# PORTUGAL

# The Extra-Contractual Civil Liability of the Public Administration in Portuguese Law: Current Law and Prospects for Change

**Nuno Peres Alves***

## Introduction

Portugal has a system of public administration of the executive type (*privilège du préalable* and *privilège de l'éxécution d'office*) inspired by the French model, although it is increasingly independent from that model. The public administration's activities revolves around the administrative act (unilateral imperative act).

The public administration is subject to administrative law (which is a separate branch of the law, consisting of a set of principles and rules which regulate administrative activity) and to a system of review of legality (judicial review) by the administrative courts (which form a judicial system independent of the judicial or common law courts, but with similar constitutional status).

The review of legality consists in the *review for annulment* of an administrative act. This type of remedy is a procedural means primarily intended to restore the integrity of the legal system. Here, the infringement or violation of the rights of private persons arises from the flaw or defect of an administrative act. The cause of action here is the flaw or defect in the act and not the violation of the rights of a private person. The request submitted to the court is a request for the annulment of the act or for a declaration that the act is void, and not the restoration of the right infringed or violated.

* Lawyer, Post-Graduate in Political and Administrative Science.

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The performance of administrative acts (by the administration itself without any prior interference of any court, as indicated above) may be unlawful because the act performed is illegal or *ultra vires*. The unlawfulness may be remedied through a review for annulment (where the act performed is illegal): in enforcing a judgment which has annulled an act, the administration must restore the situation in full, i.e. the administration must perform all acts necessary to reinstate a private person in the 'situation which would have existed if the illegal act had not been performed or if the act had been lawfully performed'.

If the administrative act is *ultra vires* (but if there is no administrative act prior to the administration's action), the restoration of the private person's rights may also be done through the institution of lawsuits. These lawsuits (intended to guarantee the rights of the private persons in other situations, as well) constitute another set of procedural means, still marginal in the judicial system for the settlement of disputes, in which the cause of action is the infringement or violation of the rights of private persons and the request submitted to the court is a request for the restoration of such rights.

The subject of the public administration's extra-contractual civil liability or liability in tort falls within this framework.[1]

The principle of a remedy for damage caused by the state and other public bodies is enshrined in Article 22 of the 1976 Constitution of the Portuguese Republic.[2] That principle specifies the citizens' fundamental right of access to law and to the courts of law, and the protection of citizens.[3] This constitutional guarantee does not refer only to the state, but also to all territorial authorities such as the Azores and Madeira Autonomous Regions and local authorities (local government) as well as to the autonomous and institutional administrations.

Although the wording of the provision makes it difficult to interpret, more than twenty years after the date on which the Constitution came into force a broad understanding has taken root. According to this understanding, the liability of the public bodies mentioned in Article 22 covers both subjective liability for unlawful acts (liability in the *Lex Aquilia*) and objective liability (liability for risks or hazards and liability for lawful acts).

1 In accordance with the well-known distinction made in 1885 by A. Dicey, it is a system of the *droit administratif* as opposed to the system of the *rule of law*. Naturally enough, the acute differences existing at the time between both systems have been attenuated over the last decades.

2 Title I ('Fundamental Principles'), Part I ('Fundamental Rights and Principles'), Section I ('General Principles'). The present wording is as amended by the constitutional revision of 1982, which modified the numbering (former Article 21 of the original version of the Constitution). Article 22 ('Liability of Public Bodies') reads: 'The State and other public bodies shall be jointly and severally liable under the civil law, with the members of their organs, their officials and their personnel, for acts or omissions in the performance of their functions, or caused by the performance of their functions, which result in contravention of rights, freedoms or guarantees or in damage to another person.' At the present, most doctrine and case law considers that the said constitutional provision covers the political and legislative function, the judicial function and the administrative (executive) function.

3 Articles 20 and 268 of the Constitution.

The literal meaning of the final part of Article 22 has contributed to the affirmation that the institutional guarantee embodied therein covers the remedial protection of all substantive legal positions, from subjective rights (both public and private) to legally protected interests ('legitimate interests', which are not confined simply to taking part in judicial proceedings).[4] In its turn, the civil, criminal and disciplinary liability of officials and other personnel of the state and other public bodies is also embodied in Article 271 of the Constitution, which deals with the public service,[5] and concerns the liability of officials and personnel of the state and other public bodies.

The system of the administration's liability is contained in a separate legislative instrument, Decree-Law No. 48,051 of 21 November 1967. It is generally considered that this Decree has been incorporated in the 1976 Constitution.[6] This 1967 Decree only regulates liability for acts of public management and only applies where such liability is not otherwise provided in special laws (e.g. Article 41 of the *Lei de Bases do Ambiente*[7] (Environment Act) and Articles 22 and 23 of the law on participation in proceedings and on class actions).[8]

Reference must be made, however, to the fact that the substantive autonomy of the administration's liability does not constitute a reduction of the administration's liability as regards the other bodies, as indicated below in relation to the public concepts of unlawfulness (of legal origin) and of fault (*culpa*) (which originated in case law) and in relation to the relevance attributed to the presumptions of liability.

The administration's liability for acts of private management is provided in Article 501 of the Civil Code of 1966. This dichotomy goes hand in hand with the

4 See the decisions of the Supreme Administrative Court of 12 January 1999 (Case 42,175); 1 February 2000 (Case 44,099); 2 February 2000 (Case 44,443); and October 2000 (Case 46,335).

5 Article 271 of the Constitution ('Liability of officials and personnel') reads:

1. Officials and other personnel of the State and other public bodies shall be responsible in civil, criminal or disciplinary proceedings for their acts or omission when performing their functions for actions that result in infringements of the rights or interests of citizens that are legally protected; no action or proceedings in respect of these matters shall be dependent, at any stage, on the prior approval of a superior authority.
2. An official or other member of the personnel of the State who acts on a service matter in accordance with the orders or instructions of his or her legitimate superior officer shall not be held liable, provided he or she, before acting, requested or required that they be given or confirmed in writing.
3. The duty of obedience ceases if the carrying out of the orders or instructions would involve committing a criminal offence.
4. The law shall regulate the circumstances under which the State and other public bodies are entitled to be indemnified by their bodies, officials or personnel.

6 Article 293 of the original version of the Constitution, now Article 290(2).

7 Law No. 11/87 of 7 April 1987.

8 Law No. 83/95 of 31 August 1995, amended by Official Declaration No. 4/95 (*Diário da República* (Official Journal) (1st Series), 12 October 1995). On the various issues in procedural matters raised by these laws, namely, their consistency with the Constitution, see the judgment of the *Tribunal de Conflitos* (Court of Conflicts) of 11 January 2000 (Conflict 343).

existence of different judicial competences. Proceedings concerning the liability for acts of public management are brought in the administrative courts and proceedings concerning the liability for acts of private management are brought in the judicial (common law) courts.

Since the 1989 revision of the Constitution, the administrative courts have an encompassing, ordinary and mandatory jurisdiction, parallel to that of the judicial or common law courts.[9] The competences of these two types of court are specified in the general provision of Article 212(3) of the Constitution: administrative courts have jurisdiction over all disputes arising from administrative legal relations (within a system of executive administration such as the Portuguese system).

Most commentators and the case law have held that this constitutional provision on jurisdiction is not absolute and that statutes may confer on the judicial or common law courts the power to adjudicate certain disputes pertaining to administrative legal relations (as is the case at the present time), and confer on the administrative courts the competence to adjudicate private law matters in which the administration's activities are in question.

A wide-ranging reform of the rules of procedure of the administrative courts is currently under way and the adoption of the relevant legislative instruments is expected to take place soon. The broad guidelines for the reform take into account the whole constitutional framework, the changes made over the last decades in administrative activity and the experience of the effectiveness of the current legislation relating to the rules of procedure of the administrative courts. i.e. the *Estatuto dos Tribunais Administrativos e Fiscais* (ETAF)[10] (Statute of the Administrative and Fiscal Courts) and the *Lei de Processo nos Tribunais Administrativos* (LPTA) (Rules of Procedure of the Administrative Courts Act).[11] In this context, the reform of the law on liability in tort, delict or quasi-delict of the state and the other public bodies[12] has been deemed necessary.

In general terms, it is possible to say that the ministerial guidelines for the reform of the rules of procedure of the administrative courts (which also relate to numerous procedural aspects of the system of the administration's liability) include most of the recommendations proposed to resolve the problems relating to the implementation of the legislation still in force. These problems and the accompanying ministerial guidelines are dealt with below.

[9] Articles 209, 211 and 212 of the Constitution.

[10] Adopted by Decree-Law No. 129/84 of 27 April 1984 (as amended by Decree-Law No. 229/96 of 29 November, with regard to the part concerning administrative jurisdiction).

[11] Adopted by Decree-Law No. 267/85 of 16 July 1985 (as amended by Decree-Law No. 229/96 of 29 November 1996, with regard to the part concerning administrative jurisdiction).

[12] The guidelines of this reform are included in the official order of the Minister of Justice No. 1602/2001 (2nd Series) of 15 January 2001 (published in the *Diário da República* (Official Journal) (2nd Series), No. 22 of 26 January 2001). The order empowered a committee to prepare the draft project of a government Bill regulating the state's liability in tort, delict or quasi-delict.

## Liability in Tort

Liability in tort (liability for unlawful acts) is based on the classic presumptions of the *Lex Aquilia* on (extra-contractual) liability: tort (unlawful act), fault and causal link between the tort and the damage or injury. It is therefore a *subjective* liability. As provided in Article 22 of the Constitution, the tort may be an act or an omission (Decree-Law No. 48,051 makes no reference to liability for omissions) and may originate from the administration's activity through administrative acts or from its 'technical activity' (material acts or operations).

### The Difference Between Acts of Public Management and Acts of Private Management

In this context, a distinction is made between the so-called 'acts of public management' and 'acts of private management'. Liability in tort originating from acts of public management is regulated by Articles 2–7 of Decree-Law No. 48,051. Liability for acts of private management is regulated by Articles 483ff. of the Civil Code: the administration is vicariously liable for the damage caused by its officials and other personnel, provided that the latter have acted with fault.[13]

The original intention of the drafters of the 1966 Civil Code was to regulate the whole of the administration's extra-contractual liability. However, when considering whether to restrict the matters regulated by the Civil Code to private legal relations, a decision was taken to regulate the liability in tort for acts of public management in separate legislation (embodied in Decree-Law No. 48,051).

Case law has uniformly used the standard of the legal/institutional framework, which covers harmful or damaging actions (the so-called 'theory of functional framework'), to establish a distinction between acts of public management and acts of private management (a particularly difficult distinction in the field of the administration's technical activity).[14]

Acts of public management are acts 'performed by the administration's bodies or agents in the exercise of a public power, namely, in the exercise of a public function under and pursuant to rules of public law, even where these do not involve the use of coercion'.

Acts of private management are acts 'performed by the administration's bodies or agents deprived of a public power and, accordingly, performed on the same footing as the private person or persons concerned by such acts, and therefore on the same conditions and under the same system available to a private person, subject only to rules of private law'.

[13] Articles 500 and 501 of the Civil Code, 'quasi tort'.

[14] See the decisions of the *Tribunal de Conflitos* (Court of Conflicts) of 5 November 1981 (Conflict 124) and 20 October 1983 (Conflict 153). See the decision of the Supreme Administrative Court of 26 September 2000 (Case 46,024).

This distinction has caused some difficulties in practice, especially due to the change in the nature of administrative action; most commentators agree that the difference between public and private management should be abolished altogether. At the substantive level, the importance of the distinction has decreased steadily, since the public and private regimes of liability in tort have converged (there has been a reduction in the number of the cases of the state's exclusive liability in the public regime, based on the rule of vicarious liability under Article 22 of the Constitution).

However, in the procedural plan, this distinction is of the utmost importance because, as noted above, it has direct implications on the legal determination of the competent jurisdiction to adjudicate lawsuits for liability: the competence to adjudicate lawsuits arising from acts of public management has been assigned to the administrative courts;[15] the common law or judicial courts have jurisdiction to adjudicate lawsuits on the administration's liability for acts of private management.[16] However, under the guidelines for the reform of the rules of procedure of the administrative courts, the administrative courts will be the competent courts to adjudicate all lawsuits relating to the administration's liability, whether such liability arises from its public or private management.

## Unlawfulness

On the question of the presumption of liability for unlawful acts performed as part of public management, it is worth noting that, according to Article 6 of Decree-Law No. 48,051, within the framework of the administrative acts, unlawfulness has been identified with illegality, i.e. with a violation of legal or statutory rules or of the applicable general principles binding upon the administration in a specific harmful or damaging activity (it is obvious that, although no reference is included in that provision, it also covers a violation of constitutional provisions).[17]

However, it has been the general understanding (albeit based on differing rationales) that unlawfulness requires a qualified illegality, i.e. that the purpose of the rules that have been violated must be the protection of the substantive legal positions of private persons, on the basis of Articles 2 and 3 of Decree-Law No. 48,051. Accordingly, a damaged or injured party is required to provide evidence of the *link of unlawfulness* between the rule or principle that has been violated and the harmed party's substantive position: this requirement is not limited in scope to the violation of formal rules, which may also constitute an illegality (because of the growing importance of administrative procedure in the effective protection of such substantive positions). Evidence of that link of unlawfulness is also required in the

[15] ETAF, Articles 3 and 52(1-h).
[16] ETAF, Article 4(1-f).
[17] Article 266 of the Constitution.

case of violation of substantive rules (which define the contents of the administration's activity).[18]

However, within the framework of the administration's technical activity or of its material operations, illegality arises from the violation of such rules or principles or of rules of a technical nature or of due care.[19] Taking into account the nature of the harmful or damaging activity, evidence of that link of unlawfulness is not required: the only requirement is the culpable violation of a substantive legal position.[20]

## Fault

Fault is considered in the abstract, and both doctrine and case law have adapted the standard of the behaviour of a *bonus pater familias* or *reasonable man* (abstract fault) by which to judge the administration's civil liability (that standard is enshrined in Article 487 of the Civil Code, referred to specifically by Article 4 of Decree-Law No. 48,051). The required degree of industry is assessed by the standard of the 'average office-holder' in a public body in the case of an illegal administrative act or the 'typical officer' in the case of acts or material operations, taking into account at all times the circumstances that surrounded the performance of the illegal act.[21]

Case law has objectified the concept of fault, recognizing that it is not easy to separate unlawfulness (or illegality) from fault. The adoption of illegal or unlawful behaviour presupposes a violation of the necessary duty of care. Case law, albeit not unanimously, has even considered that, in cases where the damage or injury is caused by an illegal or unlawful administrative act, it is unnecessary to provide evidence of the fault of the holder of the public office[22] (the legal presumption of fault is used for that purpose,[23] since there is no established legal presumption on this matter; doctrine has recommended that the forthcoming new law on the liability of the state should include that presumption[24]).

Another facet of objectifying fault is the use of the case law concept of fault in the performance of functions (not provided in Decree-Law No. 48,051, but arising from Article 22 of the Constitution), which was imported from the French concept of

[18] See the decisions of the Supreme Administrative Court of 31 May 2000 (Case 41,201); 27 September 2000 (Case 45,684); and 9 November 2000 (Case 46,441).

[19] Article 6 of Decree-Law No. 48,051.

[20] Articles 2 and 3 of Decree-Law No. 48,051.

[21] See the decision of the Supreme Administrative Court of 20 January 2000 (Case 43,794); and Article 487 of the Civil Code.

[22] See the decisions of the Supreme Administrative Court of 20 October 1987 (Case 24,579); 17 May 1988 (Case 25,003); 1 June 1999 (Case 43,505); and 8 July 1999 (Case 43,956).

[23] Articles 349 and 351 of the Civil Code.

[24] See the decisions of the Supreme Administrative Court of 7 December 1999 (Case 44,836); 20 December 2000 (Case 46,704); and 10 February 2000 (Case 45,101).

*faute du service*.[25] The importance of this concept is well known in cases of the poor performance of services, where it is impossible to identify the organs or officials and agents to whom the harmful or damaging act or omission may be attributed (this is of particular importance in the technical activity, namely, in the case of fault by non-fulfilment of the duty of supervision (*culpa in vigilando*)). In this context, the necessary industry is assessed by standards of efficiency and productivity in a modern and well-organized public service.

## Liability of Office-Holders, Officials and Personnel

The administration will not be liable where the harmful or damaging act has not been performed solely as part of its functions or during the performance of its functions but not caused by that performance:[26] this principle corresponds, albeit not very accurately, to the classic French concept of *faute personelle du fonctionnaire* (although Decree-Law No. 48,051 does not contain any elements that make it possible to distinguish between personal fault and functional fault, it is unanimously acknowledged that such a distinction is no longer possible, in its classic form, by reference to the flaws or defects of the administrative act).

On the other hand, the extension of the liability of officials and other personnel of the state in the performance of their functions[27] is widely discussed: these are classic situations qualified as *faute de service du fonctionnaire*, notwithstanding the fact that this type of fault has currently been brought under the scope of unlawfulness and is no longer based on fault (the basis on which the concept originally developed).

Most doctrine holds that, even in case of negligence, the author of the act is also directly liable to the damaged or injured party. Article 22 of the Constitution, which provides for the administration's vicarious or joint liability (i.e. including the liability of officials and other personnel), would have caused the superseding unconstitutionality of Articles 2 and 3 of Decree-Law No. 48,051. The same doctrine also holds that the *Lei das Autarquias Locais* (Local Government Act) which transposes the provisions of Articles 2 and 3 of Decree-Law No. 48,051[28] with minor changes, was originally unconstitutional.[29]

[25] See the decision of the *Tribunal de Conflitos* (Court of Conflicts) of 10 July 1969; and the decisions of the Supreme Administrative Court of 7 November 1989 (Case 27,240); 27 October 1999 (Case 44,097); and 20 January 2000 (Case 44,023).

[26] Article 22 of the Constitution; and Article 3(1) of Decree-Law No. 48,051.

[27] Articles 22 and 271(1) of the Constitution.

[28] Doctrine refers specifically to Articles 90 and 91 of Decree-Law No. 100/84 of 29 March 1984. These provisions have been transposed without change to Articles 96 and 97 of Law 169/99 of 18 September 1999, which approved the new *Lei das Autarquias Locais* (Local Government Act).

[29] Reference should be made to the fact that the regulation of this matter relating to local government was enshrined in the *Código Administrativo* (Administrative Code), as amended by Article 10 of Decree-Law No. 48,051, which was repealed when the *Lei das Autarquias Locais* (Local Government Act) of 1984 came into force.

These provisions of Decree-Law No. 48,051 as well as Articles 96 and 97 of the *Lei das Autarquias Locais* exclude the direct liability of the author of the act, provided that he has acted negligently. It only provides that, at a subsequent stage, the administration may exercise a right of recovery if the author has acted 'with clearly less industry and zeal than he was bound to by reason of his office'. Acting with lesser zeal – slight fault – does not therefore make the agent liable, even to the administration. The administration's decision to exercise that right of recovery against the agent is a discretionary decision, and there is no tradition of that happening in Portugal.

According to the said legal instruments, agents are also only directly liable where they have acted with *dolus* (deceitful or malicious intent, i.e. serious fault). In the case of an agent's deceitful or malicious action, the role of the administration will simply be that of guarantor of the payment of compensation, as in civil law, and, accordingly, that of guarantor of acts of private management.[30]

The sole specific characteristic worth mentioning with reference to the *Lei das Autarquias Locais* is that, in order for the administration to be liable, it is enough that the holder of an office in a public body or an official or agent has acted in the performance of his or her duties.[31] This extension of the functional liability (*faute de service*) is not to be found in the above-mentioned provisions of Articles 2 and 3 of Decree-Law No. 48,051.

In the context of the forthcoming new law on the liability of the state, doctrine suggests that the administration and office-holders, officials and agents may be held jointly liable if the latter have acted with clearly less zeal than they were bound to do (apart from the cases of deceitful functional action); doctrine also recommends the legal enshrining of the administration's mandatory exercise of its right of recovery against office-holders, officials or agents if the administration has been held liable to the injured party; doctrine also recommends the release of the liability of office-holders, officials or agents, in case of slight fault.

The official's duty of obedience to unlawful orders or instructions from their legitimate superior officers constitutes a defence to the unlawfulness or illegality of the behaviour, provided that, before obeying such orders, the official has objected to the order or requested or required that the order or instruction be given or confirmed in writing.[32] The duty of obedience to the orders or instructions of a superior officer ceases if the carrying out of the orders or instructions would involve the committing of a criminal offence and, accordingly, if that were the case, the official or agent would also be liable.[33]

[30] Article 500 of the Civil Code.

[31] Article 97(1) of Law 169/99: 'if they have exceeded the limits of their functions or powers (*ultra vires*) or if, in the performance of such functions or powers *or* because of them, they have acted with deceitful or malicious intent ("*dolus*").'

[32] Article 271(2) of the Constitution.

[33] Article 271(3) of the Constitution.

On the other hand, in collegial bodies, where a defeated vote has been recorded as such in the minutes, its author is released from any liability which may arise from the resolution approved.[34]

## The Causal Link

In order to establish a causal link between the act and the damage or injury, doctrine and administrative case law use the criterion of adequacy set forth in Article 563 of the Civil Code,[35] in accordance with the negative formulation of the theory of appropriate cause of Ennecerus and Lehmann. 'The act that operated as the cause of the damage will not be considered as the appropriate cause only if, given its general nature, it is totally irrelevant [*gleichgültig*] to the occurrence of the damage or injury and has caused such damage or injury only as a result of *exceptional, unusual, extraordinary or anomalous* circumstances which have operated in the concrete case.'[36]

Recently, doctrine has held that, in accordance with the said criterion, and with reference to the theory of the objective of the rule, the causal link in liability for illegal acts is established between the damage or injury and the specific illegality committed (the damage or injury must be within the scope of protection of the rule) and not between the whole administrative act and the damage or injury.

## The Obligation to Indemnify

However, once the indemnifiable damage or injury (i.e. an injury of a substantive legal position) has been identified, it must be redressed as a whole, and case law admits that compensation is due even for minor damages to property, for 'moral damages' (pain and suffering) and for future damages where these are likely to occur, as well as lost profits (*lucrum cessans*).[37]

Case law has even allowed compensation for damages or injuries caused by a negative illegal act (in those cases where the administration's action is strictly

[34] Article 28(2) of the *Código do Procedimento Administrativo* (Code of Administrative Procedure), approved by Decree-Law No. 422/91 of 15 November 1991, as amended by Decree-Law No. 6/96 of 31 January 1996.

[35] In accordance with Article 563 of the Civil Code, '[t]he obligation to indemnify only exists in connection with the damages which the injured party would probably have not suffered if the injury had not occurred', with a defence of a restrictive interpretation of the provision in the sense of the theory of appropriate cause adopted by this provision.

[36] See the decisions of the Supreme Administrative Court of 20 April 1999 (Case 44,328); and 23 February 2000 (Case 45,694).

[37] Article 564 of the Civil Code. See the decisions of the Supreme Administrative Court of 24 March 1999 (Case 44,364); 13 May 1999 (Case 44,284); 25 November 1999 (Case 44,679); and 16 March 2000 (Case 45,275).

circumscribed), thus protecting the 'legitimate expectations', provided that it is demonstrated that the damage would have been avoided if the administration had acted in accordance with the law.

Lastly, the courts have also admitted, with the doctrine's approval, compensation *in natura*, i.e. the restoration in kind (provided for, in general terms, in Article 566 of the Civil Code).[38] This requires the abandonment of the dogma that the administration could only be ordered to pay compensation in cash equivalent: ordering the administration to perform a specific act would infringe the principle of separation of the judicial and the executive powers, and therefore the administration should only be ordered to pay compensation in cash (in addition, since 1977, under Decree-Law No. 256-A/77 of 17 June 1977,[39] the administrative courts, in enforcement of orders made final, may instruct the administration to take specific action).[40]

As regards liability for illegal administrative acts, a trend in the case law has recently become apparent. According to this, the injured party's non-use of legal remedies, including interim measures, may amount to a contribution by the damaged or injured party to the fault itself and, as such, would be a cause for a reduction or even the exclusion of the administration's liability.[41] The injured party's omission must be culpable (violation of objective good faith) taking account the case law *praxis* (e.g. the failure to apply for a stay of execution in case of damages or losses caused by the performance of the act, provided that such damage or loss may be redressed by a pecuniary remedy, is not culpable behaviour, because case law unanimously considers that, in such a case, there are no grounds to grant restraining orders).

This interpretation of Article 7 of Decree-Law No. 48,051 is contrary to the traditional interpretation of that provision, according to which the prior bringing of an action for review for annulment of an illegal act is a procedural presumption in lawsuits for liability: the non-use of such proceedings would confirm and validate the act by remedying its illegality, which would therefore no longer be unlawful.

On the other hand, it was also argued that the lawsuit was a subsidiary means of pursuing an annulment and of seeking to stay the operation of the act (since, in Portuguese law, the filing of an appeal does not automatically stay the operation of the act), intended only to obtain redress for the damages still existing in spite of the proceedings for enforcement of the court decision which provided for the restoration of the position the injured party would have been in had the act not been done.[42]

[38] See the decisions of the *Tribunal de Conflitos* (Court of Conflicts) of 7 July 1988 (Conflict 201).

[39] Which includes the system of enforcement of sentences passed by the administrative courts.

[40] Article 9(2) of Decree-Law No. 256-A/77.

[41] See the decisions of the Supreme Administrative Court of 4 February 1999 (Case 37,338); 15 April 1999 (Case 37,995); 16 June 1999 (Case 36,211); 29 September 1999 (Case 44,919); 7 December 1999 (Case 43,829); and 11 January 2000 (Case 45,240).

[42] Decree-Law No. 256-A/77.

Against this, it has been argued that the injured party does not have the burden of promoting the remedy of the illegality (the nature of the review proceedings is chiefly objective and its purpose is to restore legality), but rather, in accordance with the principle of objective good faith, must seek to prevent the damage getting worse; the filing of the appeal and the subsequent bringing of proceedings for enforcement of an order involves a greater and unjustified procedural effort to obtain the remedial protection of the affected legal position. Lastly, reference has also been made to the literal contents of the provision, the argument in this connection being that there is no indication in the provision of the lawsuit's subsidiary nature as regards the review proceedings.

However, it is true that, in most cases, and in all cases where the interested party's wish depends on the exercise by the administration of a discretionary power, only the annulment of the act and the adoption of a new act (*contrarius actus*) will make it possible to assess the extent of the damage. Accordingly, in addition to those cases where the injured party's action, in conformity with the principle of good faith (i.e. the non-contribution to the occurrence of the damage or to its increase) requires the prior filing of a review for annulment, there are many other cases in which the use of this procedural means is indispensable to establishing the actual existence of damage.

## Objective Liability

Contrary to the concept of liability in the *Lex Aquilia*, which historically arose out of private law and is based on unlawfulness itself, the administration's objective liability (*responsabilité sans faute*) originates from public law and is based on the principle that all citizens are equal before the law in the performance of public duties:[43] the administration's (lawful) activity may cause particular injury to substantive legal positions which, under and in accordance with the principle of equality, should not be borne by the wronged party.

Albeit in different dogmatic contexts, because the Portuguese system is based on the administrative autonomy of the state's liability, and is inspired by the French system, the compensation granted to the injured party is not equivalent to *responsabilitá* in Italian doctrine but to *indennizo* (in German, *Staatshaftung* and *Entschädigung*, respectively). In fact, and in any case, particularly in the case of liability for lawful acts, where the emphasis lies on the imposition of a special burden on private persons, the 'indemnity' mentioned in the law is a payment to compensate the loss or damage rather than the removal of such loss or damage.

That liability has been codified, for the first time ever in Portugal, in Articles 8[44]

[43] Article 13 of the Constitution.

[44] Article 8 of Decree-Law No. 48,051 provides: 'The State and other public legal persons shall be liable for special and unusual damages or injuries arising from the operation of exceptionally dangerous

and 9[45] of Decree-Law No. 48,051, through a general clause: the possibility of compensating special and unusual damage caused by lawful acts. The new *Lei das Autarquias Locais* still does not include any provisions relating to objective liability and its regime is therefore governed by Articles 8 and 9 of Decree-Law No. 48,051.[46]

The indemnity for damages or injuries derived from this type of administrative action has therefore ceased to be contingent on specific provisions therefor in special laws (as was the case until the 1950s, before the existence of a general legal principle derived from the Civil Code of 1867 was recognized): it exists whenever a private person suffers a special and extraordinary damage or injury. The specificity of the damage means that the damage has left the injured party or parties in a situation of disadvantage as regards other persons in general, with special emphasis on the result of the act's omission or commission rather than on the formal aspect of the lawful act (as is characteristic of objective liability, centred on damage). The unusual nature of the damage reflects the existence of damage exceeding the hazards of normal social life, characterized by the all-encompassing service-provider-type of administration that is characteristic of modern society.[47]

## Liability for Risk

According to Article 8 of Decree-Law No. 48,051, liability for risk may arise from the operation of administrative services, from the possession and use of property and from the performance of activities. All these activities may be exceptionally hazardous (the operation of a hydroelectric power station is a classic example of an exceptionally hazardous service). It is therefore clear that the existence of a hazard is not enough: the special nature of the hazardous activity would be sufficient to limit the type of damages that may be redressed by law.

The administration's liability may be avoided if it is shown in evidence that the damage originated from *force majeure* external to the operation of such services or to

*contd.*

administrative services or from things or activities of the same nature unless, in general terms, there is evidence that there has been *force majeure* external to the operation of such services or to the performance of such activities, or in case of fault ("*culpa*") of the victims or of a third party or parties and, in that case, the degree of liability shall be determined in accordance with the degree of each one's fault.'

45 Article 9 of Decree-Law No. 48,051 provides: '1. The State and the other public legal persons shall indemnify the private persons to whom they have imposed charges or caused special or unusual damages or injuries through legal administrative acts or lawful material acts. 2. Where the State and other public legal persons need, in case of need and due to imperative reasons of public interest, to sacrifice especially, and whether wholly or in part, a thing or right of a third party or parties, the State or such other public legal persons shall be bound to indemnify them.'

46 By virtue of Article 22 of the Constitution and of Article 1 of this Bill of 1967.

47 See the decisions of the Supreme Administrative Court of 13 January 2000 (Case 44,287); 2 February 2000 (Case 44,443); 25 May 2000 (Case 41,420); 27 September 2000 (Case 29,018); and 19 December 2000 (Case 31,791).

the performance of such activities. If it is proved that the injured party itself or a third party is to be blamed for the damage, the indemnity will be excluded or reduced according to the extent of the injured or third party's contribution to the damage (thus returning to the classic *Lex Aquilia*'s presumption of fault but only in relation to the injured party or to the third party whose behaviour has contributed to the damage, since the administration's liability is an objective liability).

### Liability for Lawful Acts

The liability for lawful acts is restricted to lawful administrative acts and to lawful material acts causing special and unusual injuries[48] (an example of liability for a lawful act giving rise to compensation is expropriation in the public interest; and an example of a lawful omission giving rise to compensation is the lawful non-enforcement, in the public interest, of a court decision of annulment of an illegal act[49]). Article 9(2) provides an indemnity in case of need or overriding public interest.

## Materialization of Liability

Lawsuits relating to liability for acts of public management, including recovery lawsuits in the case of liability for unlawful acts, are specifically provided as one of the types of lawsuit in Article 71(2) and (3) of the LPTA and must be filed in the administrative courts.[50] As stated above, if the cause of action is an unlawful and harmful act performed as an act of private management, the lawsuit must be brought in the judicial courts.

In addition to this diverse jurisdiction, lawsuits always follow the same procedure,[51] with the sole special case of the Public Prosecutor's intervention through an opinion issued prior to the order.[52] The Public Prosecutor's intervention as defender of legality is concurrent with his capacity as representative of the state in liability lawsuits, a fact that has been the subject of much criticism in doctrine. In the reform of the rules of procedure of the administrative courts which is currently under way, the Public Prosecutor's power to intervene on behalf of the state will be abolished.

[48] Article 9(1) of Decree-Law No. 48,051.

[49] See Article 7(1) of Decree-Law No. 256-A/77.

[50] ETAF, Articles 51(1-h) and 55(1).

[51] Articles 467ff. of the Code of Civil Procedure.

[52] LPTA, Article 72. The Public Prosecutor is a constitutionally autonomous judicial body for the adjudication of justice, which brings public proceedings and acts as defender of legality and 'justice assistant' (Article 219 of the Constitution).

All persons having suffered a damage caused by an act of the administration or its agents have legal standing to sue.[53] The lawsuits may be brought against the state, or against the public body to whom the harm may be attributed, as well as against office-holders, officials or agents, where the latter are also directly liable (joint liability).

It is a controversial question as to whether or not the administration may summon to appear in liability proceedings on the grounds of performance of an unlawful act office-holders, officials and agents against whom the administration considers that it has a right of recovery. Those supporting this view quote Articles 325–329 of the Code of Civil Procedure (which regulate the intervention of third parties), applicable as supplementary to the rules of procedure of the administrative courts under Article 1 of the LPTA.

The commentators who have dealt with this question consider that recourse to voluntary arbitration is permissible, even where the liability for acts of public management is not at stake, arguing that Article 2(2) of ETAF (which accepts courts of arbitration in the field of the procedure of the administrative courts, in cases of liability, including recovery lawsuits) is a special provision for the purposes of Article 1(4) of Law No. 31/86 of 29 August 1986 (*Lei de Arbitragem Voluntária*, or Voluntary Arbitration Act) which allows the state and other public bodies to submit to voluntary arbitration provided that a special authorization law exists for disputes concerning administrative legal relations.

Except where any law provides to the contrary, lawsuits may be brought at any time. However, the right to an indemnity is subject to a time limit in accordance with Article 489 of the Civil Code.[54] In accordance with the general rule of the statute of limitations applicable to the right to compensation provided in the Civil Code, the time limit on that right is three years from the date on which the injured party became aware of such right, irrespective of the awareness of the person responsible and of the extent of the damage. However, the time limit on that right will expire, in all cases, upon expiry of the general period of limitation (twenty years from the date of the harmful act). In case of damage caused by an unlawful administrative act, the review stops time running;[55] the time limit restarts from the date on which the decision on the review became final.[56]

That is the solution most commonly defended by doctrine and case law, taking into consideration the fact that the matter was covered by Article 71(3) of the

[53] Article 824 of the Administrative Code, approved by Decree-Law No. 31,095 of 31 December 1940, which has been amended several times; many of its provisions have been repealed.

[54] Article 71(2) of the LPTA, which repealed Article 5 of Decree-Law 48,051.

[55] Article 323 of the Civil Code.

[56] Articles 326 and 327(1) of the Civil Code (without prejudice to the provisions of the said Article 327(2) and (3), if the review ends without a decision on the merits). See the decisions of the Supreme Administrative Court of 29 April 2000 (Case 40,503); and 16 November 2000 (Case 45,235).

LPTA,[57] which was considered unconstitutional (on the grounds of organic unconstitutionality[58]). The Constitutional Court ruled thus[59] in a case of concrete judicial review (which was an incidental case, and therefore the decision was binding only in that case) and the Supreme Administrative Court has also ruled to that effect.[60]

As part of the reform of the rules of procedure of the administrative courts, a system similar to that of Article 71(2) and (3) of the LPTA is expected to be adopted. There will be no time limit on the expiry of the period of six months following the date on which the decision on the review for annulment was made final. However, some commentators have held that this period should only apply where decisions of a mere procedural nature are at stake (i.e. where no decision on the illegality of the act has been made).

Another question that has been attracting attention is the possibility of including a request for indemnity in the review for annulment (in which the administrative act can be annulled or declared void). Doctrine unanimously recognizes the importance of this possibility, which would save much time and resources and would provide protection for the injured parties, together with a swifter settlement of damages.

However, case law and most doctrine consider that such a possibility is not available under the present rules of procedure of the administrative courts, because the lawsuits and the reviews follow different rules of procedure.[61] The possibility is, however, referred to in ministerial guidelines for the reform of the system.

## Enforcement of Judgments

The aforesaid ministerial guidelines state that the question, widely controversial in doctrine and in case law, of the competent jurisdiction to decide lawsuits for the enforcement of court decisions ordering the administration to pay an indemnity must now be resolved. On the one hand, it is specifically provided that these enforcement lawsuits must follow the same procedure specified in the Code of Civil Procedure.

Under the present law, and taking into account the latest case law on the matter

[57] According to this Article, there is no time limit 'before expiry of the six months period following the date on which the Court decision has been made final', but its interpretation is controversial.

[58] Because the government may only legislate on the civil liability of the public administration where legislative powers have been delegated to the government by the Assembly of the Republic (Article 165(1-s) of the Constitution), which is not the case with the LPTA's supporting law.

[59] See Decision No. 148/96 of the Constitutional Court. If the Constitutional Court determines that the same rule is unconstitutional in more than two cases, the rule shall be deemed unconstitutional with generally binding effect (Article 281(3) of the Constitution).

[60] Under the 'diffuse' control of constitutionality in force in Portugal, either court may make such a ruling: Article 204 of the Constitution. See the decisions of the Supreme Administrative Court of 2 October 1997 (Case 35,488); 3 March 1999 (Case 41,013); and 9 November 2000 (Case 44,953).

[61] See the decision of the Supreme Administrative Court of 3 May 1990 (Case 26,968).

and the opinions of the commentators who have written on this subject, it is important to differentiate between cases in which the administration is ordered to pay compensation in cash and cases in which the administration is ordered to pay compensation in kind, or to restore the *status quo*.[62] If the judgment is for the payment of compensation in cash under Articles 90ff. of the Code of Civil Procedure, the competent courts are the courts of first instance of each jurisdiction.

Accordingly, the lawsuit for the enforcement of judgments for liability in the framework of private management (decreed by a judicial court) must be brought before the judicial court,[63] applying the general rules of executive civil procedure relating to enforcement through payment of a lump sum and to the settlement of the obligation to indemnify.[64]

The judgment for liability within the framework of public management (decreed by an administrative court) must be made by the administrative court,[65] applying the rules of the Code of Civil Procedure as well as the applicable administrative rules of procedure.[66] This empowerment of the administrative courts, which has been based on other ETAF rules, is derived from the understanding that Article 74 of the LPTA (which is interpreted as including only a procedural presumption in cases where the enforcement should be effected via the judicial courts) could not determine the competence of the judicial courts on the matter, otherwise it would be organically unconstitutional.

If the administration is ordered by an administrative court (through liability for acts of public management) to pay compensation in kind (to restore the *status quo*), the application of the usual system of enforcement of decisions of the administrative courts[67] is recommended. However, it should be stressed that this system is not usually applicable to cases where judgment is given against office-holders, officials and agents. There is a budgetary allocation to bear the costs incurred by the administration through its compliance with the judgment[68] which, however, in many cases, will not preclude in practice the injured party's right to bring proceedings for payment of a lump sum.

Lastly, reference should be made to the fact that, in the ministerial guidelines for reform, it is provided that the administrative jurisdiction shall be competent to adjudicate lawsuits for liability based on acts arising from the performance of legislative and judicial functions. At the present time, the judicial courts are the

[62] See the decisions of the Supreme Administrative Court of 9 March 1995 (Case 35,439); 14 November 1996 (Case 37,427); and 15 January 1998 (Case 37,149).

[63] Articles 90ff. of the Code of Civil Procedure.

[64] Articles 805–810 of the Code of Civil Procedure.

[65] Supplemental application of Articles 90ff. of the Code of Civil Procedure, in accordance with Article 1 of the LPTA.

[66] See the decision of the Supreme Administrative Court of 27 September 2000 (Case 44,370).

[67] Decree-Law No. 256-A/77, Articles 5ff.

[68] Decree-Law No. 256-A/77, Article 12.

competent courts for the trial of lawsuits for damages caused by the legislative function.[69]

The devolution of this competence to the administrative courts will make it possible to solve the complex problem of determining the competent jurisdiction for the adjudication of lawsuits relating to liability for damages caused by unlawful administrative acts under the guise of law. Some commentators consider that, at the present time, the administrative courts are undoubtedly the competent courts for adjudication of these lawsuits, since they already have the competence to adjudicate reviews for annulment of administrative acts under the guise of law.[70]

[69] ETAF, Article 4(1-b).
[70] Article 268(4) of the Constitution.