to agree upon. Behind *Factortame* lies a sorry history of depleted fish stocks, decaying traditional communities and national quotas under strain from 'quota hopping'[162]; as we have seen, views on animal welfare, which underlie *Lomas*, differ significantly and are held to the point of civil disobedience. Patient negotiation rather than obedience is required for successful outcomes[163].

The EC law-making process is noted for its complexity but not for its participatory characteristics or transparency[164]; the warning conveyed by the German Constitutional Court in its celebrated Maastricht decision[165] strikes straight at the heart of the EC law-making process. Correction has proved more

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159 Verhej, 'Dutch Administrative Law after Benthem's Case', [1990] *Public Law* 23; *Benthem v Netherlands* (1985) 8 EHRR 1. See also, the Netherlands Report (M. Claes and B. de Witte) in *The ECJ and National Courts* project.

160 Thus Montesquieu (*L'Esprit des Lois*, 1748), Hamilton, Madison and Jay (*The Federalist Papers*, 1787-8), Rousseau (*Contrat Social*, 1762) and Dicey, (*Introduction to the Study of the Law of the Constitution*, 1885) all wrote before universal suffrage had been attained. See further, Harlow, 'Power from the People? Representation and Constitutional Theory', in P. McAuslan (ed.), *Law Legitimacy and the Constitution* (Sweet & Maxwell, 1985) p 62; P. Craig, *Public Law and Democracy in the United Kingdom and the United States of America*, (Clarendon Press, 1990).

161 Opinion, *Lomas*.

162 Churchill, 'Quota Hopping: The Common Fisheries Policy Wrongfooted?', (1990) 27 *CML Rev.* 209.

163 See Snyder, 'The Effectiveness of EC Law: Institutions, Processes, Tools and Techniques', (1993) 56 *Modern Law Rev.* 19. May, 1972, pp 417, 433 urges the ECJ to a negotiatory role. And see, Burley and Mattli, 'Europe Before the Court: A Political Theory of Legal Integration', (1993) 47 *International Organisations* 42.

164 Curtin and Mejers, 'The Principle of Open Government in Schengen and the European Union: Democratic Retrogression?', (1995) 1 *CML Rev.* 390.

165 The 'Maastricht Decision' *BVerfGE* 89 noted Herdegen, 'Maastricht and the German Constitutional Court: Constitutional Restraints for an "Ever Closer Union"', (1994) 31 *CML Rev.* 235, also reported as *Brunner v European Union Treaty* (1994) 1 *CMLR* 57.

difficult than one might suppose[166]. National parliaments are presently making vigorous efforts towards greater democratic input into the process. While there are differences of opinion as to how they should do this[167], there is general agreement that it would be desirable. The language of agency - Steiner's picture[168] - is as unhelpful as it is insulting. It sits uncomfortably with the Maastricht subsidiarity principle and finds no counterpart in the jurisprudence of federal courts.

For many years the ECJ was able to pursue an integrationist course, fashioning its role as guardian of the EC legal order without attracting more than occasional criticism[169]; Was this, perhaps, because public perception of EC law was as largely technical[170]? Today, as its highly visible judgments veer alarmingly between the daring and the indecisive[171], this perception has changed; by moving the effects of its judgments from low to high policy, the ECJ moves itself and, at the same time, national courts into the political limelight. To maintain their standing, courts need to be alert to the reactions of political actors[172]. A topical warning is contained in the UK White Paper for the Rome Intergovernmental Conference, proposing structural modifications to the EC courts system plus restrictions on the retrospectivity of ECJ rulings, both aimed directly at *Factortame (No 4)*[173]. This has been followed by a demand for a special conference devoted to the subject. The German 'Maastricht' decision, Treaty opt-outs, a non-justiciable Third Pillar may be undesirable. They were quite as foreseeable, however, as are future Council ouster clauses!

At the time that *Francovich* was decided, no sanctions had specifically been made available to the ECJ. The TEU, amending Article 171 EC, empowered the Commission to bring an erring Member State back to Court in

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166 Dehousse, 'Constitutional Reform in the European Community. Are there Alternatives to the Majoritarian Avenue?', (1995) 18 *W. Eur. Politics* 118.

167 Norton, 'Conclusion: Addressing the Democratic Deficit', (1995) 1 *J. of Legislative Studies* 177, 183 (Special Issue on the performance of national parliaments). See also Judge, 'The Failure of National Parliaments?', 18 *W. Eur. Politics* 79.

168 *Op cit*, n 30, 3, 16. See also, AG Mischo in *Francovich*, AG Leger in *Lomas*. But see, *Telecom*.

169 Notably, H. Rasmussen, *On Law and Policy in the Court of Justice* (Martinus Nijhoff Publishers, 1986).

170 Stein, 'Lawyers, Judges and the Making of a Transnational Constitution', (1981) 75 *Am. J. of Int. Law* 1, 3.

171 Reich, 'The "November Revolution" of the European Court of Justice: *Keck*, *Meng* and *Audi* Revisited', (1994) 31 *CML Rev.* 459; Ward, *op cit*, n 13 205.

172 Garrett, 'International Cooperation and Institutional Choice: The EC's Internal Market', (1992) 46 *International Organizations* 534, 558.

173 *A Partnership of Nations: The British Approach to the European Union Intergovernmental Conference 1996* Cm. 3181, 1996. See also, HC Deb. vol. 276 cols. 198-204 (23 April 1996): Private Member's Bill introduced by Ian Duncan-Smith MP to amend the European Communities Act 1972 in respect of judgments of the ECJ.

cases of failure to execute judgments. The ECJ may now impose 'a lump sum or penalty payment'[174]. The Community legislator has conceded that the disobedient State shall be sanctioned. The pity is that the ECJ did not leave the matter there.

[174] See Diez-Hochleitner, 'Le traité de Maastricht et l'inexécution des arrets de la Cour de Justice par les Etats Membres', (1994) 2 *Revue du Marché Unique Européen* 111, preferring the liability route. Fines and 'penalty payments' also feature in EC competition law (EEC Art 172 and Art. 17 of Reg. 17: Joined Cases 90. 91/63 *Commission v Luxembourg and Belgium* [1964] ECR 625.

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