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Governmental liability, an unlimited project

The regime of public authorities' liability under the Portuguese and the American legal systems

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Raquel de Almeida Marques Barrela

Nº 63331

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Introduction:

We live in a community marked by the industrial, technological, and scientific development, which originates an endless number of risks whose harmful potential is unimaginable. The theme of 'extra-contractual civil responsibility for the risk' or 'public authority liability' is then relevant due to the current risk inherent to our society.

In recent decades, the liability of public authorities has been one of the main areas of development in and at the edges of tort law in Europe, with major reforms implemented at a national level, and a steady stream of major court decisions.

The present post aims to contribute to the understanding of the law regulating liability as it applies to the public authorities in the legal systems of Portugal and The United States of America, to facilitate its enhancement where necessary or desirable, and to consider the possibilities for harmonisation in the area.1

Firstly, it approaches the general historical evolution of the public authorities' liability which is important to comprehend the more specific evolutions regarding the chosen legal regimes. Regarding the Portuguese legal system, we approach the juridical regime of the responsibility for the risk of the State and other public entities who answer for the current damages of activities, things, or services that are especially dangerous. The involving problem does not exclude a historical context and a comparison of the previous regime (art. 8. º DL 48 051) with the current (art. 11. º of the Law 67/2007 - RRCEE) regarding the generosity of the legislator when foreseeing an expressed aggrandizement on the extent of the responsibility for the risk, which can burden the treasury strongly. And, due to the deep economic crisis lived in our days, this reflection seems to be of greatest importance in the measure that, citizen-harmed benefits with the new regime, while the citizen-taxpayer loses with such gap. [2]

Regarding the United States legal system, we approach firstly the historical evolution of the public authority liability, and its problematics attempts of legislation. Then it proceeds to the explanation of its current legal regime and the problematics around it.

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[1] Ken Oliphant, "The Liability of Public Authorities in Comparative Perspective." Intersentia, 2016, 1-6.
[2] Andreia Raquel da Silva Sousa, O Regime Jurídico da Responsabilidade pelo risco do Estado e demais entidades públicas, maio 2016, Abstract.

General Historical Origin and Evolution:

Public authority liability is a child of the 19th and 20th centuries. Until the middle of the former century, all legal systems observed the maxim *'the King can do no wrong'* (often rendered in French: *'le roi ne peut mal faire'*). The immunity of the State for the actions of its servants was underpinned by the theory that the civil servant's mandate to act extended only to lawful and correct conduct which could never lead to liability (*'Mandatsvertragstheorie'*, mandate contract theory). [3]

But gradually, from the mid-19th century on, the immunity was limited in application and then abolished. The idea put up first was that the State should be liable for the wrongs of its servants insofar as it acted in the private field (bought goods, rented buildings, etc). An English decision of 1866 established that a public corporation could be liable for the negligence of its servants in the same way as a private employer.[4] The imposition of vicarious liability on public authorities was also accepted in case-law in other parts of Europe, often paving the way for subsequent legislation. Where courts proved reluctant to admit such liability, the legislature intervened independently, for example in the 1930 revision of the Portuguese Civil Code. [5]

In some countries, provision was made for State liability as a matter of constitutional law, though the further implementing legislation required often had to wait for quite some time. This and other anomalies were only finally cleared away in the period after World War II, which saw the legislative abolition of most remaining vestiges of the erstwhile immunity.[6] The restoration of democracy consequently acted as a stimulus to further legislative reform. [7]

The movement from immunity to liability of increasing extent,[8] as described above, coincided with a move away from the exclusive liability of the individual servant towards

[3] Ken Oliphant, "The Liability of Public Authorities in Comparative Perspective.", 2016, 851.
[4] *Mersey Docks and Harbour Board Trustees v Gibbs* (1866)
[5] Ken Oliphant, "The Liability of Public Authorities in Comparative Perspective.", 2016, 851.
[6] Lead to the consecration in the US of the Federal Tort Claims Act, in 1946 (explained below).
[7] Ken Oliphant, "The Liability of Public Authorities in Comparative Perspective.", 2016, 852.
[8] In some countries occurred a discussion on the retrenchments in consequence of concern that public authority liability may have extended *too far.*

the joint liability of the public institution by which the servant was engaged (*'respondeat superior'*) and frequently its exclusive liability.

Even up to the present, public authority liability has continued to attract the attention of the legislator in several places, with new laws adopted in the last twenty years in (for example, and to mention only jurisdictions within the present study) the United States of America and Portugal.[9]

Historical evolution in Portugal:

The Portuguese evolution of the liability of the State followed the path of seven centuries of history, between 1143 and 1822, regarding the informal Portuguese constitutions, in which the country 'rehearsed' and lived three ways of government[10]. Portugal experienced monarchy, aristocracy, and democracy, concerning the participation of several representatives of the people in deliberative organs of the State[11]. The previous Portuguese Law was based on the 'irresponsibility' of the State until the Constitution of 1822 [12], where it began to be referred as liability of public officials for illicit damages committed in the performance of their duties [13].

The reform carried out by Decree-Law no. 19126, of 16 December 1930, made the State jointly liable[14] for the illicit damage done by employees [15]. However, administrative civil liability for the risk and by lawful acts was not the subject of a general forecast, which meant that the principle of solidarity would only serve to cover the cases expressly provided by law [16].

The 1967 Civil Code project sought to exclude matters of public-administrative relevance, for this reason for the first time it enshrined provisions applicable to non-contractual administrative civil liability for acts of private management, leaving the

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[9] Portugal: Law 67/2007 of 31 December 2007; USA: Restatement of Torts, 2009.
[10] Jorge Miranda, *As Constituições Portuguesas* (De 1822 ao texto actual da Constituição), 5.ª ed., 2004, p. 9.
[11] Diogo Freitas do Amaral, *As Sete Constituições Informais da Monarquia Portuguesa antes do Liberalismo*, Estudos de Homenagem ao Prof. Doutor Martim de Albuquerque, vol. 1, ed. da Faculdade de Direito da universidade de Lisboa, Lisboa: Coimbra Editora, 2010, p. 445.
[12] Maria da Glória, *A Responsabilidade Civil do Estado e Demais Pessoas Colectivas Públicas*, 1997, *in* CES, p. 10.
[13] Margarida Cortez, R*esponsabilidade Civil da Administração por Actos Administrativos Ilegais e Concurso de Omissão Culposa do Lesado* (Trabalhos preparatórios da reforma) in Boletim da Faculdade de Direito da universidade de Coimbra, Coimbra Editora, 2000, p. 11.
[14] solidariamente responsável, in portuguese.
[15] Ibidem, *A Responsabilidade Civil do Estado e Demais Pessoas Colectivas Públicas,* cit., p. 11;
[16] Marcelo Caetano, *Tratado Elementar de Direito Administrativo*, n.º 166, 1943, p. 417

regime of non-contractual civil liability for acts of public management to a special law [17]. In this context, the jurisprudence anchored in article 22 of the CRP, the right to demand compensation for losses caused by any functional action by the State, namely, by acts related to the judicial and legislative function. The requirements and conditions of that public duty to compensate were based on the direct application of the principles of 'Aquilian' liability[18]. The legal discussion proceeded with some disagreement, and the question arose as to whether article 22 of the CRP, comprehended civil liability for lawful and unlawful acts and the strict civil liability of the State (''responsabilidade civil objetiva do Estado'').

The State's 'extra-contractual' civil liability regime was, for decades, essentially regulated by Decree-Law No. 48051, of 21 November 1967 [19] and by some CPP rules. It was considered that it covered only the acts integrated in the administrative function of the State. For that reason, it was inapplicable to acts within the jurisdictional and legislative function[20].

The evolution observed in the Portuguese legal order led to the consecration in the 1976 Constitution of a general constitutional principle of liability of public authorities (meaning the State and other public entities), as well as their officials, arising out of functional acts or omissions causing violation of 'rights, freedoms and guarantees' or damage to someone (article 22 of CRP).[21]

This principle is understood as a principle that implies *direct* liability of the State and other public entities irrespective of the State function (legislative, administrative, or judicial), the way in which they carry out their activity (public or private) and the cause of the obligation to compensate (unlawful conduct and fault, lawful conduct implying sacrifice or mere risk inherent to hazardous things, activities or services).

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[17] ADRIANO VAZ SERRA, *Responsabilidade Civil do Estado e dos seus órgãos ou agentes*, BMJ 85 (1959), pp. 446-518; MENEZES CORDEIRO, *Tratado de Direito Civil Português*, cit., p. 633; MARGARIDA CORTEZ, *Responsabilidade Civil da Administração por Actos Administrativos Ilegais e Concurso de Omissão Culposa do Lesado*, cit., p. 19.

[18] Reference to article 483.º of the Portuguese Civil Code

[19] This Law-Decree legislated the extra-contractual liability of the State and other public entities regarding public management acts.

[20] Advocating the rejection of a restricted interpretation of article 22 of the CRP, limited to the civil liability of the administration, Rui Medeiros considers that this article constitutes a general principle regarding the matters of fundamental rights, Rui MEDEIROS — *Ensaio sobre a Responsabilidade Civil do Estado por Actos Legislativos*, Coimbra: Livraria Almedina, 1992, p. 85.

[21] Maria José Reis Rangel De Mesquita, "*The Liability of Public Authorities in Comparative Perspective*, Intersentia, 2016, 387-420.

Moreover, this principle is an expression of the *rule of law* principle which implies a general duty to compensate even in cases which may not be covered by the general principle of State liability laid down in article 22 of the Constitution.[22]
The principle of direct liability of the State and other public entities is a general principle regarding fundamental rights and has been considered by the Constitutional Court to be directly applicable at least regarding liability for unlawful and faulty acts or omissions (decision no 107/92) meaning that it can be invoked against the law or in the absence of law.

The intervention of the legislator to develop the constitutional principle is therefore desirable although not indispensable, namely, to establish the regime of the public liability and requirements of the obligation to compensate. Only in 2007 was a new law on the liability of the State and other public entities, according to the constitutional principle, approved by Parliament, which is the law in force foreseeing the rules on the liability of the State and other public entities, Law 67/2007[23].

Portugal's Regime:

On a first approach, it should be noted that brevitatis causa the study of the legal regime of liability for risk concerns the Portuguese legal system, however the influences it has gathered from other foreign legal systems, with special relevance to the French legal system, are not to be ignored.[24] In France, the *"arrêt Blanco"* case of 1873 stands out, establishing the autonomy of administrative responsibility in matters of State liability for damages caused to private individuals. They can be demanded in the common forum, and the agent's faute service and the Administration can be sued by the Administration in the administrative courts. The 'faute de service' would cover any dysfunction in the service of public services. The matter then evolved towards an idea of risk, based on equitable distribution of risks and charges to all.[25]

[22] Ibidem. P. 387-420.
[23] Lei 67/2007, de 31 de dezembro de 2007 – "Regime da Responsabilidade Civil Extracontratual do Estado e Demais Entidades Públicas" (RRCEE).
[24] Andreia Raquel da Silva Sousa, O Regime Jurídico da Responsabilidade pelo risco do Estado e demais entidades públicas, maio 2016, p.10.
[25] António Menezes Cordeiro, A responsabilidade civil do Estado. Texto destinado aos Estudos em Honra do Prof. Doutor José Manuel Sérvulo Correia. O Direito. Coimbra., 2010, p. 623-658.

The non-contractual civil liability of the State and other public entities for the exercise of the administrative function is subdivided into liability for an unlawful fact and liability for risk. The second, which is the subject of the present study, is centred on the risk (article 11 of Law No. 67/2007, of 31 December).[26]

As mentioned above, the public authorities' liability is regulated by the Law No. 67/2007, revoking the Decree-Law No. 48051, which preceded the Portuguese democratic Constitution of 1976.[27] The Constitution's article 22 states that: '*Jointly with the officeholders of their entities and organs and their staff and agents, the state and other public entities are civilly liable for actions or omissions that are committed in or because of the exercise of their functions and result in a breach of rights, freedoms or guarantees or in a loss to others'*.[28]

According to the constitutionalist authors Gomes Canotilho and Vital Moreira, article 22 does not exclude liability for risk and does not require illegality and guilt to hold the State and other public entities civilly liable, although it admits that the formula used suggests a restriction of liability to damages caused by unlawful acts or omissions, and only because of that it is perceived the consecration of the jointly liability of the State and the holders of its organs, officials or agents.[29]

Although the previous law (DL No. 48051) was considered unconstitutional by the Constitutional Court only after many attempts was the Law No. 67/2007 approved.[30] The latter law is applicable not only to public authorities but also to legal persons governed by private law when they act with prerogatives of public powers or are regulated by principles of administrative law, as it is established in Article 1.

The article 11º/1 is dedicated to liability irrespective of 'fault', stating that 'The State and other legal persons governed by public law are liable for its (especially dangerous) activities, property or administrative services resulting damages, except if proven to had happen an event of force majeure or the concurrence of the injured parties' fault, case in

[26] https://dre.pt/web/guest/lexionario/-/dj/120820811/view
[27] Nuno Manuel Pinto Oliveira, André Gonçalo Dias Pereira, "Tort Law in Portugal", Kluwer Law International, 2020, 3§2 Liability of Public Authorities
[28] https://dre.pt/part-i –– CONSTITUTION OF THE PORTUGUESE REPUBLIC - PART I
[29] Gomes Canotilho/ Vital Moreira, Constituição da República Portuguesa anotada, 4.ª ed., Coimbra, 2007, p. 169.
[30] the LRCEE came into force on the 30th of January of 2008, Cfr. article 6.º, Law 67/2007, of 31st of December, which approved the regime for extra-contractual civil liability of the State and other public entities.

which the Court can, attending all the circumstances, reduce or exclude any due compensation.' [31]

When an action by a third party concurs to the existence or aggravation of damages, the State and other legal persons governed by public law are jointly liable with the third party, withal the right to redress, giving article 11º/2 an innovative character in contrast with the previous regime. [32]

This means that it must be taken under consideration, hypotheses in which the Public Administration, while carrying out an activity that in itself involves possible damages that are inherent and predictable, responds for them without the need for fault, as they are risks inherent to the activity in question. This only will not happen, when it is possible to prove that there is a force outside and independent of the activity and its inherent risks, which led to the verification of damages.

In terms of requirements, there must be (i) an administrative activity, thing or service that reveals a special danger; (ii) an actual damage; (iii) a causal link between the referred activity and the damage caused.[33] [34]

The 'responsibility for the risk' takes on a particular shape when it is shown that "there was a force majeure or competition for the fault of the injured party". [35] In the latter case, that is, having the injured person contributed to the production or to the aggravation of the damages, it is up to the court, considering a global analysis of the case, to decide whether the compensation should be reduced or even totally excluded.[36]

According to Professor Carla Amado Gomes, the legal solution of article 11º/2 is quite risky and even unconstitutional because it is manifestly unnecessary. [37]

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[31] Responsabilidade pelo risco: art. 11º do RCEEP: "1 - O Estado e as demais pessoas coletivas de direito público respondem pelos danos decorrentes de atividades, coisas ou serviços administrativos especialmente perigosos, salvo quando, nos termos gerais, se prove que houve força maior ou concorrência de culpa do lesado, podendo o tribunal, neste último caso, tendo em conta todas as circunstâncias, reduzir ou excluir a indemnização."

[32] Artigo 11º/2 do RCEEP, "Quando um facto culposo de terceiro tenha concorrido para a produção ou agravamento dos danos, o Estado e as demais pessoas coletivas de direito público respondem solidariamente com o terceiro, sem prejuízo do direito de regresso".

[33] Cfr. article 11, no. 1 of the annex to Law no. 67/2007, of 31 December

[34] https://dre.pt/web/guest/lexionario/-/dj/120820811/view

[35] cf. article 11, no. 2 of Law no. 67/2007, of 31 December.

[36] https://dre.pt/web/guest/lexionario/-/dj/120820811/view

[37] Carla Amado Gomes, *A Responsabilidade Administrativa pelo Risco na Lei 67/2007, de 31 de Dezembro: uma solução arriscada?*, in *Textos dispersos sobre Direito da Responsabilidade Civil Extracontratual do Estado e demais entidades públicas*, cit., p. 108.

Given that the 'force majeure' case is any unpredictable and inevitable event foreign to the functioning of things, machines or vehicles, the fortuitous case is all that it is inherent in the functioning of these.[38] According to what is written in the law only the case of 'force majeure' is excluded by liability for risk.

→*What is implied in the term "especially dangerous"?*

The *"especially dangerous"* is a nuclear expression, in the context of responsibility for risk. It means that it is not enough to have verified the danger: the activity, the thing or the administrative service must be proven to be particularly dangerous, and the doctrine and the jurisprudence must then proceed to the identification of realities capable of deserving such qualification.

According to Professor Vaz Serra dangerous activities are those "that create a state of danger for third parties, that is, the possibility or, the probability of receiving damage, is greater than the normal probability derived from other activities" [39]. For its part, the Court of Appeal of Guimarães, decreed on the subject: "… although the law does not define in any part what is a dangerous activity, the truth is that according to the doctrine, what determines the qualification of an activity as dangerous is its special aptitude to produce damages, aptitude that will result, in accordance with the provisions of article 493/2 of the Civil Code, from its own nature or the nature of the means used ".[40]

It is discussed, whether this 'specially dangerous' should be minimally characterized, on one hand, due to the enormous openness that the disappearance of the damage qualification assumptions imply; and on the other hand, the danger should be measured in an abstract way and not in a concrete one; finally, in a sense of censoring the option for subtracting the requirement of abnormality of injury, which the author believes to be an imperative of the fair sharing of public burdens on which the strict liability is seated.[41]

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[38] Carlos Alberto Fernandes Cadilha, Regime da responsabilidade civil extracontratual do estado e demais entidades públicas. Anotado, Coimbra, 2008, p.184.

[39] Adriano Vaz Serra, Responsabilidade civil do Estado e dos seus órgãos ou agentes *in BMJ* nº 85, 1959, p. 378.

[40] Tribunal da Relação de Guimarães, em Acórdão de 5 de novembro de 2003 (*in CJ*, 2003/5, pp. 289 segs) - "…muito embora a lei não defina, em qualquer parte, o que seja atividade perigosa, a verdade é que segundo a doutrina, o que determina a qualificação de uma atividade como perigosa é a sua especial aptidão para produzir danos, aptidão que há-de resultar, de harmonia com o disposto no art. 493º/2 do CC, da sua própria natureza ou da natureza dos meios utilizados".

[41] Carla Amado Gomes, ob. Cit. pp. 85-95.

According to Professor Freitas do Amaral, some examples of sources of strict liability based on risk are: -Damages caused by manoeuvres, exercises, or training with fireweapons by the Armed Forces or by the police forces; -Damages caused by the explosion of military storerooms or nuclear centrals; -Damage caused involuntarily by police officers in operations to maintain public order or to capture suspects in the commission of a crime[42].

→*Regarding the compensation for the damage:*

Many authors discuss whether the compensation for damages should be restricted according to the circumstances in place.

According to Professor Marcelo Rebelo de Sousa, the compensation for damage resulting from dangerous activities unfolds in two theories: the theory of risk creation and the theory of risk-benefit. The first one, implies that liability for risk is excluded or modified if the injured party or a third party is at fault; and the second, implies that responsibility for risk is only of the administrative legal persons and not of their holders of bodies or agents, since the risk is created for the exclusive benefit of the public interest pursued for the former and not for the particular interests of the latter. [43]

In this regard, Professor Carla Amado Gomes, alludes to the theory of the created risk: whoever creates a risk must bear the costs it entails. This theory can be applied to Administrative Law, in the sense that, as the author points out, there are a variety of actions developed by the administration essential to the pursuit of public interest missions that, nevertheless, are likely to generate losses to individuals. By that if the whole community profits from the performance of administrative services, then it is only fair that the losses should not fall only on some citizens but should be distributed on the community as a whole, through compensation mechanisms. [44]

This means, that the responsibility for risk cannot be exceptional, despite certain current trends in the different sense that occur in this last branch of law[45]. In any case, civil law essentially considers the security and ease of legal trade, so strict liability must be typified

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[42] Diogo Freitas do Amaral, Curso de Direito Administrativo, vol. II, Almedina 2016, 3ed. p. 601

[43] Marcelo Rebelo de Sousa, André Salgado Matos, Responsabilidade Civil Administrativa, Direito Administrativo Geral, Tomo III, Lisboa: Publicações Dom Quixote, 2008, p.38-41.

[44] Carla Amado Gomes, ob. Cit., p.86

[45] Cfr. Carlos Alberto Cadilha, op. cit. P.189, "the LRCEE aimed to replace the previous regime of DL no. 48051 of 1967, but it did not aim to derogate special regimes, which were subjected to art. 1, paragraph 1, in fine.

by law. None of this is verified in Public Law so the responsibility for the risk applicable to the State and other public entities does not have to be exceptional and typified[46]. The Portuguese Constitution does not distinguish, in the general scope of the responsibility of public entities, between the responsibility for illicit, lawful acts and risk[47]. It is the ordinary law that does it[48]. However, in doing so, it restricted the responsibility for the risk to the exercise of the administrative function.

USA

The USA terminology:

An initial word about terminology is needed. 'Public authority liability' is not the term that would be used in the United States to describe the rules governing liability of public entities. Instead, the almost universal terminology is 'governmental liability' or 'governmental immunity'. One popular treatise does employ the term 'public entities officers and employees' liability, although it also uses 'governmental entities' liability when focused on the liability of those entities apart from their employees and officials.[49]

Due to its federal system, public authority liability, is divided between states, which are co-equal sovereigns alongside the United States. Federal law addresses the liability of the federal government and its employees, while state law governs the liability of individual states and their employees. One qualification to the above statement of source of law is that federal constitutional provisions can be the basis for liability of state employees and in some instances the basis for injunctive relief as well.[50]

Although the traditional blanket immunity for sovereign entities has long since been abrogated, governmental entities and officials retain a large amount of freedom from tort liability, particularly regarding 'discretionary' decisions made while governing. This area of the law is dominated by statutes – with the Federal Tort Claims Act (FTCA) governing federal liability and virtually every state having its own counterpart. Public authority liability thus involves the adoption of universal principles of private tort law, along with

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[46] Gomes Canotilho e Vital Moreira, Constituição da República Portuguesa anotada, vol. I (4.º ed.), Coimbra, 2007. pp. 431-432 e 437; Jorge Miranda e Rui Medeiros, Constituição Portuguesa Anotada, Tomo I, Coimbra, 2005, pp. 211-212

[47] Gomes Canotilho e Vital Moreira, op cit., pp. 185-186.

[48] Carlos Alberto Cadilha, op.cit., p.175.

[49] Ken Oliphant, M. Green, J. Cardi, *The Liability of Public Authorities in Comparative Perspective*, Intersentia, 2016, pp. 537-558.

[50] *Ibidem*.

modifications, often in the form of limitations on the liability of public authorities, contained in the FTCA.[51]

Pursuant to the FTCA, the federal government may be liable for actions in its sphere, including regulatory efforts. Similarly, state governments (and substate governmental units) may be liable for actions in their sphere, including regulatory actions. However, with 51 independent state jurisdictions, it exists a considerable variation regarding the law governing liability of public entities and public employees. [52]

Tort Law:

Tort law determines whether a person should be held legally accountable for an injury against another, as well as what type of compensation the injured party is entitled to.
The four elements to a tort case are: i) duty, ii) breach of duty, iii) causation and iv) injury. It is necessary the breach of duty is made by the defendant against the plaintiff, which resulted in an injury. Tort lawsuits are the biggest category of litigation and can encompass a wide range of personal injury cases, however, there are three main types: intentional torts, negligence, and strict liability.53

In the latter, torts involving strict liability, strict, or "absolute," liability applies to cases where responsibility for an injury can be imposed on the wrongdoer without proof of negligence or direct fault. What matters is that an action occurred and resulted in the eventual injury of another person. In lawsuits such as these, the injured only has to establish that their injuries were directly caused by the action in question. For example, the fact that the government (or another public entity) did not "intend" for the citizen to be injured is not a factor. Some examples of Strict Liability Torts are: -Defective products (Product Liability), -Animal attacks (dog bite lawsuits), and -Abnormally dangerous activities (which are the object of our current study).

[51] Ibidem.
[52] Ibidem.
[53] https://www.injurylawcolorado.com/legal-library/tort-law-types.html

The activity is considered abnormally[54] dangerous if "(1) the activity creates a foreseeable[55] and highly significant risk of physical harm[56] even when reasonable care[57] is exercised by all actors; and (2) the activity is not one of common usage [58]".[59]

The USA Historical Evolution: →*How did public authority liability first appear?*

To understand the United States' regime, we must first approach the circumstances that leaded to the consecration of the Federal Tort Claims Act and its development.

Bearing in mind what was explained above regarding the maxim 'the King can do no wrong', it should be noted that from the nineteenth century onwards, and especially in the twentieth century, the rule of absolute immunity experienced a significant erosion.[60]
The American history of state liability in tort reflects the evolution from the unqualified and almost unquestioned reception of a common law doctrine of sovereign immunity, containing a strong flavour of the feudal privilege of the Lord over his vassals, to an apparent statutory basis for immunity,' [61] although with some important waivers, such as the Federal Tort Claims Act of 1946 and other state statutes along similar lines.'[62]

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[54] Abnormally Dangerous Activity, as found on the Legal Information Institute Online, Cornell University Law School.
[55] Foreseeability: Actual knowledge of the risks is not necessary for an activity to be found abnormally dangerous. It is sufficient that the defendant should have known / had reason to know (often because the risky nature of the activity is of common knowledge). Restatement (Third) of Torts § 20, cmt. (i) (2009).
[56] Highly significant risk of physical harm: the term "physical harm" generally includes both bodily harm and property damage. Restatement (Third) of Torts § 20, cmt. (g) (2009).
[57] Reasonable care: To be deemed abnormally dangerous, any activity must present a highly significant risk of physical harm even when all participants are reasonably careful. Restatement (Third) of Torts § 20, cmt. (h) (2009).
[58] Common usage**:** An activity that a significant part of the community engages in (driving cars is in common usage, but storing toxic chemicals is not). Restatement (Third) of Torts § 20, cmt. (j) (2009)
[59] Restatement (Third) of Torts § 20(b) (2009).
[60] Giuseppe Dari-Mattiacci, Nuno Garoupa & Fernando Gomez-Pomar, *State Liability*, 18 Eur. Rev. Private L. 773 (2010). P.780
[61] Under common law, the state is traditionally immune from liability for damages without its consent. Most state constitutions in the United States impose restrictions on suits against the state. Therefore, a court cannot hear a case asking it to force the state to pay damages absent legislative authorization for payment; the remedy is itself unconstitutional. In addition, the Eleventh Amendment protects states (but not the federal government since this one has immunity in common law) from liability in reaction to the 1793 decision by the Supreme Court in *Chisholm v. Georgia,* 2 U.S. 419 (1793). With respect to constitutional torts in particular, the immunity doctrines have been
devised by the Supreme Court. Lawrence Rosenthal, 'A Theory of Government Damages Liability: Torts, Constitutional Torts, and Takings', *University of Pennsylvania Journal of Constitutional Law* 9 (2007): 797, fns 13, 14, and 83.
[62] Helene Goldberg, 'Tort Liability for Federal Government Actions in the United States: An Overview', in *Tort Liability of Public Authorities in Comparative Perspective,* ed. Duncan Faircrieve, Mads Andenas & John Bell, London: British Institute of International and Comparative Law, 2003, 521; Lawrence Rosenthal, op. cit. n.15, 799.

The American legal tradition on state liability has been largely sceptical of imposing liability on the state, pointing at the uncertainty of its consequences, but also at the inconsistency of allowing the exercise of legal rights against the same authority (the government) that makes the law on which these rights depend.[63]

The two concurring views were expressed in the well-known case of *Dalehite v. US* (1953), also known as the Texas City disaster.

The case regarded the devastating explosion of two ships being loaded with explosive chemicals (nitrate fertilizer) under the control of the federal government. It occurred in the Port of Texas City, at Galveston Bay, on 16 April 1947. [64] It was the deadliest industrial accident in United States history and one of history's largest explosions having killed over 500 people and having wiped out the entire city.[65] [66] The disaster drew the first-class action lawsuit against the United States government, on behalf of 8485 victims, under the 1946 Federal Tort Claims Act[67]. [68]

The petitioners (the victims) claimed that the nitrate fertilizer was an "inherently dangerous commodity", and that the Government was engaging in an "extrahazardous" activity. When any damages result from the decision to engage in an "extrahazardous" activity, strict liability is imposed on the tortfeasor irrespective of the tortfeasor's conduct. Consequently, the petitioners asserted that the Government should be held strictly liable for the accident without any regard to negligence. [69] [70]

While the majority of the Court took the view that the FTCA did not create broad state liability (alien to the common law) by concluding that the government benefits from an exception of discretionary function, [71] the dissenting minority argued that since the disaster was caused by actions completely controlled by the government, tort liability should be imposed on the government.

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[63] Paul F. Ficley & Jay Tidmarsh, 'The Appropriations Power and Sovereign Immunity', *Michigan Law Review* 107 (2009): 1207.

[64] H. Street, Governmental Liability: A Comparative Study, Cambridge, Cambridge University Press, 1953, Pp. iv, 223.

[65] Hugh W. Stephens, 1997. The Texas City Disaster, 1947. University of Texas Press. p. 100

[66] https://www.history.com/this-day-in-history/fertilizer-explosion-kills-581-in-texas

[67] Also mentioned as FTCA.

[68] an action to recover damages for death under the Federal Tort Claims Act 1946.

[69] *See* Dalehite v. United States, 346 U.S. 15 (1953) - at 44-45.

[70] Patrick F. Lustig, Strict Liability within the Federal Tort Claims Act: Does It Belong, 57 Chi.-Kent L. Rev. 499 (1981). P 502

[71] Mr. Justice Jackson, dissenting, was moved to remark: "Surely a statute so long debated was meant to embrace more than traffic accidents. If not, the ancient and discredited doctrine that 'The King can do no wrong' has not been uprooted; it has merely been amended to read, 'The King can do only little wrongs" (p.60).

The dissenting minority also expressed the view that the adoption of the government's exception of discretionary doctrine would undermine the incentives for official responsibility in certain risky activities.[72] Largely speaking, the view of the majority has prevailed so far.[73]

On April 13, 1950, the district court found the US responsible for a litany of negligent acts of omission and commission by 168 named agencies and their representatives, in the manufacture, packaging, and labelling of ammonium nitrate. On June 10, 1952, the U.S. Fifth Circuit Court of Appeals overturned this decision, finding that the US maintained the right to exercise its own "discretion" in vital national matters. The Supreme Court affirmed that decision[74] in a 4-to-3 opinion, noting that the district court had no jurisdiction under the federal statute to find the U.S. government liable for "negligent planning decisions" which were properly delegated to various departments and agencies. In short, the FTCA clearly exempts "failure to exercise or perform a discretionary function or duty", and the court found that all the alleged acts in this case were discretionary in nature.

In its dissent, the three justices argued that, under the FTCA, "Congress has defined the tort liability of the government as analogous to that of a private person", i.e., when carrying out duties unrelated to governing. In this case, "a policy adopted in the exercise of an immune discretion was carried out carelessly by those in charge of detail", and that a private person would certainly be held liable for such acts. A private person is held to a higher standard of care when carrying out "inherently dangerous" acts such as transportation and storage of explosives.

According to Melvin Belli in his book *Ready for the Plaintiff!* [75](1965), Congress acted to provide some compensation after the courts refused to do so. The Dalehite decision

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[72] The current scope of the federal government's immunity is essentially the same that governs the states and has not changed - *Department of the Army v. Blue Fox, Inc.,* 525 U.S. 255 (1999) and *West v. Gibson,* 527 U.S. 212 (1999). In fact, Jeffrey A. Segal & Harold J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (Cambridge: Cambridge University Press, 2002) argued that the Supreme Court has expanded state immunity and effectively constrained congressional authority to develop state liability in the last decade or so.

[73] The majority of the Court rejected liability on any decision at any high level of the administration. Giuseppe Dari-Mattiacci, Nuno Garoupa & Fernando Gomez-Pomar, *State Liability*, 18 Eur. Rev. Private L. 773 (2010). p.781 // Harold J. Krent, 'Preserving Discretion without Sacrifice Deterrence: Federal Governmental Liability in Tort', *UCLA Law Review* 38 (1991): 871;

[74] (346 U.S. 15, June 8, 1953).

[75] Melvin Belli, *Ready for the Plaintiff!* Popular Library, 1965, pp. 83–85

was eventually "appealed" to Congress, where relief was granted by means of legislation.[76]

The Federal Tort Claims Act:

The Federal Tort Claims Act, of August 2, 1946, is a federal statute that permits private parties to sue the United States in a federal court for most torts committed by persons acting on behalf of the United States. Historically, citizens have not been able to sue their state due to the doctrine referred to as sovereign immunity (mentioned above). The FTCA constitutes a limited waiver of sovereign immunity, permitting citizens to pursue some tort claims against the government.

The *"Federal Tort Claims Act"* was also previously named the official short title passed by the Seventy-ninth Congress as Title IV of the *Legislative Reorganization Act*, 60 Stat. 842, which was classified principally to chapter 20[77] of *former* Title 28, *Judicial Code and Judiciary*.[78]

The Act was passed following the B-25 Empire State Building crash, where a bomber piloted in thick fog by Lieutenant Colonel William F. Smith, Jr. crashed into the north side of the Empire State Building. As reported, "Eight months after the crash, the U.S. government offered money to families of the victims. Some accepted, but others initiated a lawsuit that resulted in landmark legislation. The FTCA of 1946, for the first time, gave American citizens the right to sue the federal government".[79] Although the crash was not the initial catalyst for the bill, which had been pending in Congress for more than two decades, the statute was made retroactive to 1945 to allow victims of that crash to seek recovery.[80]

The FTCA was then amended by the Federal Employees Liability Reform and Tort Compensation Act of 1988, also known as the Westfell Act, following the Supreme Court decision in *Westfell v. Erwin* in which the Court had found a federal employee liability for negligence in their duties. The 1988 act amended the FTCA as to make federal employees immune to tort lawsuits results from cases of negligence or omission in their

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[76] (Public Law 378, Chapter 864, 69 Stat. 707 (1955).
[77] (§§ 921, 922, 931–934, 941–946)
[78] That Title IV of the *Legislative Reorganization Act* was substantially repealed and re-enacted as sections 1346 (b) and 2671 et seq. of this title by act June 25, 1948, ch. 646, 62 Stat. 982, the first section of which enacted this title (Tort Claims Procedure).
[79] "The Day A Bomber Hit The Empire State Building". *National Public Radio*. Retrieved July 28, 2008.
[80] State Ins. Fund v. United States, 346 U.S. 15 (1953), pp.24-30

duties, instead making the U.S. government the defending party under the FTCA as to allow the litigant to seek damages for constitutional violations.[81]

Under the FTCA, "the United States is liable ... in the same manner and to the same extent as a private individual under like circumstances but is not liable for interest prior to judgment or for punitive damages."[82] Federal courts have jurisdiction over such claims but apply the law of the State "where the act or omission occurred".[83] Thus, both federal and State law may impose limitations on liability. The FTCA exempts, among other things, claims based upon the performance, or failure to perform a "discretionary function or duty".[84] The FTCA also exempts several intentional torts.

However, the FTCA does not exempt intentional torts committed by "investigative or law enforcement officers", thus allowing individuals aggrieved by the actions of law enforcement officers to have their day in court.[85]

Under the FTCA, a tort claim against the United States must be presented in writing to the appropriate federal agency within two years after the claim accrues, or within six months after notice of final denial of the claim by the agency, or it is time-barred.[86]

The Supreme Court of the United States has limited the application of the FTCA in cases involving the military, known as the *Feres* doctrine.

To sum up, the imposition of strict liability on the Government is not precluded by any provision of the FTCA, nor does the legislative history of the Act evidence any intent by Congress to exclude it.
Nonetheless, the United States Supreme Court has held that the Government cannot be held strictly liable under the FTCA. Until the FTCA is interpreted as its language warrants, plaintiffs will either find no relief in strict liability situations against the Government, or courts will have to look past the applicable state law to find a remedy wherever possible. However, this defeats the purpose of the Act and leads to inequitable results.

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[81] *Lee, Jr., Robert D. (1996). "Federal Employees, Torts, and the Westfall Act of 1988". Public Administration Review. 56 (4): 334–340*
[82] 28 U.S.C. § 2674.
[83] 28 U.S.C. § 1346(b).
[84] 28 U.S.C. § 2680(a)
[85] 28 U.S.C. § 2680(h
[86] 28 U.S.C. § 2401(b).

Today the Government is involved in an ever-increasing variety of extra-hazardous activities, such as supersonic flights, nuclear energy programs, and blasting, which typically carry with them the application of strict liability to those engaging in the activity. If a private individual were involved in the activity, that individual would be held strictly liable for any injury or damage caused by his choice to engage in such an activity. Regarding this matter, the FTCA states that the Government should be treated as a private citizen. Nonetheless, the Supreme Court has held that strict liability cannot be imposed on the Government under the FTCA. Despite the Supreme Court's holding there is nothing in the legislative history of the Act which indicates that even though a private citizen engaging in these types of activities will be held strictly liable, the Government will be immune from suit. Such a result is at odds with the basic rationale of the Act.

It is suggested that Congress intercede to settle the dispute over the role of strict liability within the framework of the Act. Then the Government will be treated as a private individual under like circumstances, and the courts will not have to look to the common law for relief but rather will find it in the applicable statutes of the state whose law governs.[87]

Conclusion:

Naturally, the importance of the topic means the sheer pace of recent developments itself justifies the pursuit of the comparative research on the subject, and this was one of the considerations that led me to embark on my own project on public authority liability.

Further, it struck me as desirable to test and interrogate the information provided in these general accounts of public authority liability in the two countries by inquiring into the application of the principles identified to concrete facts.

The state can be a significant source of negative externalities, through actions of its employees, officials, and agents and through the failure to act in each way.

States have armies, police forces, and prosecutors who can produce harm by their actions, as well as let harm happen by their omissions. States promote public works and build and maintain public infrastructures of many kinds, and private individuals can suffer physical

[87] Patrick F. Lustig, Strict Liability within the Federal Tort Claims Act: Does It Belong, 57 Chi.-Kent L. Rev. 499 (1981). P 518-519.

and property harm because of both. States regulate, in varying degrees, many if not most economic activities, and they can impose, or fail to impose, regulatory measures that can result in economic losses for the individuals. Yet the observed legal treatment of the liabilities that may be attached to those instances of harm widely differs from the ordinary rules of tort law.'[88]

In so doing, they would acknowledge that the King can, in fact, still do wrong.

Say what you do,

Do what you say,

Be able to prove it,

But if you can't do it safely, don't do it at all. 89

The end.

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[88] Giuseppe Dari-Mattiacci, Nuno Garoupa & Fernando Gomez-Pomar, *State Liability*, 18 Eur. Rev. Private L. 773 (2010), p.774.
[89] Alan Cotterell, Acotrel Risk Management Pty Ltd, 30th August 1999. https://www.angelfire.com/nb/hazsub/admincont.html

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