



State Liability for Judicial Wrongs: Comparative Analysis of the UK, France and Ukraine

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Abstract

This paper aims at analyzing legal rules governing state liability for judicial wrongs in Ukraine, France and the UK as well as standards established by international regime of ECHR and supranational regime of the EU. It shows that restrictive rules that exist in Ukraine and the UK do not comply with ECHR standards. The author argues that there are no compelling reasons for such a restrictive rules and fair balance requires certain scope of liability of state for judicial wrongs.

It is suggested that judicial wrongs are not homogeneous and can be divided into two types depending on whether they derive from substantive content of judgment. It is argued that it is not reasonable to apply equally restrictive rules to both types. It is revealed that Ukrainian approach is the most restrictive and does not comply with standards of ECHR. Several suggestions are made as to how Ukrainian rules can be improved.

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Introduction

This paper addresses issues of civil liability of state for judicial wrongs in the United Kingdom, France and Ukraine. Notion of judicial wrong is understood widely and means any breach of proper administration of justice and includes two types of wrongs, namely those that are concerned with substantive content of judicial decision and those that are not.

State liability for judicial wrongs is a part of broader concept of civil liability of public authorities. This kind of liability falls within the scope of broader concept of civil delictual liability, or liability in tort if to use common law terminology. This liability is non-contractual liability that derives directly from the law. This paper focuses on civil liability only and criminal, administrative, disciplinary or other types of liability that can be triggered by judicial wrongs are not covered.

Civil liability of state for its authorities represents a relatively young and developing sphere of law. In the United Kingdom it was only after World War II, with the enactment of the Crown Proceedings Act 1947, when the state started to systematically assume civil liability for acts and omissions of its authorities. In France it happened earlier and it was gradually developing process starting after the French Revolution¹. Before state has assumed such a liability the dominant legal doctrine was that “the king can do no wrong”, i.e. as a general rule, the crown, or the state, was immune from being sued².

Later, in addition to abandonment of the “king can do no wrong” maxim, state liability was reinforced on international and supranational levels. With the subscription and coming into force of the European Convention on Human Rights (ECHR) states-signatories, including the

¹ See Duncan Fairgrieve, *State Liability in Tort: a Comparative Law Study* 7-14 (2003); Spyridon Flogaitis, *State Extra-Contractual Liability in France, England and Greece* in Duncan Fairgrieve et al., *Tort Liability of Public Authorities in Comparative Perspective* (2002)

² Id.

three jurisdictions covered in this paper can be sued in European Court of Human rights. State liability was reinforced once again with even new force by jurisprudence of the European Court of Justice. These extra-national regimes, as it will be shown below, added much to the development of state liability, in particular liability for judicial wrongs.

State liability for judicial wrongs is among the most complex and delicate issues of all those connected with state liability for public authorities. It is mostly due to specific nature of functions performed by the judiciary and its place in framework of the modern democratic polity. The very existence and extent of state liability for judicial wrongs involves consideration and balancing of different interests and the most obvious of them are: interest of the injured to be redressed and compensated, public interest proper administration of justice and accountability of those holding the judicial office³, public interest in efficient usage of public funds. On extra-national level, issue of state liability for judicial wrongs committed by its domestic judiciary becomes even more complicated.

Issues of state liability for judicial wrongs have been addressed in literature, though it cannot be said that there has been much written on the topic. Those who addressed these issues not only descriptively generally agree that state should be liable for judicial wrongs absolute judicial immunity is not appropriate⁴. In this research these issues will be addressed from another angle: there should be distinguished judicial wrongs that derive from substantive content of judicial decision and those that are not. This helps to determine the scope of state liability for judicial wrongs: liability for wrongs that derive from content of judgment is less

³ See Abimbola A Olowofoyeku, *Accountability versus Independence: the Impact of Judicial Immunity* in Guy Canivet et al., *Independence, accountability, and the judiciary* 357 (2006)

⁴ E.g. Abimbola A. Olowofoyeku, *Suing judges: a study of judicial immunity* (1993); Sue Arrowsmith, *Civil liability and public authorities* (1992); Nick Taylor and James Wood, *Victims of Miscarriages of Justice* in Clive Walker and Keir Starmer, *Miscarriages of Justice: a Review of Justice in Error* (1999)

desirable and should be narrow while liability for wrongs that are not concerned with judgment can safely be introduced to broader extent.

This research is confined to civil liability of state and issues of accountability of judiciary in general, such as appellate review, scrutiny by the media etc⁵., are not covered. This paper is aimed at investigation of liability which stems from the injury caused to those who “use” judicial system and not those who constitute its part or work in it. The research is also not intended to cover public international law issues of state liability.

There are several reasons why the UK, France and Ukraine were chosen for this research. First of all, it allows covering two major contemporary legal systems, the common law system represented by the UK and the civil law one represented by France and Ukraine. Besides, it allows covering extra-national standards in this sphere, namely international regime of ECHR that encompasses all of the three jurisdictions and regime established by EU law that encompasses France and the UK. What is also important, the three jurisdictions represent quite different approaches to the issue and it helps to show contrast between domestic rules of state liability for judicial wrongs that can be found.

Ukraine proved to represent the most restrictive approach to liability for judicial wrongs which is not compatible with ECHR. Besides, Ukrainian law that governs administration of justice and shapes judicial system is currently in the process of reformation so some observation as to how rules of liability for judicial wrongs can be improved are relevant.

The main aim of this paper is to analyze and compare legal rules governing state liability for judicial wrongs in Ukraine, France and the UK as well as standards established by international regime of ECHR and supranational regime of the EU. It will be shown that

⁵ On issues of accountability of the judiciary in general see, for example, Andrew Le Sueur, *Developing Mechanisms for Judicial Accountability in the UK* in Guy Canivet et al., *Independence, accountability, and the judiciary* (2006)

extremely restrictive rules that exist in Ukraine and the UK do not comply with ECHR standards. It will be argued that there are no compelling reasons for such a restrictive rules and fair balance requires certain scope of such liability. It will also be shown that judicial wrongs are not homogeneous and can be divided into two types depending on whether they derive from substantive content of judgment and it is not reasonable to apply equally restrictive rules to both types.

As I deem it impossible to fully understand and compare civil liability of state for judicial wrongs without understanding general regime of liability of public authorities in a given country, I will start my analysis with investigation into the basic conditions of liability of liability of public authorities in the three jurisdictions, theirs basic similarities and differences. After this analysis is done in the first chapter, I will move to specifically analyze liability for judicial wrongs that are not concerned with substantive content of judicial decision; the third chapter will deal with liability for wrongs that derive from substantive content of judicial decision.

Chapter I. Liability of Public Authorities: General Framework

1.1. Introductory note

In order to properly understand rules of liability of state for judicial wrongs in the three jurisdictions it is important to look at general rules governing liability of public authorities. The judiciary certainly belongs to public authorities and these general rules, though with significant modifications, apply to liability of state for its activities.

In all of the three jurisdictions basic conditions necessary to trigger state liability of public authorities are unlawful conduct, loss (damage) sustained by victim, and causal link between unlawful conduct and loss. These conditions are not always mentioned expressly in legal provisions but they always apply; there can be other conditions depending on the jurisdiction and circumstances of particular case but these are the core conditions. In this chapter I will analyze these conditions as they exist in national law of the three jurisdictions and show their basic differences and similarities. But first of all I would like to focus on general frameworks of the common law tradition and the civil law one. As it will be seen, these are different and these differences will be felt throughout this paper.

1.2. Liability of Public Authorities in the Common Law and the Civil Law Legal Systems

Legal approaches to civil liability of state for its authorities differ drastically in common law legal tradition and the civil law one. In France, which belongs to the civil law legal system, issues of civil state liability are approached with general provisions of the Civil Code: “[a]nyone who, through his act, causes damage to another by his fault shall be obliged to compensate the damage (article 1382)”⁶; article 1383 extends this rule to negligence and

⁶ As reproduced in English in Walter van Gerven et al, *Tort Law* 57 (2000)

carelessness⁷. So, potentially any unlawful act or omission that causes loss can give rise to liability⁸.

Ukrainian law approaches the issues with similar general provisions that pecuniary and non-pecuniary damage caused to somebody (both individuals and legal personalities are included) by unlawful decisions, acts, or inaction is to be compensated in full by perpetrator(s) of damage⁹. So again, like in France, potentially any act or omission of public authority is capable of giving rise to civil liability if there is damage sustained by victim, the act or inaction is unlawful, and there is a causal link between act or omission and damage. Please note that no fault on the part of public authority is required, i.e. liability of public authorities is no-fault liability¹⁰.

The approach adopted by common law tradition, as exemplified by the UK, is not one of general statutory provisions. In the UK, there exist a number of common law torts, such as trespass, nuisance, negligence etc., capable of giving rise to tortious, or civil, liability; each of these torts has its own requirements and protected interests¹¹. The conduct complained of can give rise to liability only if it falls within the scope of at least one of these designated torts, i.e. not every harmful or injurious conduct triggers civil liability in tort. Besides, the same regime of liability applies to both public authorities and private individuals (private legal personalities)¹².

In the UK, courts may apply the same tort differently in different situations depending on particular circumstances involved; that is why in order to determine whether liability in tort

⁷ Id.

⁸ Id. 58

⁹ Article 56 of the Constitution of Ukraine, articles 1166, 1167 of the Civil Code of Ukraine.

¹⁰ As a general rule requirement of fault is applied in non-contractual civil liability (article 614 of the Civil Code) but article 1173 of the Civil Code removes this requirement when it comes to conduct of public authorities.

¹¹ Walter van Gerven et al, *Tort Law* 44 (2000)

¹² Id., 358

can arise under particular circumstances it is important not only to identify suitable tort(s) but also to identify most similar scenarios and look how certain tort has been applied there. In civil law legal system countries, like France and Ukraine, it can be identified whether under particular circumstances rules of civil liability can be applied by analyzing whether conditions established by general statutory provisions, namely unlawfulness of conduct, fault, damage and causation, are satisfied. There are certain exceptions or special rules applicable under certain circumstances, but for purposes of this paper it is sufficient to describe these general conditions only and I will proceed to analyze them.

1.3. Unlawfulness and fault

I decided to analyze both unlawfulness and fault in one sub-section because of similar functions they can perform in different jurisdictions. If certain jurisdiction does not employ both concepts, either of them can be employed to carry out certain tasks. Besides, as it will be seen further, these concepts are closely related to each other and sometimes one of them encompasses the other.

Unlawfulness of conduct (it can also sometimes be called “illegality”) can be characterized as “inconsistency between the conduct required by the [legal] duty or obligation concerned and the actual conduct of tortfeasor”¹³, i.e. it is actual noncompliance to some objective legally prescribed standards of behavior; it is an objective criterion. Fault (sometimes term “fault” is used in a sense of “culpability” or “imputability” of wrongful conduct to wrongdoer) is subjective criterion in a sense that it characterizes wrongdoer’s psychological attitude to his, or her, wrongful behavior¹⁴.

¹³ Walter van Gerven et al., *Tort Law* 301 (2000)

¹⁴ Id.; Ia. M. Shevchenko et al, *Tsivilne pravo Ukraïny [Civil Law of Ukraine]* 205 (2003);

Ukrainian law distinguishes unlawfulness as an objective criterion and fault as subjective one as described above. As I said at the beginning of this chapter, state is liable for its authorities regardless of fault on their part so, for purposes of this paper, I will not go in further details of notion of fault in Ukrainian law. Application of condition of unlawfulness means that if conduct of an authority does not comply with objective legal standards of proper behavior and given damage and causation are present, and no specific deviations apply, liability arises; i.e. only objective criteria matter.

As to standards of proper conduct, there is principle in Ukrainian law, established by article 19 of the Constitution that public authorities are permitted to act only in the way specifically prescribed by law; so if an authority acts otherwise and no specific rules apply, an authority behaves unlawfully. This principle applies to active behavior; as to unlawfulness in case of omission, or inaction, it is logically follows that if law requires an authority to act in certain way its failure to do so triggers unlawfulness.

The fact that no subjective requirement of fault applies does not mean that it is abnormally easy to bring a successful claim against the state in Ukraine. Claims that can fail on fault, or culpability, in other jurisdictions in Ukraine can fail, for instance, on unlawfulness because authorities' powers, or discretion, can be broadly defined by statutory law or broadly construed by courts.

French law uses notion of fault to accommodate both objective criterion of unlawfulness and subjective criterion, which can be called "imputability" or "culpability"¹⁵. However, it is suggested that fault now mostly means its objective component and culpability is, as a general rule, not a condition of liability anymore¹⁶. Moreover, unlawfulness, or

¹⁵ Id. 301-302

¹⁶ Id. 302, 332

illegality, is *per se* sufficient condition of liability¹⁷; in practice fault is incurred whenever a violation of mandatory legal rule occurs and no valid justification is suggested, and burden to disprove fault is on the part of wrongdoer¹⁸. So, in fact, laws of Ukraine and France are not dissimilar at this point in spite of existence in France of subjective element of fault, which is absent in Ukraine.

There exists a point of view that equation of objective illegality and fault in French law is valid in respect of administrative decisions only and different standards apply in respect of physical acts of public bodies, which cannot be set aside¹⁹. In cases of physical acts, it is suggested, the test is whether service fault has occurred²⁰. For the purposes of this paper I will not go into details of these issues but notion of service fault and distinction between it and personal fault of individual officer, which are prominent features of French law, are to be addressed.

Service fault (*faute de service*) is “an objective defect in the organization or functioning of an administrative body in relation to the goal...which is imposed on it by law” and not “the act of man”...which implies a subjective evaluation by the judge of the motives of a human or legal person”²¹, for which public bodies are liable²². Individual servants can be liable for personal fault (*faute personnelle*) committed in the course of their professional activities if their wrongful behavior amounts to it; different factors are taken into account by courts while

¹⁷ Duncan Fairgrieve, *State Liability in Tort: a Comparative Law Study* 30 (2003)

¹⁸ Walter van Gerven et al., *Tort Law* 305 (2000)

¹⁹ Duncan Fairgrieve, *State Liability in Tort: a Comparative Law Study* 103 (2003)

²⁰ Id.

²¹ Marie-Aimée de Lqtournerie, *Law of France* in John Bell and Anthony W. Bradley, *Governmental Liability: a Comparative Study* 207 (1991)

²² Duncan Fairgrieve, *State Liability in Tort: a Comparative Law Study* 20 (2003)

deciding whether personal fault has occurred but in general personal fault is incurred only when servant's act has "no connection with public service"²³.

Besides, service fault may derive merely from "the defective organization and functioning of the administration", which can be detected by comparison of conduct complained of to abstract model of proper conduct; reasonable behavior does not itself exclude service fault if actual results are improper and "anonymity" of service fault generally makes the state of mind of responsible servants irrelevant²⁴.

This distinction between types of fault is not only of theoretical importance; if personal fault has occurred claim cannot be brought against state, or public authority, but against individual servant, which is not beneficial for claimant. However, these two types of fault are not mutually exclusive and can occur simultaneously²⁵.

One more prominent feature of French law is gradation of fault according to criterion of seriousness, or graveness. More serious type of fault is called *faute lourde* and is distinguished from *faute simple*; there is no uniform definition of *faute lourde*, various factors are taken into account while establishing it, including subjective component of fault that I mentioned above²⁶. Liability for some types of wrongful activity, for example medical and emergency services, requires *faute lourde*²⁷. In the next chapter I will show the role played by *faute lourde* and *faute simple* in liability for judicial wrongs in France.

And finally, sometimes the French state is liable even without anybody's fault. This no-fault liability is based on theory of risk and principle of equality before public burdens²⁸. This paper is not a proper place to give detailed account of theoretical grounds of no-fault liability in

²³ Id. 21-23

²⁴ Id. 104-105

²⁵ It was established by Conseil d'Etat in its decision CE 3 Feb. 1911, *Anguet* [1911] Rec. 146

²⁶ Duncan Fairgrieve, *State Liability in Tort: a Comparative Law Study* 106-120 (2003)

²⁷ Id.

²⁸ For more details see e.g. L. Neville Brown and John S. Bell, *French Administrative Law* 193-199 (5th ed. 1998).

French law and conditions under which it can arise but in the next chapter I will show how state liability for judicial wrongs can be incurred in France without fault.

English law, as I mentioned in the previous section, is characterized by number of torts, or heads of tortious liability and there are no general statutory provisions governing civil liability akin to those in Ukrainian or French law described above. Each tort has its own specific requirements to be satisfied in order for liability to arise. While looking at requirements of number of torts it is possible to see that there is a distinction between objective unlawfulness and subjective fault in law of torts. For example, for tort of misfeasance in public office mere illegality of impugned act does not trigger liability and certain mental subjective attitude of wrongdoer to the act is required²⁹. For tort of negligence mere illegality also does not suffice.

Scholars generally agree that tort of negligence has become nowadays dominant tort in the UK³⁰ so it is worth looking at it in more detail. The central component of this tort is duty of care. According to the judgment of House of Lords in *X v Bedfordshire County Council*³¹, duty of care owed by a public authority can arise if public authority acted outside its discretion or, even if acted within the discretion, exercised it so “carelessly or unreasonably that it cannot be held to have acted within its discretion”; if public authority’s conduct was not within its discretion, in order duty of care to be imposed it must be proven that the harm was reasonably foreseeable, there was a relation of proximity between the defendant and the plaintiff, and it is “fair, just and reasonable” to impose a duty of care.

²⁹ This state of mind is called “bad faith” and, as was explained by Lord Steyn in *Three Rivers District Council and Others v Governor and Company of the Bank of England* [2000] 2 WLR 1230-1236, means that defendant either has intended to injure the plaintiff (targeted malice) or had acted knowing that he had no power to do the act complained of, or with reckless indifference to the illegality of the act, and knowing that such a conduct would probably injure the plaintiff.

³⁰ See Duncan Fairgrieve, *State Liability in Tort: a Comparative Law Study* 58, 101 (2003); Walter van Gerven et al., *Tort Law* 304 (2000)

³¹ *X v Bedfordshire County Council* [1995] 2 AC 633

As it is seen from above-described requirements of tort of negligence mere unlawfulness is not sufficient, certain attention is given to mental state of tortfeasor. Besides, as it seen from above, there are also other notions, such as “fair, just and reasonable” requirement, which are used to regulate liability under the tort of negligence.

It is impossible, and perhaps unnecessary, to give account of all torts that exist in the UK in this paper so I will stop analyzing UK’s law here emphasizing once again that different combination of objective unlawfulness with subjective fault can be required depending on certain tort(s) relied on. Such a different approach to civil liability in the UK from that existent across civil law system jurisdictions makes me think that notion of tort liability as it is used in common law is not equal to that used in civil law tradition to denote non-contractual civil liability.

1.4. Causation and Damages

Type of liability addressed in this paper is liability for some damage caused to the injured. Below I will give a brief overview of types of damage recognized by the three jurisdictions and rules of establishing causal link between damage and wrongful act. Please be aware that this overview, though sufficient for the purposes of this research, is the most general and these issues are much more nuanced and complex, and may be subject to various deviations and qualifications depending on certain circumstances of concrete cases.

All of the three jurisdictions have adopted, with some variations, *condition sine qua non* test to deal with issues of causation³². This test is also known as “but for” test because it is satisfied if the harm would not have occurred but for impugned conduct³³. The most notable

³² Duncan Fairgrieve, *State Liability in Tort: a Comparative Law Study* 165-173 (2003); Walter van Gerven et al., *Tort Law* 408, 418-421(2000); Ia. M. Shevchenko et al, *Tsivilne pravo Ukraïny [Civil Law of Ukraine]* 100-101 (2003); O.V. Dzera and N.S. Kuznetsova, *Tsivilne pravo Ukraïny [Civil Law of Ukraine]* 514-515 (2004).

³³ Walter van Gerven et al., *Tort Law* 408, 418-421(2000)

features of this test in the three countries are: in the UK there is one more – second – stage of establishing the causal link, causation in law, when policy considerations, such as “remoteness” of damage, will be taken into account³⁴; in France “but for” test is unitary test and is applied rather strictly, harm must be direct and certain³⁵; in Ukraine this test is also unitary and strict, wrongdoer will be liable for the harm caused by its conduct³⁶.

It is worth taking into account that in different jurisdictions different tasks are carried out by different instruments: for example, remoteness of damage, its foreseeability in Ukrainian law are not dealt with by issues of causation, as they are in the UK, but are encompassed by conception of fault and contributory fault. Different combinations of different conceptions, including causation, can be used in different jurisdictions to control civil liability but this paper is not a proper occasion to analyze role of causation any deeper and I will stop doing it at this point.

Once it is established that there is unlawful act which caused damage an important issue comes up as to what kinds of damage can be awarded. Generally the three jurisdictions do not differ much according to types of damage that can be awarded. Laws of all the three countries allow obtaining compensatory damages (whose aim is to make good the injury), exemplary, or punitive, damages (whose aim is to have punishing and deterrent effect on the wrongdoer), nominal damages (whose aim is not to provide compensation but rather to have violation of right(s) officially declared; very small amount of money is awarded); wide range of damage, including personal injury, damage to property, pure economic loss, is recognized by the three

³⁴ Duncan Fairgrieve, *State Liability in Tort: a Comparative Law Study* 166 (2003); Walter van Gerven et al., *Tort Law* 408 (2000)

³⁵ Walter van Gerven et al., *Tort Law* 408, 418-421(2000)

³⁶ Ia. M. Shevchenko et al, *Tsivilne pravo Ukraïny [Civil Law of Ukraine]* 100-101; O.V. Dzera and N.S. Kuznetsova, *Tsivilne pravo Ukraïny [Civil Law of Ukraine]* 514-515

jurisdictions; compensation in kind or in money can be awarded depending on circumstances of the case³⁷.

Conditions necessary for obtaining of certain kind of damage vary depending on jurisdiction and actual circumstances of individual case, as well as chosen cause of action. It is not possible, and perhaps unnecessary, to give comprehensive account of these conditions in this paper but the most general summary of key features of rules related to awarding of damages in the three jurisdictions can be given as follows: in the UK courts are generally reluctant to compensate pure economic loss (i.e. not actual damage but loss of profit), lost chances and non-pecuniary (moral) damage compared to situation in France³⁸. In Ukraine, punitive damages are not formally recognized because notion of damage is linked to compensation and not punishment; however, de facto, moral damages awards can amount to punitive damages and fulfill their functions; courts enjoy wide discretion in awarding moral damages³⁹.

Sometimes government decides to compensate certain damage even if rules of civil liability do not oblige it to do so. This type of compensation is known as *ex gratia* payments.

1.5. Other Important Issues: Who to Sue and Where

Brief account of general conditions of liability of public authorities taken above would be unsatisfactory if such practically important issues as division between liability of state and personal liability of individual officers, as well as courts competent to adjudicate on claims against public authorities, in the three jurisdictions would not have been addressed. These

³⁷ Duncan Fairgrieve, *State Liability in Tort: a Comparative Law Study* 189-238 (2003); Ia. M. Shevchenko et al, *Tsivilne pravo Ukraïny [Civil Law of Ukraine]* 97-100, 325-326; O.V. Dzera and N.S. Kuznetsova, *Tsivilne pravo Ukraïny [Civil Law of Ukraine]* 510-511, 717-718; articles 22, 23 of Civil Code of Ukraine.

³⁸ Duncan Fairgrieve, *State Liability in Tort: a Comparative Law Study* 192 (2003)

³⁹ Article 23 of the Civil Code of Ukraine; postanova Plenumu Verkhovnogo Sudu Ukraïny “Pro sudovu praktyku v spravah pro vidshkoduвання moralnoï (namainovoï) shkody” [resolution of Plenum of the Supreme Court of Ukraine “On judicial practice on reparation of moral (non-pecuniary) damage”] # 4 from 31 March 2005

issues play important role in further analysis of liability for judicial wrongs, as I will show in following chapters.

In France and Ukraine there exist specialized administrative courts that, with some exceptions, are competent to adjudicate on complaints against public authorities⁴⁰. In Ukraine, at least, this is of significant importance because rules of procedure applied in these courts, proscribed by the Code of Administrative Procedure of Ukraine⁴¹, place the burden of proof on the part of defendant public authority, i.e. victim does not need to prove that defendant is liable but it is for the defendant to disprove it. However, due to the existence of special statute⁴², which regulates state liability for conduct of judicial and law-enforcement authorities, and courts' construction of rules of applicability of concurring legal provisions courts have taken restrictive approach and apply rules of the statute⁴³, which are less favorable for victims, when defendant authority is one of those enumerated in it. Conduct of judicial authorities is also within the scope of restrictive applicability of this statute and this is one of points of my criticism in the next chapter.

In the UK, on the contrary, no such division exists and claims against public authorities are within jurisdiction of ordinary courts; individual servants are personally liable for committed wrongs alongside with public authority they serve in; generally public authorities

⁴⁰ For France see, e.g. Duncan Fairgrieve, *State Liability in Tort: a Comparative Law Study* 20-23 (2003); For Ukraine see zakon Ukraïny "Pro sudoustrii Ukraïny" [the Law of Ukraine "On Judicial System of Ukraine" # 3018-III of 07 February 2002 article 19; Kodeks administratyvnoho sudochynstva Ukraïny [Code of Administrative Procedure of Ukraine] #2747-IV of 06 July 2005 article 2.

⁴¹ Article 71 of the Code

⁴² Zakon Ukraïny "Pro poriadok vidshkoduvannia shkody, zavdanoï gromadianynovi nezakonnymy diiamy organiv diznannia, dosudovogo slidstva, prokuratury ee sudu" [the Law of Ukraine "On Procedure of Compensation of Damage Caused to Individual by Unlawful Actions of Investigatory, Prosecutorial and Judicial Authorities] # 266/94-BP of 01 December 1994;

⁴³ E.g. uhvala Vyshchogo administratyvnoho sudu Ukraïny [Decision of the Supreme Court of Ukraine] of 19 December 2005 in case of R proty Derzhavnoï podatkovoi administratsii Ukraïny v Vinnystskii oblasti [R v State Fiscal Administration of Ukraine in Veennytsia Region];

assume vicarious liability for their servants⁴⁴. Crown Proceedings Act 1947 waived immunity of the Crown and the Crown⁴⁵ is now liable for most of public officials. However, the Crown does not assume liability for judicial officers⁴⁶ and this plays important role in my analysis of liability for judicial wrongs in the UK in the following chapters.

In France, state assumes liability for individual officials as long as conduct complained of does not qualify as *faute personnelle*⁴⁷. In respect of judicial authorities, however, the state assumes responsibility always regardless of type of fault⁴⁸. Theoretically judges can be personally liable for their wrongs in the sense that the state, after having compensated a victim, has right of recourse against them⁴⁹ but the state does not use this right⁵⁰.

In Ukraine, the rule is that the state is always liable for conduct of its officials while exercising their powers⁵¹. In certain instances, where impugned conduct of investigatory, prosecutorial and judicial officials constitutes crime, the state has right of recourse to convicted officials⁵²; but, be it either way, it does not affect victim who is anyway eligible to cover damages from the state. Here it is possible to see some analogy with France in case of *faute personnelle*, though I think in general commission of crime supposes higher degree of seriousness of delinquency and procedure of establishing it seems to be more complicated.

⁴⁴ E.g. Duncan Fairgrieve, *State Liability in Tort: a Comparative Law Study* 23-24 (2003)

⁴⁵ There is no concept of the state in the UK akin to those that exist in Ukraine and France and Crown is not understood to be the state but for the purposes of this paper notion of liability of Crown is used to denote liability of the state in the UK. For more details see Abimbola A. Olowofoyeku, *Suing judges : a study of judicial immunity* 157-165 (1993)

⁴⁶ Crown Proceedings Act 1947 article 2 (5)

⁴⁷ E.g. Duncan Fairgrieve, *State Liability in Tort: a Comparative Law Study* 20 (2003)

⁴⁸ Article L.781-1 of the Code de l'organisation judiciaire as reproduced in English in Walter van Gerven, *Tort Law* 384-385 (2000), see also notes.

⁴⁹ Id.

⁵⁰ Guy Canivet, *The Responsibility of Judges in France* in Guy Canivet et al, *Independence, accountability, and the judiciary* 39 (2006)

⁵¹ Article 1174 of the Civil Code of Ukraine.

⁵² Id. article 1191

1.6. Conclusion

In this chapter it was shown that rules of liability of public authorities in the three jurisdictions share similarities in fundamental issues: normally liability of public authorities is triggered by conduct which is disapproved (unlawful or fault-based conduct or both) and causes loss. However, there are substantial differences that are to be taken into account; for example, unlawfulness and fault have different meanings in France and Ukraine; in France, liability may arise for conduct which is not disapproved (no-fault liability) and in Ukraine no-fault liability is a general regime of liability of public authorities but it entails disapproval (unlawfulness); in the UK there are no general rules at all and not every harmful conduct triggers liability but only conduct that constitutes at least one of torts etc. These differences in approaches are of considerable practical importance.

General rules of liability of public authorities are modified when applied to liability for judicial wrongs as it will be shown in following chapters; however, they influence rules of liability for judicial wrongs and help to explain them.

Chapter II. Liability for Judicial Wrongs That Do Not Derive From Substantive Content of Judicial Decision

2.1. Introductory Note

In this chapter, liability of state for judicial wrongs that do not derive from substantive content of judicial decision will be examined. Wrongs of this type are not concerned with exercise of judicial discretion and making judgments. In short, liability for these wrongs arises not because “wrong” judgment is delivered or discretion is exercised “improperly” but because of failure of judicial officer to properly perform his duties that do not require making judgments or exercise of discretion. It is not possible to give full list of possible wrongs of this type; excessive length of judicial proceedings can serve as good example of wrong of this type, other examples may include failure to properly inform the parties about their rights, failure to issue certain documents if they are to be issued under specified circumstances etc.

I will start the analysis with international regime established by European Convention For the Protection of Human Rights and Fundamental Freedoms (ECHR) because it establishes certain standards of proper performance of judicial function and liability for this type of judicial wrongs state-signatories, including the three jurisdictions under comparison, are to comply with. It will be shown in this chapter that this international regime influences domestic law of states-signatories but often states do not comply with it. Then I will analyze how laws of the three jurisdictions deal with this type of wrongs.

Issues covered in this chapter are quite specific and the three jurisdictions deal with them quite differently. That is why, in order to present the issues in a coherent way, I think it the most appropriate to organize this chapter not according to specific issues, as the previous chapter, but according to jurisdictions.

2.2. Liability for Judicial Wrongs and ECHR

All of the three jurisdictions analyzed in this paper are parties to the ECHR and are obliged to protect basic human rights proscribed in it. In my analysis I will focus on those rights that are relevant to liability of states-signatories for judicial wrongs, namely right to a fair trial (article 6) and right to an effective remedy (article 13) as far as it interacts with article 6.

Article 6 of the ECHR establishes some basic standards designed to guarantee proper judicial proceedings in domestic courts of states-signatories. Encompassed proceedings are those related to issues of both criminal and civil law. As interpreted in jurisprudence of the ECtHR these standards relate to access to court, fair hearing, independence and impartiality of tribunal, equality of arms of the parties, prompt information of the parties, reasonable time of litigation etc⁵³. Judicial wrongs can be detected in breach of any of these standards and it is not possible to give full account of them in this paper. Whether judicial wrong has occurred depends also on domestic law of particular state-defendant.

The ECtHR only examines whether defendant state complied with the standards necessary to guarantee right to fair trial and it does not fulfill any functions of appellate court. It does not review whether national judge exercised his or her discretion “properly”, whether the assessment of evidence was “correct” etc. It only assesses whether necessary standards were observed. That is why it deals mostly with those judicial wrongs that are not concerned with substantial content of judgment. Some of the wrongs may be such that it is impossible to determine whether judgment would have been the same have they not been committed (for

⁵³ For more information see Philip Leach, *Taking a Case to the European Court of Human Rights* 241-278 (2005); Martin Kuijer, *The blindfold of Lady Justice : judicial independence and impartiality in light of the requirements of Article 6 ECHR* (2004)

example, if judge refused to hear the evidence) but still they do not derive from the content of judgment, i.e. the Court does not say that the judgment itself is wrong.

What is also important is that not every detected judicial wrong will lead to liability of state-defendant because the Court looks at judicial proceedings as a whole and if proceedings, taken as a whole, comply with these standards minor wrongs can be excused⁵⁴.

A good example of liability of states-signatories for judicial wrongs that are not concerned with content of judicial decision for violation of article 6 and article 13 is liability for excessive length of litigation. In *Kudla v Poland*⁵⁵, because of high number of applications concerning excessive length of litigation in national courts, the Court started to examine not only alleged violations of article 6 but also of article 13 (right to effective remedy). Since *Kudla* the Court construes article 13 as requiring effective domestic remedy allowing victim to obtain compensation for excessive length of litigation in domestic courts. The Court's case law on liability of states-signatories for excessive length of litigation is quite extensive. However, as it is seen from *Kudla*, application of article 13 does not go further than liability for excessive length of litigation and there are strong arguments that it should apply to all acts and omissions of the judiciary⁵⁶.

All of the three jurisdictions are parties to the Convention. In Ukraine and France the Convention came into force and became part of national law after it was ratified. It is worth mentioning that Ukraine has adopted special law designed to facilitate the execution of Court's decisions against Ukraine and strengthen the role of jurisprudence of the ECtHR: national courts are obliged to take into account jurisprudence of the Court as part of national law; the

⁵⁴ Philip Leach, *Taking a Case to the European Court of Human Rights* 253 (2005)

⁵⁵ *Kudla v Poland*, 26 Oct 2000

⁵⁶ See Tom Barkhuysen and Michael L van Emmerik, *Accountability of the Judiciary on the National Level for Violations of the European Convention on Human Rights* in Guy Canivet et al, *Independence, accountability, and the judiciary* 39 (2006)

law obliges the executive, in case the Court finds Ukraine in violation of the Convention, to take certain measures in order to eliminate causes of these violation(s)⁵⁷. However, as it will be shown below, this law has not ensured compatibility of Ukrainian law with ECHR.

In the UK, where there is doctrine of sovereignty of parliament, the Convention was not part of national law and was not obligatory for domestic courts until the Human Right Act 1998 came into force in 2000⁵⁸. This Act incorporated the Convention, with the exception of article 13, into English law and obliges national court to adhere to jurisprudence of the ECtHR and interpret national legislation in compatibility with the Convention⁵⁹. The Convention and Act thus started to exert influence on domestic procedural and substantive law⁶⁰ giving victims additional remedies against misconduct of public authorities. However, as it will be seen further, these remedies are not sufficient to ensure compatibility of the law of the UK with ECHR.

All of the three jurisdictions are supposed to comply with standards of liability established by the Convention and subsequent jurisprudence of the Court. However, as it will be shown below, the UK and Ukraine do not comply and only France shows positive changes in domestic law influenced by the ECHR.

⁵⁷ Zakon Ukraïny “Pro vykonannia rishen ta zastosuvannia praktyky Ievropeiskogo sudu z prav liudyny” [the Law of Ukraine “On the Execution of Decisions of the European Court of Human Rights and Application of its Jurisprudence”] # 3477-15 of 23 February 2006

⁵⁸ E.g. Peter Leyland, *The Constitution of the United Kingdom: a Contextual Analysis* 37-41, 44-45 (2007)

⁵⁹ Articles 1, 2, 3 of the Act

⁶⁰ See generally Jane Wright, *Tort Law and Human Rights* (2001)

2.3. France

In France, as I mentioned in the previous chapter, there exist two types of courts, ordinary and administrative ones. State liability for improper operation of ordinary courts is regulated by article L.781-1 of the *Code de l'organisation judiciaire*⁶¹:

the state shall be liable for the damage caused by defects in the functioning of the judicial power. Such liability is engaged only upon gross negligence or a denial of justice . . .

The state shall assume the burden of liability towards the victims of injury caused by the personal fault of judges and other magistrates, without prejudice to its recourses against them.

This approach seems to be quite restrictive – liability is possible only in cases of gross negligence (*faute lourde*⁶²) or denial of justice – but it is not. Initially *faute lourde* could be “committed under the influence of such a gross error that a judge normally aware of his duties should not have been guilty of it”⁶³. However, later courts have adopted liberal construction of notion of *faute lourde* and now it means “any deficiency characterized by a fact or series of facts showing that the public service of justice has not fulfilled its mission”⁶⁴. This test *de facto* substituted *faute lourde* for *faute simple*⁶⁵ and even a bill aimed at legislative approval of this change was introduced⁶⁶.

⁶¹ Translation by P. Larouche as quoted in Walter van Gerven, *Tort Law* 384 (2000)

⁶² Term *faute lourde* is used in the original text as available at <http://droit.org/code/CORGJUDL-L781-1.html>

⁶³ Roger Errera, *Liability of the State for Defective Functioning of Justice – Excessive Length of Proceedings Before Administrative Courts* P.L. 2002, WIN, 807-811

⁶⁴ Id. citing Cass. Flén., February 23, 2001, Consorts Belle – Laroshe c. Agent Judiciaire du Trésor.

⁶⁵ Roger Errera, *Liability of the State for Excessive Length of Proceedings – Basis: Arts 6(1) and 13 ECHR and General Principles of Law* P.L. 2006, WIN, 863-865

⁶⁶ Roger Errera, *Liability of the State for Defective Functioning of Justice – Excessive Length of Proceedings Before Administrative Courts* P.L. 2002, WIN, 807-811

Notion of denial of justice has also received quite liberal interpretation and means “any failure by the state to fulfill its duty of judicial protection of the individual” and includes right to have a case decided within reasonable time⁶⁷. Such an interpretation of provisions of article L.781-1 makes it quite favorable to victims and substantive sums of money are constantly awarded to them⁶⁸. What is remarkable is that, according to these provisions, state is liable not only for wrongs committed by judges themselves but also for wrongs committed by other staff subordinated to them⁶⁹.

State liability for improper operation of administrative courts has been, in the absence of relevant statutory provisions, established in jurisprudence of Conseil d’Etat. In its celebrated decision in *Magiera* case⁷⁰ the Conseil d’Etat held that litigants in administrative courts have the right to have their claims adjudicated within a reasonable time. This right is based on articles 6(1) and 13 of the ECHR and, when dispute does not fall within the scope of provisions of these articles, on “general principles governing the functioning of the administrative courts”⁷¹. When breach of this right causes some loss the aggrieved are entitled to reparation caused by improper functioning of judicial system (article L.781-1 of the *Code de l’organisation judiciaire* is not basis for this reparation though analogy is clear). Further case law of Conseil d’Etat followed this approach⁷². Now Conseil d’Etat is the court of the first and

⁶⁷ Id.

⁶⁸ E.g. Roger Errera, *State Liability for defective functioning of justice* P.L. 2004, WIN, 899-901;

⁶⁹ Roger Errera, *Distsiplinarnyi rezhim magistratov ee otvetstvennost gosudarstva za gosudarstvennyiu sluzhbu pravosudiia vo Frantsyi* [Disciplinary Regime of Magistrates and State Liability for National Service of Justice in France] in Guy de Vel et al., *Etika Sudiy* [Ethics of a Judge] 126 (2002)

⁷⁰ Garde de sceaux, ministre de la justice c. M. Magiera, June 28, 2002 p. 247 CE 28 June 2002, *Magiera*, Req 239575

⁷¹ English translation of this decision is available in Duncan Fairgrieve, *State Liability in Tort: a Comparative Law Study* 313-315 (2003)

⁷² See comments on recent jurisprudence of Conseil d’Etat on this subject in Roger Errera, *Liability of the State for the Excessive Length of Administrative Litigation based on Arts. 6(1) and 13 ECHR, and on General Principles of Law* P.L. 2007, SUM, 380-385

the last instance adjudicating on complaints concerning excessive length of litigation in administrative courts⁷³.

In *Magiera* Case Conseil d'Etat also established quite generous approach to damages that can be awarded: these include actual direct and certain loss, moral damage, and compensation for loss of a chance or an advantage. Basically any loss caused can be compensated.

What is remarkable is clear influence of jurisprudence of the ECtHR on the developments described above. The Conseil d'Etat decided *Magiera* after the ECtHR has several times found France in breach of article 6(1) ECHR because of excessive litigation in national courts⁷⁴. In *Magiera* the Conseil d'Etat expressly referred to articles 6(1) and 13 of the ECHR. More liberal construction of article L.781-1 of the *Code de l'organisation judiciaire* has also been introduced under the influence of ECtHR case law⁷⁵.

Legal rules of state liability proscribed by article L.781-1 of the *Code de l'organisation judiciaire* seem to apply to both wrongs deriving from the substantive content of judicial decision and those that are not concerned with it. As to administrative courts, Conseil d'Etat held in *Darmont*⁷⁶ case that *res judicata* does not allow to hold the state liable for fault concerned with substantive content of final judicial decision. In the text of *Magiera* decision this approach was reiterated. Substantive content of decisions of ordinary courts, even of final

⁷³ Article 311-1-7 of the Code de justice administrative as amended by Décret n° 2005-911 du 28 juillet 2005 modifiant la partie réglementaire du code de justice administrative (JORF n°180 du 4 août 2005 page 12772 texte n° 27)

⁷⁴ E.g. *Camilla v France*, September 26, 2000

⁷⁵ See generally Roger Errera, *Liability of the State for Defective Functioning of Justice – Excessive Length of Proceedings Before Administrative Courts* P.L. 2002, WIN, 807-811

⁷⁶ CE 29 Dec. 1978, *Darmont* [1978] Rec 542 as cited in Roger Errera, *Liability of the State for Defective Functioning of Justice – Excessive Length of Proceedings Before Administrative Courts* P.L. 2002, WIN, 807-811 (808)

ones, can trigger liability of state and *res judicata* is not an obstacle⁷⁷. It also seems that decisions of administrative courts that are not final can also trigger liability.

Rules described above are general rules based on notion of fault. There exists number of specific rules applicable under certain circumstances that establish regime of liability without fault and, unlike general rules described above, are concerned with wrongs deriving from the substantive content of judicial decision. This regime can be exemplified by rules described below.

Code de procédure pénale provides for full compensation of loss in case a person suffered pretrial detention and later was acquitted or the case was dismissed for the lack of evidence⁷⁸. As I mentioned in the previous chapter, this no-fault liability is based on principle of equality before public burdens and originally required that damage be special and extraordinary; “[e]xtraordinary, in terms of scope and degree, because members of community must endure the ordinary inconveniences of life as part of society without seeking compensation”⁷⁹. However, later this requirement was abolished and now compensation for unlawful detention is no longer a matter of judge’s discretion but a right⁸⁰. *Code de procédure pénale* also prescribes liability for loss caused to a convicted person who was later acquitted⁸¹. These rules clearly provide for liability for judicial wrongs deriving from the content of judicial decision. This kind of liability will be analyzed in the next chapter.

⁷⁷ E.g. Roger Errera, *State Liability for defective functioning of justice* P.L. 2004, WIN, 900-901;

⁷⁸ Articles 149-150 of the Code as cited in Roger Errera, *Liability of the State for Defective Functioning of Justice – Excessive Length of Proceedings Before Administrative Courts* P.L. 2002, WIN, 807-811 (807) and Guy Canivet, *The Responsibility of Judges in France* in Guy Canivet et al., *Independence, accountability, and the judiciary* 33 (2006)

⁷⁹ A Chapus, *Droit administratif général* (15 ed.) 1337 onwards as cited in Guy Canivet, *The Responsibility of Judges in France* in Guy Canivet et al., *Independence, accountability, and the judiciary* 33 (2006)

⁸⁰ Law # 96-1235 of 30 Dec 1996 and Law # 2000-516 of June 2000 as cited in Guy Canivet, *The Responsibility of Judges in France* in Guy Canivet et al., *Independence, accountability, and the judiciary* 34 (2006)

⁸¹ Article 626 as cited in Roger Errera, *Distiplinarnyi rezhim magistratov ee otvetstvennost gosudarstva za gosudarstvennyu sluzhbu pravosudiia vo Frantsyi* [Disciplinary Regime of Magistrates and State Liability for National Service of Justice in France] in Guy de Vel et al., *Etika Sudiy* [Ethics of a Judge] 123 (2002)

So it can be seen that French law admits liability for judicial wrongs that are not concerned with substantive content of judicial decision and, as it will be seen from the comparison with laws of the UK and Ukraine, is the most progressive among the three jurisdictions.

2.4. The United Kingdom

The UK contrasts sharply with France on point of liability for judicial wrongs. There are two key features of the UK law that shape rules of liability for judicial wrongs. The first is domination of doctrine of absolute judicial immunity and the second is personal liability of individual judges for wrongs committed by them (there is one exception of which I will say later)⁸². I will now turn to analysis of these features.

In the UK judges are immune from any actions in damages while performing judicial acts within their jurisdiction⁸³. There can be only two exceptions to this principle: a) when judge acts without jurisdiction⁸⁴ and b) when judge commits wrong while performing an act that is not judicial act.

As to action without jurisdiction, in the UK law there is a distinction between superior court judges and inferior court judges. The former determine their jurisdiction themselves and thus are absolutely immune⁸⁵; theoretically there may be, however, instances of exceptionally outrageous conduct of a superior court judge who, acting in bad faith (knowing that he acts

⁸² See generally Anthony M. Dugdale and Michael A. Jones, *Clerk and Lindsell on Torts* 301-310 (19 ed. 2006); W. V. H. Rogers, *Winfield and Jolowich on Tort* 824-826 (16 ed. 2002); Peter W. Hogg and Patrick J. Monahan, *Liability of the Crown* 6.2(j), 8.5 (3 ed. 2000); Abimbola A. Olowofoyeku, *Suing judges : a study of judicial immunity* (1993); Sue Arrowsmith, *Civil Liability and Public Authorities* 140-144 (1992)

⁸³ Id.

⁸⁴ *Re McC* [1985] AC 528

⁸⁵ See generally Abimbola A. Olowofoyeku, *Suing judges : a study of judicial immunity* 55-59 (1993)

outside his jurisdiction), plainly acts outside of his jurisdiction⁸⁶. But in reality, at least by 2000, there has been reported no such incident⁸⁷.

Inferior court judges are not free to determine their jurisdiction and thus are less protected than superior court ones. Acts of inferior court judges can be reviewed by superior court judges so it logically follows that their acts outside of jurisdiction can be detected on review. In order for immunity of inferior court judge to be destroyed bad faith is not required, i.e. it is not necessary to prove that judge knowingly acted outside of jurisdiction. However, it is important to point out immediately that abuse of jurisdiction is not sufficient to denude judges of immunity⁸⁸ and only absence of jurisdiction can do so; equally error of fact or law also does not suffice as long as they are not outside of jurisdiction.

There is no uniform rule of determination whether a judge acted outside of jurisdiction. Meaning of concept of jurisdiction varies depending on context of individual cases⁸⁹. What is important is whether a judge had jurisdiction to deal with the matter; if he had not, he can be said to have acted outside of jurisdiction⁹⁰. If a judge has jurisdiction to deal with the matter but deals with it in unauthorized manner he can also be said to have acted outside of jurisdiction but in this case not every but only quite exceptional irregularity can take judge outside of jurisdiction⁹¹. There is no rule as to how to determine these irregularities but some examples can be given: if a person was tried for one offence and convicted for another, if a judge failed to properly inform an accused concerning legal aid, if a judge refused to allow the defendant to submit evidence⁹².

⁸⁶ Re McC [1985] AC 528 per Lord Bridge

⁸⁷ Peter W. Hogg and Patrick J. Monahan, *Liability of the Crown* 8.5 (b) (3 ed. 2000)

⁸⁸ Fray v Blackburn (1863) 3 B. & S. 576; Sirros v Moore [1975] Q. B. 118, CA.

⁸⁹ W. V. H. Rogers, *Winfield and Jolowich on Tort* 825 (16 ed. 2002)

⁹⁰ Id.

⁹¹ Anthony M. Dugdale and Michael A. Jones, *Clerk and Lindsell on Torts* 304-306 (19 ed. 2006)

⁹² Id

As it is seen, judicial wrongs capable of taking a judge outside of jurisdiction can be those deriving from the substantive content of judicial decision as well as those that do not. But, as it is seen, wrong capable of destroying the immunity must be exceptional one; it is not easy to denude judges of immunity, to say at least.

The other type of situation when a judge does not enjoy immunity, as I said above, is when he does not perform a judicial act. This is because judicial immunity does not apply to ministerial acts⁹³. There is also no uniform rule as to how to distinguish judicial act from non-judicial one. Notion of judicial act is usually used in contradiction to notion of ministerial act; ministerial act does not involve any discretion or judgment and judge is to act only in certain way; he also cannot refrain from performing ministerial act if necessary requirements are satisfied⁹⁴. There is no precise definition of judicial act but it follows that it is an act involving exercise of discretion, making judgments, evaluation of evidence, construction of law etc. It could be said that act bearing characteristics of ministerial act is not judicial act but in common law an act which can be ministerial in general sense can be qualified as judicial for the purposes of immunity⁹⁵. So it is not always clear whether certain act under certain circumstances will qualify as judicial.

In order for liability to arise, as I explained in the previous chapter, defeat of judicial immunity is not sufficient. In order to trigger liability judicial wrong must constitute a tort. In other words, once judicial immunity is destroyed general rules described in the first chapter apply. This makes liability even harder to arise. So, as it can be seen, it is normally extremely difficult to make judges liable for their wrongs.

⁹³ *Ferguson v Earl of Kinnoul*, 8 ER 412 (1842)

⁹⁴ Abimbola A. Olowofoyeku, *Suing judges : a study of judicial immunity* 34-35 (1993)

⁹⁵ *Id.* 38

What is also important is that in the UK judges are personally liable for their wrongs. The state, or to be more precise the Crown, does not assume liability for judicial wrongs. This is not favorable to victims because individual judges, despite having good salaries, may prove to be worthless to sue. Personal liability of judges also gives some explanation of existence of absolute judicial immunity in the UK: if judges were liable in damages for every wrong they commit it would significantly impede the proper performance of their functions; this is not desirable for the society. If it were not judges but state that was liable there could have probably not been so robust judicial immunity.

But it is not true to say that there in the UK the state is not liable for judicial wrongs at all. Criminal Justice Act 1988 in s. 133 provides that the state is, if a miscarriage of justice occurs, to compensate for those wrongfully convicted. This provision applies when conviction has been reversed or a person has been pardoned “on the ground that a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice”. This provision clearly provides for state liability for judicial wrongs deriving from the substantive content of judicial decision; this liability seems to be incurred even without anybody’s fault.

So it is not to say that liability for judicial wrongs that do not derive from the content of judicial decision is not possible in the UK. But liability of this kind seems to be extremely rare and can be incurred when wrongs are such that they question the validity of judgment. However, notion of non-judicial act, which does is not protected by immunity, gives some indication that in some instances judges can be liable for wrongs of this kind even without judicial immunity being overcome. But still there is nothing to suggest that, for example, damage caused by excessive length of litigation can be effectively redressed in the UK and this is not compatible with standards of ECHR described above.

2.5. Ukraine

Ukraine belongs to civil law legal tradition and there is no concept of judicial immunity in Ukrainian law so it can be expected that its rules of liability for judicial wrongs resemble French ones. However, as the following analysis shows, Ukrainian approach is even more restrictive than the UK's one.

In Ukraine, principal rules governing state liability for judicial wrongs, besides those general rules analyzed in the first chapter, are contained in the Constitution, the Civil Code and the special law⁹⁶ of 01 December 1994. Constitution provides that if a person was convicted and this conviction was later held unlawful and set aside (this can happen on appeal or cassation), the state compensates this person for pecuniary and non-pecuniary damage caused by unlawful conviction (article 62).

Civil Code in article 1176 provides that loss caused to an individual by unlawful conviction, detention and arrest is to be fully compensated by the state regardless of fault on the part of the judiciary; there is no liability if criminal charge was abandoned due to act of amnesty or grant of pardon, i.e. person must be vindicated, and also in case of self-incrimination by an aggrieved. This provision extends liability to instances of unlawful detention and arrest.

The law of 01 December 1994 gives more extensive number of potential causes of liability including liability for unlawful investigative actions, unlawful confiscation and unlawful imposition of fine (article 1). Liability for judicial wrongs enumerated both in this law

⁹⁶ Zakon Ukraïny "Pro poriadok vidshkoduvannia shkody, zavdanoï gromadianynovi nezakonnymy diiamy organiv diznannia, dosudovogo slidstva, prokuratury ee sudu" [the Law of Ukraine "On Procedure of Compensation of Damage Caused to Individual by Unlawful Actions of Investigatory, Prosecutorial and Judicial Authorities] # 266/94-BP from 01 December 1994;

and the Civil Code is incurred whenever a person is acquitted, detention or arrest is declared to have been unlawful even if a person has not been acquitted (article 2).

Provisions described above apply to criminal cases; as to civil cases, Civil Code provides that the state is to compensate loss caused by unlawful judgment in a civil case only if judge(s) is (are) convicted of a crime that has affected lawfulness of judgment (article 1176).

According to Ukrainian law all of the above-described judicial wrongs can be committed only while exercising judicial discretion, making judgments and taking decisions, i.e. these wrongs are concerned with the substantive content of judicial decision even if this decision is not conclusive in certain case. Besides, the necessary condition of liability is rendering unlawful and repeal of wrongful acts by courts of higher ranks.

But what about other judicial wrongs not enumerated above? Civil Code provides that in all other instances of alleged judicial wrongs general rules, described in the first chapter, apply (article 1176). But general rules are not of any avail when it comes to judicial wrongs. This is because of restrictive interpretation courts have given to provisions of law of 01 December 2004.

There have been attempts to bring actions in courts concerning allegedly unlawful conduct of other courts or individual judges but they all failed; it has been held that that the only remedy against actions or inaction of judges is appellate review or review on cassation⁹⁷. These actions were not concerned with civil liability of state for these alleged judicial wrongs but it is quite predictable that civil claims against the state for judicial wrongs other than those

⁹⁷ E.g. postanova Vyshchogo gospodarskogo sudu Ukraïny u spravi # 1/196/3 [Decision of the High Arbitration Court of Ukraine in case # 1/196/3] of 09 Nov 2004; postanova Plenumy Verkhovnogo Sudu Ukraïny [Resolution of the Plenum of the Supreme Court of Ukraine] of 26 Feb 1999; ukhvala Vyshchogo administratyvnogo sudu Ukraïny [Decision of the High Administrative Court of Ukraine] of 10 May 2006; Rishennia Konstytutsiinogo Sudu Ukraïny [Decision of the Constitutional Court of Ukraine] # 6-pr/2001 in case # 1-17/2001 of 23 May 2001. Postanova Plenumu Verkhovnogo Sudu Ukraïny [Resolution of the Plenum of the Supreme Court of Ukraine] # 13 of 03 December 1997.

enumerated in the Law of 01 December 1994 and where judicial wrongs are not declared to be such by courts of higher ranks cannot succeed. It can be understood from the reasoning of courts; the reasoning is that the Law of 01 December 1994 provides the exhaustive list of instances when the state is liable for judicial wrongs (according to courts this law is to be given precedence of other legislation). So, judicial wrongs other than enumerated there are to be remedied on review and do not trigger civil liability.

All that was said above shows that there is no civil liability of state for judicial wrongs that are unconnected to substantive content of judicial decision as it exists, for example, in France or even in the UK. In Ukraine, civil claim against the state, for example, for excessive length of litigation cannot be brought successfully.

This approach is the most restrictive among the three jurisdictions and, I believe, it is not justified. This approach is not consistent with ECHR and Ukraine was many times found in breach of article 6(1) for excessive length of litigation by Strasbourg Court⁹⁸.

This situation should be remedied especially taking into account process of reformation of judicial system that takes place in Ukraine. It would be appropriate to remedy this situation as a part of reformation. To my mind remedy can be achieved through abrogation of the law of 01 December 1994 and, perhaps, by enacting of new one with different rules.

The law of 01 December 1994 became the basis of courts' reasoning while adopting restrictive approach; courts view this law as specific law that must be given precedence of the Civil Code, Code of Administrative Procedure⁹⁹ and other legislation. To my mind it is not correct; this law was adopted long time ago and many things have changed since then; despite

⁹⁸ E.g. *Safyannikova v Ukraine*, 26 July 2007, app. # 31580/03; *Benyaminson v Ukraine*, 26 July 2007, app. # 31585/02; *Shanko v Ukraine*, 26 July 2007, app. # 39970/02.

⁹⁹ In the previous chapter I explained that of the law of 01 December 1994 is a basis for restrictive approach that does not allow application of more liberal and progressive Code of Administrative Procedure.

the fact that this law specifically deals with state liability for judicial wrongs Civil Code and Code of Administrative Procedure must be given precedence at least because they were adopted recently (in 2003 and 2004 respectively) and reflect process of reforming of judicial system. If this law will be abrogated there will at least be possibility to apply general rules of liability of public authorities to judicial wrongs prescribed by the Civil Code and liberal procedural rules prescribed by the Code of administrative Procedure.

In order to specifically introduce liability of state for at least some judicial wrongs, including excessive length of litigation, new law should be enacted. Abrogation of the law of 01 December 1994 will bring positive changes but it is unpredictable how generous courts will be while construing provisions of the Civil Code.

2.6. Conclusion

In this chapter liability for judicial wrongs that do not derive from the substantive content of judgment was analyzed. It was shown that there exist certain standards in this field established by European Convention on Human Rights. All of the three jurisdictions are parties to the Convention and are to comply with these standards. It was shown that ECHR and its application by European Court of Human Rights brought positive changes in French law while laws of the UK and Ukraine are still not consistent with jurisprudence of the Strasbourg Court.

It was shown that domestic rules of liability for judicial wrongs analyzed in this chapter differ significantly in the three jurisdictions. Ukrainian law proved to be the most restrictive, even more restrictive than law of the UK with its doctrine of judicial immunity, while French law appeared to be the most liberal and I think the most progressive. Some suggestions were proposed as to how to improve Ukrainian law.

Liability for judicial wrongs that do not derive from the substantive content of judgment if it is born by the state and not by judges personally do not encroach upon judicial independence and does not impede proper administration of justice as those analyzed in the next chapter can do.

I believe state liability for this type of wrongs should definitely include wrongs deriving from gross breaches of procedural law that question the validity of judgment. Usually if these breaches are committed case is send back to the court of first instance to be adjudicated again. These wrongs are normally not concerned with exercise of judicial discretion (these can probably be classified as ministerial acts in the UK). If s case is sent back to court of first instance it normally takes a lot of additional time and incurs additional expenses to be covered by parties, as well as emotional distress, and I do not see reasons why there must not be liability for them. Of course, if judge commits such a wrong due to excusable ignorance of some facts liability must not be incurred.

Chapter III. Liability for Judicial Wrongs that Derive From the Substantive Content of Judicial Decision

3.1. Introductory Note

In this chapter state liability for judicial wrongs that derive from substantive content of judgment will be analyzed. This type of judicial wrongs differs from one analyzed in the previous chapter. Liability for this kind of wrongs raises certain legitimate concerns as to its desirability because of principle of judicial independence and proper administration of justice it may encroach upon. Most of these concerns will be addressed below. It will be argued that liability for this kind of wrongs should exist though within certain limits and it will be shown that all of the three jurisdictions under comparison allow it. Besides, at the EU level liability for this type of wrongs was recently established by European Court of Justice; this is major development and remarkable precedent so it is worth to start with it.

3.2. Liability for Judicial Wrongs at EU Level: Influence of the ECJ.

At the level of European Union, which covers the UK and France, principle of liability of Member States was established by the Court of Justice of the European Communities (European Court of Justice, ECJ). It was established even despite wishes of some Member States (including large ones such as the UK and Germany)¹⁰⁰.

In its celebrated *Francovich*¹⁰¹ decision the ECJ held that “EEC Treaty has established its own legal system, which is integrated into the legal systems of the Member states and which their courts are bound to apply” and it is a principle “inherent in the system of the Treaty” that

¹⁰⁰ See Jonas Talberg, *Supranational Influence in EU Enforcement: the ECJ and the Principle of State Liability* 7:1 *Journal of European Public Policy* (2000), 104-121.

¹⁰¹ *Francovich and Others v. Italy*, Joined Cases C-6/90 and C-9/90, European Court reports 1991 page I-05357

“a State must be liable for loss and damage caused to individual as a result of breaches of Community law for which the State can be held responsible”.

The conditions of liability were established as follows: a) Community law infringed by state authorities must be intended to confer rights on individuals, b) the content of these rights must be identifiable, and c) there must be causal link between the breach and damage sustained by the plaintiff. It was also provided that it is for the national law to determine rules of reparation of such losses but they must not be less favorable than rules concerning similar claims based on domestic law.

After *Francovich* the ECJ started to develop and expand principle of Member States liability. In its *Brasserie du Pêcheur/Factortame III*¹⁰² judgment the ECJ said that the principle applies to breaches of all types of Community law and a breach can be caused by any branch of government, though the requirement that the content of these rights must be identifiable was substituted for requirement that the breach must be sufficiently serious, i.e. a Member State “has manifestly and gravely disregarded the limits of its discretion”. Finally, in its *Köbler*¹⁰³ decision the Court applied the principle to breaches of Community law by national court adjudicating in the last instance.

In *Köbler* the ECJ said that principle of Member States liability applies to breaches of Community law caused by decisions of national courts adjudicating in the last instance under the same three conditions but due to “to the specific nature of the judicial function and to the legitimate requirements of legal certainty” the second condition was modified. State liability in such instances “can be incurred only in the exceptional case where the court has manifestly infringed the applicable law”. So, when Community law is infringed by a

¹⁰² *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others*, Joined cases C-46/93 and C-48/93, European Court reports 1996 page I-01029

¹⁰³ *Gerhard Köbler v Republik Österreich*, case C-224/01, European Court reports 2003 page I-10239

decision of a national court adjudicating at the last instance sufficiently serious breach means manifest infringement of Community law. In order to determine whether infringement is manifest account must be taken of “all the factors which characterise the situation put before it”. These factors include¹⁰⁴:

the degree of clarity and precision of the rule infringed, whether the infringement was intentional, whether the error of law was excusable or inexcusable, the position taken, where applicable, by a Community institution and non-compliance by the court in question with its obligation to make a reference for a preliminary ruling under the third paragraph of Article 234 EC.

In any event, an infringement of Community law will be sufficiently serious where the decision concerned was made in manifest breach of the case-law of the Court in the matter.

Moreover, the Court said that Member States must themselves designate national courts competent to determine disputes relating to reparation for these breaches which can be somewhat problematic because *Köbler* liability applies to wrongs committed by supreme courts of Member States.

Commentators met *Köbler* judgment with different opinions. Some approve the taken approach because it is narrow enough to admit liability only for indeed manifest breaches and thus strikes a fair balance interests “of Community law” and principle of legal certainty, and because it is in harmony with remedies available in the ECtHR and domestic remedies of some Member States¹⁰⁵. The other opinion is that judgment of such a kind is inappropriate and may

¹⁰⁴ Id. 55-56

¹⁰⁵ Martin Breuer, *State Liability for Judicial Wrongs and Community Law: the Case of Gerhard Köbler v Austria* (case comment) E.L. Rev. 2004, 29(2), 243-254

cause various problems in national law of Member States as well as at Community level¹⁰⁶. I think that there is rationale behind both points of view. But be it as it may, *Köbler* is major development of principle of state liability for judicial wrongs suggesting that principles of legal certainty and *res judicata* do not preclude such liability and do not justify absolute immunity as it exists, for example, in the UK and *de facto* in Ukraine. This decision's impact is still to be felt in national law of Member States.

3.3. Liability for Judgments in National Law

All of the three jurisdictions allow, though to a different extent, liability of state for judicial wrongs that derive from substantive content of judicial decision. In France, as I explained in the previous chapter, article L.781-1 of the *Code de l'organisation judiciaire* seems to apply to both types of judicial wrongs and can trigger liability for judicial wrongs deriving from content of judicial decision, even of a final one. As to administrative courts, Conseil d'Etat rejected liability for wrongs deriving from content of a final judicial decision¹⁰⁷ because of principle of *res judicata* but there is no indication that judicial decisions that are not final attract the same level of protection. Besides, *Code de procédure pénale* provides for no-fault liability of state for wrongful convictions and pretrial detention followed by acquittal (articles 149-150); these rules concern miscarriages of justice that clearly involves wrongs deriving from content of judicial decision.

In the UK, as I explained in the previous chapter, liability for wrongs deriving from the content of judgment can arise if judicial officer acts outside of his jurisdiction; this liability is personal liability of defaulter judge and can arise under very restrictive conditions only: a judge

¹⁰⁶ J. H. Jans, *State Liability and Infringements Attributable to National Courts: a Dutch Perspective on the Köbler Case* available at Social Science Research Network website www.ssrn.com

¹⁰⁷ CE 29 Dec. 1978, *Darmont* [1978] Rec 542

must act outside of his jurisdiction (jurisdiction is construed quite broadly) and commit a tort. Liability of the state can also arise though for miscarriage of justice only and is concerned with compensation of those wrongfully convicted¹⁰⁸; this liability does not depend on someone's fault.

In Ukraine the only possible liability for judicial wrongs is liability for wrongs deriving from judgment (it is not necessary judgment conclusive in a case but exercise of judicial discretion is always involved). As I explained in the previous chapter, this liability arises for wrongful conviction, detention, imposition of fine, confiscation, and investigative actions, i.e. it is liability for miscarriages of justice. In case wrongful judgment in civil case is delivered liability arises only if judge(s) is (are) convicted of a crime for behavior which influenced wrongfulness of judgment. It is no-fault liability.

As it is seen, all of the three jurisdictions provide for state liability for miscarriages of justice and it is no-fault liability. French law also assumes liability for other wrongs that derive from content of judgment, so does the law of the UK but under significantly more restrictive conditions. Ukrainian law assumes the narrowest scope of liability.

3.4. Liability for Judgments: Fixing the Limits

State liability for judicial wrongs that derive from content of a judgment is a sensitive issue. This kind of liability may endanger judicial independence and proper administration of justice. However, as it is demonstrated above it is normally not contested that this type of liability should exist and it is desirable¹⁰⁹. All of the three jurisdictions under comparison

¹⁰⁸ Criminal Justice Act 1988 in s. 133

¹⁰⁹ For positive impact of state liability on level of crime see Vincy Fon and Hans-Bernd Shaefer, *State Liability for Wrongful Conviction: Incentive Effects on Crime Levels* available at www.ssrn.com

assume this kind of liability. Moreover, the ECJ inculcates it at supranational level of EU into domestic laws of Member States. The question arises only as to the scope of such liability.

There are different interests to be reconciled while determining the desirable scope of liability for judgments. The main interests are: interest of the litigant in enjoying his rights and obtaining redress in case these are violated by improper performance of judicial duties, interest of the judge not to be harassed in performance of his duties, interest of the society in uninhibited administration of justice and prevention of abuse of judicial power¹¹⁰. There is also interest of society in proper allocation of public funds. Besides, there are principles of *res judicata* and legal certainty¹¹¹ that should not be unduly encroached upon.

How much liability for judgments can be allowed while keeping these interests balanced? In jurisdictions where it is the state that bears liability for judicial wrongs and not a judicial officer himself (in this paper those are Ukraine and France) concerns about protecting judicial officers from undue harassment are not valid. It is not a judge who can be harassed but the state. This concern is valid in the UK where judicial officers are personally liable for their wrongs. It has been argued that this concern does not justify absolute judicial immunity; honest mistakes are not to trigger liability indeed but behavior aimed at deliberate and intentional deprivation of someone's rights is not to be protected and claims where such behavior is alleged are to proceed to trial¹¹². Undue harassment can be prevented by procedural rules aimed at disposal of unmeritorious claims before they proceed to trial.

Principles of *res judicata* and legal certainty also seem to be not unduly encroached upon if procedural barriers will inhibit claims that are clearly ill-founded. Concerns of *res*

¹¹⁰ See generally Abimbola A. Olowofoyeku, *Suing judges : a study of judicial immunity* 178-201(1993)

¹¹¹ In particular, principles of certainty, *res judicata* and judicial independence were among those Member States' arguments against imposition of state liability for judicial acts on when the ECJ heard Köbler case, of which I will say later in more detail. See, J.H. Jans, *State Liability and Infringements Attributable to National Courts: a Dutch Perspective on Köbler Case* 166-167, available at Social Science Research Network website www.ssrn.com

¹¹² Abimbola A. Olowofoyeku, *Suing judges : a study of judicial immunity* 183-184 (1993)

judicata and legal certainty were not found valid in France in respect of liability for wrongs committed by ordinary courts, as I explained above, and did the ECJ while deciding *Köbler*.

Interest of the society in uninhibited administration of justice is quite legitimate but it does not seem that it is unduly encroached upon by liability for manifestly wrongful judgments or judgments that intentionally deprive somebody of his rights. Procedural safeguards can guarantee that it is not every judgment that is contested but only those where there is some prospect of success. Given procedural guarantees, administration of justice can be inhibited only where there will be many well-founded claims but in this case its properness can be questioned. If there will not be many well-founded claims than there is no threat to proper administration of justice and if there will be then it means that administration of justice is, in general, not proper and this kind of liability will only be a cure.

As to independence of the judiciary it does not seem to suffer from liability of this kind because if it is the state who bears it because no liability arises on the part of the judiciary. If liability is born by judicial officers qualified immunity will suffice (i.e. immunity where claims that are not unmeritorious can proceed to trial)¹¹³.

Interest of the society in proper allocation of public funds can also be protected. If there will not be many successful claims then compensation for wrongful judgments will not require much public money to be spent. On the other hand, if there will be a lot of successful claims that question arises whether spending money on compensation for wrongful judgments is improper; eventually the state will have to do something about improper administration of justice and public money spent on compensation can turn out to be money spent on the cure of judicial system, which is in interest of society. Besides, it is not necessary that huge damages

¹¹³ Id at 193-195

be awarded (for example, huge punitive damages) and some reasonable limits can be introduced.

The discussion above suggests that state liability for wrongful judgments can safely be expanded beyond compensation for miscarriages of justice in criminal cases given due limits are introduced. Olowofoyeku argues that this liability can be limited to dishonest exercise of judicial function when judge knowingly and intentionally infringes someone's rights¹¹⁴.

I think that these limits can be expanded to wrongs that derive from manifest infringements of law by a judge. Even if these wrongs are committed honestly I do not see much rationale behind excluding liability for them. Judges are supposed to know the law; it is true that often the same legal provisions are construed differently by different courts or even by the same court at different time, there are also in law nuances and ambiguities but I say about infringements of those legal provisions whose content is clearly understood and every judge is supposed to know it. I do not see any reasons to exclude liability for wrongs committed by a judge who is honest but nevertheless insufficiently qualified for judicial service.

As it is seen from the discussion above, liability for judgments can safely enough be expanded beyond liability for miscarriages of justice in criminal cases to include wrongs that derive from manifest infringements of law and dishonesty. This will help to protect public interest in proper administration of justice and prevent abuses of judicial power (especially if combined with proper disciplinary or even criminal sanctions where appropriate). Besides, liability for manifest infringements of Community law was introduced by the ECJ in respect of EU law; liability for manifest infringements of domestic law will eliminate discrimination of those whose claims are not based on EU law.

¹¹⁴ Id at 184

Conclusion

Analysis of state liability for judicial wrongs performed in this paper suggests that states are normally reluctant to assume ample liability for judicial wrongs. Major changes often come from extra-national regimes though some states may prove to be quite persistent in preserving their restrictive domestic rules as it was exemplified by the UK and Ukraine.

In every jurisdiction that was analyzed in this paper rules of liability for judicial wrongs are significantly modified compared to rules governing liability of public authorities in general. It is justified, to certain extent, by particular qualities of judicial function, such as exercise of discretion, need to make judgments etc. However, extremely restrictive rules are not justified because of at least three reasons.

First reason is that there are no compelling reasons to preserve extremely restrictive rules of state liability for judicial wrongs. Fair balance can be achieved by allowing liability for at least those judicial wrongs that are committed in bad faith with knowledge that someone's rights are being infringed. This will not interfere with proper administration of justice but on the contrary will help to prevent abuses of judicial power.

The second reason is that judicial wrongs are not homogeneous and can be divided into two types; wrongs of first type are concerned with judicial function and involve exercise of discretion, making subjective evaluation of evidence, and making judgments; wrongs of second type are not. I think that UK's approach according to which immunity from liability applies depending on whether judge performs judicial act (i.e. act concerned with exercise of judicial discretion and making judgments) or not is correct. There are no compelling reasons to apply equally restrictive rules of liability for wrongs of both types.

Liability for wrongs of first type bears certain potential of endangering judicial independence, principles of *res judicata* and legal certainty, and can interfere with proper administration of justice so it is reasonable that only manifest wrongs of this kind incur liability.

Liability for wrongs of second type possesses little or no danger to proper administration of justice and liability for them should be allowed in broader scope. Wrongs of this type can be no less harmful than those of the first type.

The third reason is need to reconcile domestic rules with extra-national standards. Unduly restrictive rules that exist in the UK and Ukraine are not compatible with standards established by international regime of ECHR. Strasbourg Court gradually advances more liberal rules of the extent of state liability for judicial wrongs. So does the ECJ but only in respect of Community law. It seems reasonable that EU Member States introduce no less favorable rules in respect of breaches of domestic law in order that there be no discrimination according to law relied on by the aggrieved. Anyway it seems proper that state liability for judicial wrongs should be allowed at least to the extent that it is compatible with standards of ECHR and principle of state liability established by ECJ.

Some suggestions were made in this paper as to possible ways of improving Ukrainian rules of state liability for judicial wrongs. Ukrainian law proved to be the most restrictive among the three jurisdictions. It is even more restrictive than common law of the UK where doctrine of judicial immunity exists. But in the UK restrictive rules can be at least to some extent justified that judges are personally liable for wrongs committed by them but in Ukraine it is the state that is liable so there is no valid excuse of this kind. Reformation of legal rules governing administration of justice and organization of judicial system seems to overlook this drawback so my suggestions are to the point.

State liability for judicial wrongs is relatively young legal realm. It is in the process of development. Rules governing this liability have been gradually liberalized and they this process seems to continue, especially taking into account changes that are being constantly introduced by extra-national regimes.

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