Lincoln – FDUL Online Students

Exchange Program

Federal Tort Claim Act in the United States and the Administrative Liability in Portugal

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Public Administration

"The Public Administration is the system of bodies, services and agents of the State, as well as other public legal persons, and some private entities, which ensure, on behalf of the community, the regular and continuous satisfaction of the collective needs of security, culture and welfare."

- Diogo Freitas do Amaral[1]

[1]In: AMARAL, Diogo Freitas do. *Curso de Direito Administrativo*. Coimbra: Almedina, 2021 (Vol. I, 4th edition), page 32

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Abstract

This assignment aims at comparing the application of the U.S. Federal Tort Claims Act (FTCA) with the administrative liability in Portugal. The first part of the assignment traces the development of administrative law. Next, the assignment concentrates on the administrative liability in Portugal and the FTCA in the U.S, individually. In addition, I will analyse one real-life case for each country, to have a better understanding of how liability works in these countries. Since the administrative law was born with a case similar to the FTCA, I will also do a brief historical context on how the administrative law was born. The two examples that are going to be given and analysed are given as a way to understand the practicality and the range of the liability of the administrative employees, and as a way to compare how this institute happens on different administrative systems.

Keywords: Administrative Law; Administrative tribunals; FTCA; Portugal; Unites States; Security; Unlawful; Responsibility; Government; Public Administration; Liability

Acronyms

- Art.º – Article
- CC – Civil Code
- CRP – Constitution of the Portuguese Republic
- DL – Decree-Law
- FTCA – Federal Tort Claims Act
- N.º – Number
- NRDC – Natural Resources Defence Council
- US – United States of America
- USC – The United States Constitution

Introduction

I chose this subject because it is an extremely interesting part of the administrative law. With this work, I intend to get to know more and deepen my knowledge on this subject. I will briefly present how the Federal Tort Claims Act and the Administrative Liability was at the base of the creation of administrative law, but I will, mostly, focus on how these institutes work in Portugal and in the United States. I will, also, direct my work to the judicial side and not so much to the theoretical side. I also intend to present real-life cases that happened in both countries and compare the two systems to show how different they work.

I hope to be able to convey, as best as possible, the importance of this institution to protect civilians from any daily accident that may happen with the State. Its influence comes from an accident that happened in France, after the Revolution, 1789. The case of Agnès Blanco, that is going to be presented as a way to contextualize, not only the administrative law, because this episode was at the base of the creation of the administrative law, but also it's the first case that it's impactful enough to pass through the barriers of time and create laws that legislate the State and protect the individual from any harm that may happen due to a state institution.

Knowing that the administrative system in Portugal is different from the US, we need to take into consideration that similar cases will have different outcomes, due to this major difference, I am curious to know the process of when a case is made against the state on both countries, and what will be its outcome.

For the United States, I'm going to analyse a water contamination problem that happened in the '80s, in New Jersey. Whereas for Portugal, I'm going to analyse a municipality road problem. It's also important to keep in mind the administrative division made in both countries.

The birth of the administrative law. The Case of Agnès Blanco

Firstly, it is worth making a brief introduction to the topic, based on the lessons of Professor VASCO PEREIRA DA SILVA.

The case of Agnès Blanco is pointed out by the Professor as one of the two moments that allow the "birth" of Administrative Law, which the Professor calls as *two traumas* because both episodes that influenced the "birth" of the administrative law are quite traumatic.

The first of these *traumas* dates back to the period following the French Revolution of 1789. The action of the Council of State, by its decisions with a jurisdictional character, prohibited ordinary courts from judging the administration. It kept her from being disturbed – *troublé l'administration*. According to Charles Debbash, there was total confusion in which the decision-making body judged the acts he had performed.

The second outbreak of trauma came up as a Law produced by the administration's private litigation, safeguarding the administration's interests, namely, by a judgment of the Court of Conflicts (*Tribunal des conflits*) in 1873. The logic of this administration's private litigation was that of litigation that safeguard the exorbitant privileges of administration. According to MAURICE HAURIOU, there was a dispute that safeguarded the logic of administrative power. OTTO BACHOF calls it *Eingriffsverwaltung*, aggressive administration, the administration that when it acts to exert physical force on individuals and acts to put their rights into practice.

According to SABINO CASSESE, the Blanco case is a *sad episode that marks a conventional birth point of Administrative Law*. On this point, VASCO PEREIRA DA SILVA notes that at the beginning, the high standards of administrative courts were strongly marked by the idea of an Administration as a power of the State, endowed with powers of self-protection of its decisions, and should therefore enjoy a special, albeit limited, status by considering the interests of individuals.

At issue was a 5-year-old child named Agnès Blanco being run over by a wagon belonging to the National Tobacco Manufacturing Company, a public company, in

Bordeaux. The car was pushed by four employees and, as a result of being run over, one of Agnès' legs was amputated.

The Bordeaux Court

The child's parents go to the court in Bordeaux to seek compensation, as the child has been seriously injured for life. The girl's father, Jean Blanco, on January 24, 1872, brought an action for damages against the State in the (civil) court, alleging civil responsibility for the conduct of the four employees – the so-called *faut du service*.

The judge in the first instance says that he is not competent, because the one who acted as an administrative entity, not a private person, and the court declared itself incompetent. In addition to this statement, the court adds that even if they were competent, they could not decide because there is no applicable law. The Bordeaux court understood that the only rules that existed, the rules of the Code of Napoleon, were only applicable to relations between equals. And the Administration was not on the same level as the citizens, therefore, they were not equal.

The Mayor of Bordeaux

The child's parents did not conform and go to administrative jurisdiction. Who attends them is the mayor, *the maire* - in the logic of promiscuity between administration and justice. This functioned as the first instance of administrative litigation. The mayor claims that he is incompetent because an administrative act, a voluntary decision of the administration, is not in question. This is a simple material operation and, therefore, the administrative jurisdiction is not competent to intervene in this matter. He will also reaffirm the idea that even if he wanted to resolve that case, there would be no applicable law.

The Court of conflicts

There is a negative conflict of jurisdictions because there are two jurisdictions that declare themselves incompetent. Thus, a court intervenes to decide which jurisdiction is competent – the Court of Conflicts.

The court is composed of four members from each jurisdiction. At the time of voting, it faced an impasse since there was a tie of 4 votes to 4. The at the time Minister of Justice, Jules Dufaure, president of the Court of Conflicts, called Guardian of the Stamps, broke the tie, using his prerogative of the Vote of Minerva. He voted in favour of the competence of the Council of State, the administrative jurisdiction.

This is where the Blanco judgment appears. This states that competence is the administrative jurisdiction.

The appellant of the judgment, David, referred the decision of the disputed matter to the administrative litigation, highlighting the specificities of Administrative Law, and stating that the State is subject to *special rules, which vary according to the service needs and the need to reconcile the rights of the State with the private rights*. But the judgment goes beyond the question of State responsibility: its considerations apply to Administrative Law as a whole. On the one hand, they reject the principles established by the Civil Code. On the other hand, they affirm the special character of the rules applicable to public services.

It is up to the administrative justice to resolve those cases of civil liability of the administration. However, the Blanco judgment explains that there is no applicable rule and that it is necessary to create a new rule specially prepared to protect the administration. The Administration cannot be subject to the same civil liability rules as any individual and must be protected through special legislation.

After consideration of the case by the Council of State, the latter decides to grant a lifetime pension to the victim. Thus, the bases of the Administrative Risk Theory are laid, which establishes the State's objective responsibility for damages caused by its agents.

The final decision

The judgment of the Court of Conflicts is important for Administrative Law because it will mark the first years of its dogmatics. This authoritarian conception gave rise to the great cathedrals of administrative law, which developed theories of the rights of individuals in the face of quite restrictive Administration.

These first legal constructions are based on the idea of administrative power, that the individual has no rights before the administration, or has the right to comply with legality.

This occurs, namely, with the Negationist and Subjectivist schools. The first is followed by authors such as LA FERRIÈRE, OTTO MAYER, SANTI ROMANO and HAURIOU, who deny the existence of subjective rights of individuals – Administration was a power that imposed its will on individuals, who were the object of power. This unfolded into two theories, the French (HAURIOU), in a logic of litigation and legality in which the individual could only defend the law - there was no Rights vis-à-vis the Administration and did not act in the process as a party, and the German Theory (OTTO MAYER): "*It makes no sense to conceive a power of will of the individual that opposes the public power*" – the individual doesn't have a subjective position of advantage, but is indirectly protected, in factual terms, by the fulfilment of the law (Reflection of Law – subjective reflection of objective law). The second, the Subjectivist school, defended by authors such as BONNARD, BARTHÉLEMY and MARCELLO CAETANO, defended the right to legality in which the individual has the right for the Administration to comply with the law.

Portugal

An Introduction

The concept of "liability" determinates that a certain person (individual or collective, public or private), has the obligation to answer for the consequences of their actions. Since it adds the word "tort", it constitutes an obligation to repair damage caused to others.

In the domain of liability, "*responsabilidade civil extracontratual*" in Portuguese, that obligation to repair the damages doesn't come from the contract, but from other legal assumptions.

The question of objective liability means that the assumption to that liability exists don't have, in its base, one contrary action to the law. We presume, even, the existence of guilt, in this case from the administration. The main fundament is to reimburse someone with the fundament that, even without guilt and lawful, the action brings some benefits causing, however, losses to certain individuals.

Nowadays, the regime of the Civil Liability in Portugal from the State and its entities it's regulated by the Law n.º 67/2007, 31 of December (changed by the Law n.º 31/2008, 17 of July, that entered in force in January 2008).

The Law n.º 67/2007, 31 of December of 2007 (which regulates the regime of the Civil Liability in Portugal), was the result of a long wait. Not so much in the field of administration, who is regulated by the Decree-Law n.º 48 051, from 27 of November 1967, but, especially in the liability of the organs and its holders of the others functions in the State: the legislative and jurisdictional.

The Portuguese Administrative Liability Institute

The everyday life is associated with the occurrence of damages in people's lives or on their patrimony, mainly in a complex, competitive, open to the world and developed society.

The principle in Portuguese Law is that the losses are dealt with the ones who suffered with them. Nonetheless, this principle has some exceptions, that imply that the damages are borne by others – this is the case of the Liability.

The main aim of the Administrative Liability in Portugal is to reimbursed or indemnify damages suffered by individuals, intending to restore their initial situation (putting the individual in the situation they would have been in if the damage hadn't occurred), when this is not possible, then compensation is made with a cash equivalent or compensation for the damage suffered.

This institute was transferred to the Portuguese Administrative Law once the exercise of the administrative act implies the usage of the authority powers, and that exercise can be a consequence to the occurrence of damages in the individuals.

The idea to charge the Administration for its actions started to develop at the beginning of the XIX Century, generally due to the case explained previously, the Agnès Blanco Case. Therefore, is due to the responsibility that a legal person governed by public law is obliged to indemnify, through a pecuniary reparation, for the damage caused by its bodies or agents to individuals, both in the exercise of the administrative function and in the exercise of the private function.

It should be noted that the issues associated with this institute are very relevant, not only for its role in the formation of the Administrative Law but also for its great topicality and pertinence, as VASCO PEREIRA DA SILVA points out[2], "the civil liability of public entities constitutes a true "beam" of the Rule of Law, being enshrined in the Constitution, within the scope of the legal regime of fundamental rights (art.º 22.º of the CRP). Furthermore, the very right to compensation in the event of an infringement of fundamental rights assumes the nature of a fundamental right (art.º 16.º and 17.º of the CRP)".

As for the historical evolution of the Civil Liability Institute of Administration, FREITAS DO AMARAL divides into four autonomous phases.

In the first phase, the State was irresponsible. The manifestation of the sovereign's wish couldn't generate any type of obligation to indemnify for the damage that it caused

[2] In: Vasco Pereira da Silva, *O Contencioso Administrativo no Divã da Psicanálise – Essay on Actions in the New Administrative Process*.

to individuals. This was the dominant conception in times when power was gathered in the hands of an absolute monarch, as well as during the 19th Century.

However not only there were exceptions to the general principle (in certain cases, situations of the State liability existed), but only under private law and only for acts and private law contracts that the former practised or entered. On the other hand, the fact that the State was not yet interventionist limited, to a large extent, the situations in which its action was likely to cause harm to individuals.

Thus, the Portuguese constitutional texts of the 19th Century only provided for the responsibility of "public employees" for faults committed in the exercise of their functions, such as errors and abuses of power. An employee liability regime was applied, and the Administration didn't respond.

However, jurisprudence and doctrine have interpreted these precepts in the sense that the acts of private management, this means that the activity of the Administration that takes place under the Private Law[3], holds the State responsible similarly to what happened with the other legal persons. Being these activities are regulated by private law.

However, the acts carried out within the scope of public administration could never hold him accountable and the 1911 Portuguese Constitution didn't even address the issue, nor did it even refer to the responsibility of public employees.

In the second phase, jurisprudence began to admit the State's responsibility for "acts of empire", until, in 1930, with the revision of the Civil Code, the State's own joint responsibility was added to the responsibility of state agents.

With the Administrative Code (ruled between 1936 and 1940), the exclusive responsibility of the State is founded, since is established, in certain cases, the exclusive responsibility of local authorities. Only the acts of incompetence, excess of power or neglect of essential formalities continued to imply the agent's personal responsibility. Otherwise, ordinary Portuguese legislation indicated that civil liability of the Administration for unlawful and negligent acts, practised by its bodies or agents in the performance of their respective functions, was admitted.

[3] In: Marcello Caetano, *Manual de Direito Administrativo II*.

Until the mid-twentieth century, doctrine held that liability only existed in cases expressly listed in special laws. "From 1950 onwards, it began to be understood that, at least in relation to liability for lawful acts, there was a general principle that imposed on the Administration the duty to indemnify, even outside the cases provided for by law".[4]

From a procedural point of view, there was a paradoxical situation: on the one hand, actions to enforce the civil responsibility of the Administration should be proposed in administrative courts. On the other hand, the competence to determine administrative responsibility rested with the judicial courts.

The third phase begins with the publication of the new Civil Code, in 1966, which brings important changes to this matter. The original intention of the legislator was to regulate in the new law all matters of extra-contractual liability of the Public Administration, however, what ended up being regulated was only the extra-contractual liability for damages caused in the exercise of the activity of private management, leaving to administrative laws the discipline of the responsibility of the Administration in the domains of public management acts, that is, "emerging from authoritarian conduct of the Public Administration, adopted under the aegis of rules and principles of administrative law"[5], which came to be established in the DL nº 48 051, of November 21st, 1967.

The law, faithful to the paradigm of attributing damage to the Administration caused by the actions of individuals with whom it maintains a functional relationship, established a different regime of responsibility of the Administration – in one part direct and in other part indirect – "in matters of unlawful and negligent facts of its bodies, employees or agents and, as a general figure, the exclusive and objective responsibility of the Administration with regard to liability for risk and liability for lawful fact".[6]

In terms of litigation, the distinction of substantive regime (public management versus private management), was reflected in the adjective plan, that is, in the determination of the competent jurisdiction for judgment of liability actions: for damages caused in the exercise of management activities private, the Administration responded according to civil law and before the judicial courts. As for damage caused in the

[4] In: AMARAL, Diogo Freita do. *Curso de Direito Administrativo*, vol. II, 4th ed.

[5] In: CAUPERS, João *Introdução ao Direito Administrativo*.

[6] In: AMARAL, Diogo Freita do. *Curso de Direito Administrativo*, vol. II, 4ª ed.

performance of public management activities, the Administration responded according to administrative law and before the administrative courts.

The fourth phase, corresponds to the present, the Portuguese Constitution expressly autonomized, in art.º 22.º, the responsibility of the State and other public entities, from the responsibility of their employees and agents.

In addition, this precept came to enshrine the principle of joint responsibility of the administration and its members of bodies, employees, and agents, for damage caused in the performance of their functions.

The 1976 Constitution also provided, in art.º 271.º, n.º 1 and n.º 4, the idea of responsibility of the Administration in a joint way with the holders of its bodies, employees or agents. However, it should be noted that this principle of responsibility differs from that provided for in the Civil Code, and must be combined with other constitutional principles, namely the efficiency and the responsibility of the Administration.

Subsequently, the Administrative Litigation Reform of 2002/2003 referred the treatment of all matters relating to the civil liability of the Administration to the administrative courts through common administrative action, which became competent to hear the contractual civil liability resulting from non-compliance with contracts subject to "a pre-contractual procedure governed by rules of public law" (public contracts) or administrative contracts[7].

The same solution is provided for the non-contractual liability of legal persons governed by public law, the holders of bodies, employees, agents and other public servants, as well as for the non-contractual civil liability of private subjects to which the specific regime of non-contractual liability applies of the State and other legal persons governed by public law[8], which translates into an extension of the scope of subjective application of the new legal regime by the legislator.

[7] In: article 4.º, n.º1, lines e) and f) from the Statute of Administrative and Tax Courts.

[8] In: lines g) and h) from the Statute of Administrative and Tax Courts.

Nonetheless, in 2007, with Law n.º 67/2007, of December 31st[9], the RCEEP[10] was approved. Two of the objectives pursued were to bring the legislative framework closer to the case law of administrative courts and to comply with the obligation to transpose Euro-Community directives in matters of pre-contractual liability.

Thus, as to its material scope, even today the duality of substantive liability regimes remains, on the one hand, civil liability arising from the exercise of private management activities, whose regime is set out in art.º 501.º of the CC; on the other hand, civil liability arising from the exercise of the administrative function, regulated by both the CCP[11] and RCEEP, with regard to contractual civil liability.

Therefore, in the synthesis presented by FREITAS DO AMARAL, regarding the civil liability regime of the Public Administration, it is possible to distinguish between the following modalities:

- For unlawful and negligent acts, practiced by bodies, agents or representatives, outside the scope and exercise of their functions, there is exclusive responsibility for them;
- For unlawful and culpable acts, committed by the body, agent or representative of the Administration, within the scope and exercise of its functions, there is joint liability of the Administration and of the individuals who have acted on its behalf. In this case:
- If the body, agent or representative of the Administration acted with intent, the Administration enjoys the right of recourse against it;
- If you acted with mere fault, the Administration is solely responsible;
- In cases of strict liability, there is also the exclusive responsibility of the Administration.

For FREITAS DO AMARAL, the solution currently in force is based on the distinction between private management (regulated in the CC) and public management (which is contained in the RCEEP, with regard to extra-contractual liability, and the CCP, regarding the liability arising from the breach of administrative contracts), is correct, insofar as,

[9] In: Later amended by Law 31/2008, of 17 July.

[10] Responsabilidade Civil Extracontratual do Estado e Pessoas Coletivas de Direito Público (*Extra-Contractual Civil Liability of the State And Legal Persons Under Public Law*)

[11] Código dos Contratos Públicos (*The Public Procurement Code*)

when the performance of the Administration is similar to that of any private entity, it must be subject to the consequences of this regime.

Thus, when an act or fact falls within an activity regulated by rules of private law, the liability regime is what is set out in civil law; when it comes to an activity regulated by rules of administrative law, the responsibility is governed by administrative law.

On the other hand, VASCO PEREIRA DA SILVA criticizes this solution since it is difficult to qualify the harmful facts as being of private management or public garland. To this, FREITAS DO AMARAL presents a solution since he makes a distinction between harmful facts that are legal acts or facts integrated in an activity that has a legal nature, or, on the contrary, material acts or facts integrated in activities of non-legal nature. As for the first, the Professor argues that there are no major difficulties regarding their qualification, however, if the harmful fact is a material fact or belongs to a non-legal activity of the Administration, some problems may already arise, as it becomes more difficult to determine if we are facing a situation of private or public management.

FREITAS DO AMARAL presents, however, a criteria to distinguish between the two types of management, in the following terms: a material act or a non-legal activity should qualify as public management if in its practice or in their exercise they are in any way influenced by the pursuit of the collective interest (that is, they correspond to the exercise of the administrative function) – either because the agent is exercising powers of authority, or because it is fulfilling duties or subject to specifically administrative restrictions, that is, typical of administrative agents. And it will be private management in the remaining cases.

Differently, VASCO PEREIRA DA SILVA considers that, on the one hand, while the move away from dual jurisdictions, with regard to administrative civil liability, removes many of the inconveniences that previously occurred, arising from doubts and conflicts concerning the jurisdiction of the courts. On the other hand, the persistence of the duality of substantive legal regimes in the field of administrative responsibility – which was previously illogical – now ceases to make any sense, not just because of the referred lack

of criteria for distinguishing between public and private management, as well as the material inadequacy of the applicable regime[12].

Accordingly, for VASCO PEREIRA DA SILVA contrary to what FREITAS DO AMARAL defends, the changes introduced by the reform of Administrative Litigation presume a change in the public civil liability regime, and it makes no sense to continue talking about the duality of substantive legal regimes (which it contrasts public management with private management), as it lacks logic and, furthermore, corresponds to the application of inappropriate legal regimes to the current social and legal administrative reality.

However, as already mentioned, there are two civil liability regimes of the Administration enshrined in Portuguese Law – liability for acts of private management and liability for acts of public management.

FREITAS DO AMARAL indicates, considering the complexity of the institute and following the structure of the diplomas and the distinction between contractual and non-contractual liability, which legal regimes are subject to the Public Administration. They are:

1. Pre-contractual and contractual civil liability arising from contracts subject to private law.
2. Non-contractual civil liability for acts of private management.
3. Non-contractual civil liability for acts of public management, which includes five modalities:
   - The Liability for unlawful and negligent action or omission committed by the members of Management bodies, their employees, or agents.
   - Liability for breach of a rule that occurred within the scope of the procedure for the formation of certain administrative contracts.
   - Liability for abnormal functioning of the service.
   - Responsibility for the risk; and
   - Liability for lawful act.
4. Contractual civil liability arising from administrative contracts.

[12] In: Vasco Pereira da Silva, *O Contencioso Administrativo no Divã da Psicanálise*.

The liability in real-life

To understand better the regime explained previously, it is going to be presented a real-life case that was assessed in the of the Northern Central Administrative Court on February 19th, 2021 (Process number: 03140/117BEPRT[13]).

The case is about a motorcycle driver, when passing on a street in City x[14], after feeling a loud bang from the underside of the vehicle, found that he had hit a sanitation cover that was raised in a diagonal position relative to the level of the road. The issue in question led to the liability of the Municipality being assessed.

The liability of the State and other public legal persons, in the field of public management acts, is governed, *in casu*, by the provisions of Law n.º 67/2007, of December 31st.

Pursuant to the provisions of art.º 7.º, n.º 1, "the State and other public legal persons are exclusively liable for damages resulting from unlawful actions or omissions, committed with slight negligence, by the holders of their bodies, employees or agents, in the exercise of the administrative function and because of that exercise".

Civil liability for acts of public management corresponds, in essence, to the civil concept of extra-contractual civil liability for unlawful acts whose assumptions are provided for in art.º 483.º, n.º 1, of the Civil Code: the fact, active or omissive behaviour of a voluntary nature; the illegality, translated into the offense of rights or interests of third parties or legal provisions designed to protect them; guilt of an average man or a typical employee or agent; the damage is from a patrimonial or moral nature; and the causal link between the conduct and the damage, determined according to the theory of causality.

Legally relevant illegality is, by virtue of the provisions of art.º 9.º, that which results from actions or omissions that violate constitutional, legal or regulatory provisions

[13] http://www.dgsi.pt/jtcn.nsf/89d1c0288c2dd49c802575c8003279c7/89e16fd8c99b999680258686003e5a1f?OpenDocument&Highlight=0,03140%2F11.7BEPRT

[14] Due to protection of the privacy and personal information, the Northern Central Administrative Court doesn't specify the city in which the accident occurred.

or principles or infringe technical rules or objective duties of care and resulting from the offense of legally protected rights or interests.

Under the terms of art.º 10.º, n.º1 of the same legal diploma, "the fault of the holders of bodies, employees and agents shall be assessed by the diligence and aptitude that it is reasonable to demand, depending on the circumstances of each case, of a holder of a zealous and compliant body, employee or agent, and without prejudice to the demonstration of intent or gross negligence, it is presumed the existence of slight negligence in the practice of unlawful legal acts" (n.º2) and "in addition to the others in cases provided for by law, slight fault is also presumed, by application of the general principles of civil liability, whenever there has been a breach of due diligence" (n.º3).

Regarding the liability of public entities for an unlawful act of public management, namely with regard to the violation of the duties of inspection and conservation of traffic lanes, the presumption of guilt provided for, in the above-mentioned, art.º 493.º, n.º1 of the Civil Code, as referred to in Ac. of the STA of 05/09/2002, proc. No. 048.301. Therefore, the Municipality was responsible for the conservation and surveillance and inspection of the road in question and to prove the measures it adopted to inspect, monitor and signal the road so that there were no obstacles or dangers for road traffic, which it did not do.

It was considered that the sanitation cover was part of the municipal road where the damaged car was circulating.

Thus, considering that the Municipality of City x did not rebut the presumption of guilt that fell upon itself and considering that the damage caused to the vehicle was due to the existence of the sanitation cover raised on the municipal road, the Municipality was sentenced to pay of the amount paid as the cost of repairing the vehicle, which amounted to € 9,887.64.

With this example it is possible to understand, better, how does the liability of administrative subjects work. It also shows that the main aim of the Administrative Liability in Portugal, as stated above, to indemnify damages suffered by individuals, intending to restore their initial situation, or when this is not possible, give a compensation for the damage suffered is put into action in the daily-life events.

United States

The American Administrative System and the Agencies Model

The common law legal system, due to its inherent characteristics, constituted an obstacle to the development of Administrative Law as an autonomous branch of Law. The idea of judicial supremacy, which gave the judicial system a power of control over the acts of public authorities (administrative act), to the point where there is no special administrative jurisdiction as existed in the French-style administrative system, represented a strong reason for the late recognition of the autonomy of Administrative Law.

The liberal revolutions of the 18th century have different characteristics, providing a different type of government and administration.

Regarding the French Revolution that took place in 1789, it is important to highlight the deep distrust that existed in relation to judges on the part of the Administration. Just think of the laws that were published in 1790 and 1795, which prohibit judges from hearing about litigation against administrative authorities. This gave rise to an interpretation of the principle of separation of powers that was completely different from that which prevailed in England.

While the executive branch could not interfere in matters relating to the jurisdiction of the courts, the judiciary also could not interfere in the functioning of the Public Administration (strict separation between executive and judicial powers). US administrative law should not be seen as a revolutionary right, as was French law. The emergence of this branch of law in the U.S. derives from a greater need for State action in the social and economic area, through the Agencies. Therefore, US Administrative Law became known as "Agency Law". Administrative agencies are provided for in Article 1, Section 1 of the US Constitution. Administrative agencies can create their own internal rules and regulations.

The Administrative Procedure Act of 1946 sets the standards for the exercise of legislative power by administrative agencies. The rules that are established in this law also help the federal courts whenever they have lawsuits that challenge the rules and regulations created by the agencies. However, there may also be independent administrative agencies (such as the Securities and Exchange Commission).

As a rule, the President is said to have limited powers regarding the dismissal of the highest body of these agencies, but the truth is that the President is intimately involved in the appointment of Heads or filling vacancies in these agencies, playing a very influential role in the activities pursued by the same Internal Administrative Agencies. The American administrative organization is, consequently, limited to the Agencies. This organizational model, even though it was adopted in a pioneering way, took more than 100 years to be implemented in the United States (it was implemented in 1887) Franklin Roosevelt was the man behind what is called the *New Deal*, which was the given name to a series of programs implemented in the United States with the objective of recovering and reforming the economy through greater state intervention. The state used the "regulatory agency model" to promote greater intervention in the economic and social order, correcting market failures. With this model, the intention was to improve and at the same time update the State's performance.

With greater intervention by the State, the powers and competences of the Administration will be expanded. It is precisely during this period that the Agencies gain strength and proliferate across the country.

The phenomenon of state regulation of the economy did not occur until the 20th Century. However, in 1929 the Great Depression began and was one of the causes the so-called "Wall Street Crash" in New York. The liberal ideals of non-state interventionism were now being questioned. At that moment, it was verified that not even the Market/Economy was able to recover on its own. It was needed a State intervention.

The Agencies

Most agencies are under the supervision of the President of the US. Examples of this are the Drug Enforcement Administration (D.E.A.) and the Federal Bureau of Investigation (FBI). Federated states have, also, other administrative agencies that are focused on state-specific issues (such as transportation, education, public health). There is also a relevant particularity about these agencies, which cannot create rules or regulations that go against federal agencies.

The rules and regulations created by administrative agencies can be applied as law. They contribute to a faster resolution of smaller cases, giving some leeway to

ordinary American courts, allowing more judicial remedies to be available for other more significant cases.

Administrative agencies may represent law-making bodies with limited powers and delegated by the Congress. These agencies specialize in specific matters relating to the social, economic, cultural, environmental fields. The members of these administrative agencies are specialists in the respective area in which they are inserted.

Regarding the American Revolution that took place in 1776, it is important to highlight, on the other hand, the distrust that existed regarding the exercise of executive power, resulting in a greater attribution of powers to the judiciary and the legislature. Contrary to what happened in France, given that the Administration had the powers of authorities.

In 1946, the Administrative Procedure Act was enacted, responsible for standardizing the decision-making procedure of Agencies, establishing three types of procedures:

1. Rulemaking – Administrative agencies use the legislative power to create rules and regulations. Laws are made based on the government policies that are in effect and by the area in which they are located. The conferred power to create regulations is subject to judicial review.

2. Adjudication – Administrative adjudication represents the exercise of judicial powers by the administrative agency. Who delegates these powers is the Congress. In this case, we are faced with a power in which agencies are allowed to judge conflicts between individuals and the Administration or the Government inclusively. The judgment decision was divided into formal or informal adjudication. Informal adjudication decisions are made after inspections, conferences or negotiations have been carried out. Formal adjudication involves a hearing (similar to a trial) with testimony, written record and final decision.

In addition, the Administrative Law judge decides based on a verdict established on legal arguments. This decision is subject to appeal to the highest administrative authority of the Agency. Judicial reviews of the decisions are limited to questions of law only (legality).

3. Investigation – the administrative agencies are empowered to carry out investigations. Only the Congress can enable administrative agencies to obtain information about activities that may be regulated by federal legislation. The form of investigation depends on the nature of the issue to be decided. The investigations are carried out in private, so that harmful publicity won't influence the result. Also, hearings are not part of the investigation, although they can be carried out.

The importance of regulatory agencies is evidenced by the high degree of independence from the executive and other powers. The three competences of the three institutionally constituted powers that were present are:

- Administrative competences – pursuit of interests related to the field in which they are inserted.
- Judicial powers – resolution of conflicts between Individuals and the executive or administration power.
- Legislative competence – is the possibility of creating rules and regulations. In the 1970s, a broad process of deregulation of the economy began, in which the government reduced the restrictions imposed on various economic sectors and regulatory agencies reduced their intervention on private entities. As for judicial review, it has been extended through the hard-look doctrine.

The principle which allows courts to assess the question of the legality and reasonableness of decisions taken by agencies, was created with the intention to discipline the decisions taken and restrict the illegitimate exercise of discretionary power. Several executive orders were issued with the aim of restricting the autonomy of the agencies.

As for presidential control over agency actions, this is intensified through the work of the Office of Management and Budget, in charge of supervising the agencies' budget proposals, or through the Office of Information and Regulation affairs) linked to the OMB[15] and responsible for ensuring that the agencies' actions comply with the policy outlined by the President.

The distrust that existed in the United States towards the model of regulatory agencies meant that the control exercised by the constituted powers (legislative and judicial) over the acts of the agencies was tightened.

[15] Office of Management and Budget

After the moment that gave rise to the *New Deal*, criticisms of the independent agency management model began to emerge. Independent agencies were thought to end up serving the interests of the most influential private or political groups.

The regulations were subject to prior control (rules review) - need to analyse the project before starting the regulatory procedure and subsequent control (legislative veto).

Lastly, in 1990, the Negotiated Rulemaking Act was enacted, allowing the holders of interests affected by a regulation of a particular agency to participate in its drafting.

The Federal Tort Claims Act

The Federal Tort Claims Act provides the exclusive vehicle for suits against the United States or its agencies sounding in tort. It is also the exclusive remedy for the common law torts of federal employees acting within the scope of their employment. It is a successful statute that has met Congress's reasons for enacting it. It creates an effective administrative procedure that efficiently resolves without litigation the vast majority of tort claims against the federal government. It grants the federal courts matter jurisdiction to decide those claims that cannot be settled, subject to specific limitations set forth by the Congress. In doing it, it effectively transfers the responsibility for deciding disputed tort claims from the Congress to the courts. The United States as the defendant in such a suit and the United States – not the individual employee – bears any resulting liability.

The doctrine of sovereign immunity[16] is a key foundation of the FTCA. While the origins, validity, and value of the doctrine of sovereign immunity are beyond the scope of this essay, the United States' sovereign immunity for suits seeking money damages is grounded on the Appropriations Clause of the Constitution (art.º I, section 9, clause 7 of the USC). The first half of the clause is the Appropriations Clause. The second half is the Statement and Accounts Clause. The clause reads in full: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time".

[16] The sovereign immunity refers to the fact that the government cannot be sued without its consent.

This doctrine, as it's understood in American jurisprudence, provides that a sovereign state can be sued only to the extent that it has consented to be sued and that such consent can be given only by its legislative branch.

Before the Congress enacted an applicable agreement of sovereign immunity, Americans injured by torts of the federal government could not sue the State for damages. This did not leave them without a remedy because the First Amendment[17] guaranteed their right to petition the government for redress of grievances.

Over the years the Congress enacted laws establishing remedies for a wide variety of claims, beginning with the 1855 Court of Claims Act that was interpreted to exclude torts. On August 2, 1946, the FTCA was enacted as part of the Legislative Reorganization Act of 1946.

The scope of the FTCA

Because the jurisdictional grant is for torts arising from a negligent or wrongful act or omission, the FTCA does not support claims for strict or absolute liability. For example, the Supreme Court held that suits arising from sonic booms do not fall within the FTCA. Likewise, claims alleging strict liability for blasting or other ultrahazardous activity are barred, as are claims arising under strict liability dram shop acts and state statutes modelled on § 402A of the Restatement (Second) of Torts. Therefore, for the FTCA to apply the "negligent or wrongful act or omission" must be that of an "employee of the Government".

The jurisdictional grant applies only to wrongful acts or omissions under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. As a result, the Congress did not create new causes of action when it enacted the FTCA. Rather, the act incorporates the existing and evolving tort law of the states. Moreover, the United States' liability is like that of a private person, not of a state or municipality. This means that there is no FTCA subject-matter jurisdiction unless the case involves a tort under

[17] AMENDMENT I: "*Congress shall make no law respecting* […] *the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.*"

state law. If there is no actionable duty under state law against a private person, there can be no tort claim against the United States.

Accordingly, if private parties do not engage in analogous activity, there is no analogous private person liability, and the waiver of sovereign immunity does not apply. Likewise, if a private person cannot be sued in tort for violation of a federal statute or regulation, then the government cannot be sued in tort for such a violation.

On a more mundane level, any defence that is available under state law to a private person defendant is available to the United States in an FTCA suit. These defences include contributory negligence, comparative negligence, superseding cause, assumption of risk, recreational use statutes, and the statutory employer doctrine.

The "private person liability" element is also the root of the Feres' doctrine, which holds that the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are during activity incident to service. In Feres' doctrine, the Supreme Court examined the FTCA and concluded that Congress had not intended to waive sovereign immunity for injuries that arise incident to military service.

Important factors in resolving whether an injury arose incident to service include the following:

- Whether the injury arose while a service member was on active duty.
- Whether the injury arose on a military situs.
- Whether the injury arose during a military activity.
- Whether the service member was taking advantage of a privilege or enjoying a benefit conferred because of military service when the injury arose; and
- Whether the injury arose while the service member was subject to military discipline or control.

If the injury arose out of an activity incident to service, suit is barred regardless of whether the claim is filed for the injuries to the US service member, for injuries to a foreign service member, for loss of consortium by the service member's spouse, or on a third-party indemnity against the United States for payments made to an injured service member. By the same token, Feres does not bar a serviceman from suing for injuries to a spouse or family member so long as those injuries were not incurred incident to service.

In summary, unless a claim falls within the specific language of § 1346(b), it is excluded from the FTCA's general waiver of sovereign immunity. To fall within the FTCA's waiver, a claim must:

- Be against the United States.
- Seek "money damages.
- For injury or loss of property, or personal injury or death.
- Caused by the negligent or wrongful act or omission.
- Of any employee of the Government.
- While acting within the scope of federal employment.
- Under circumstances where a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Absent any of these elements, the claim cannot use the FTCA as a bridge across the moat of sovereign immunity.

Prerequisites for suit under the FTCA

Before an FTCA suit can be filed in court on a claim that meets all the elements of 28 U.S. Code § 1346, the claimant must first comply with the procedural requirements of the statute.

There are three prerequisites for suit under the Federal Tort Act. If any of the prerequisites are not met the FTCA cannot be used.

The first FTCA prerequisite is for the claimant to exhaust the administrative remedies created by the Act. The Act provides, "an action shall not be instituted, unless the claimant shall have first presented the claim to the appropriate Federal agency"[18]. To meet the presentation requirement, the claimant must at least file an administrative claim in writing with the "appropriate Federal agency" that states a certain of the damages suffered and identifies the conduct involved. More information may be required in some circuits.

Suit can be filed once the agency either denies the claim "in writing" or fails to dispose of it "within six months after it is filed"[19]. In McNeil v. United States, where a

[18] Id. § 2675(a)
[19] 28 U.S.C. § 2675(a)

pro se plaintiff filed suit four months before filing his administrative claim, the Supreme Court unanimously held that "The FTCA bars claimants from bringing suit in federal court until they have exhausted their administrative remedies"[20]. Consequently, there can be no class action suits under the FTCA unless all the class participants have filed administrative claims and had them denied.

A second prerequisite is that suit be filed within both FTCA's two statutes of limitations. One requires that the administrative claim be presented in writing to the appropriate federal agency within two years after the claim accrues. A claim accrues when the claimant is in possession of the critical facts that he has been hurt and who has inflicted the injury. Accrual is not delayed until the claimant knows that there was tortious conduct. State law tolling doctrines such as those for infancy or incompetency do not apply to the FTCA statutes of limitations. It appears that the doctrine of equitable tolling does not apply to FTCA cases. The second FTCA statute of limitations requires that suit be filed within six months of the denial of the administrative claim.

A third prerequisite is that suit be filed in the right court. Only federal district courts have subject matter jurisdiction over FTCA cases. Venue is proper only in a federal district where "plaintiff resides or wherein the act or omission complained of occurred"[21]. The FTCA venue provision can be waived.

If all these prerequisites are met, and the claim meets all the elements of § 1346(b)'s grant of jurisdiction, the FTCA's bridge is open to it. Whether the claim can cross the bridge depends upon whether it falls within any of the holes Congress placed in the FTCA's general waiver of sovereign immunity.

To sum up, the FTCA succeeds at the task the Congress set for it. It generally waives the United States' sovereign immunity for the torts of federal employees and provides an effective mechanism to resolve claims against the government administratively or, if necessary, judicially. It also preserves the United States' sovereign immunity as the Congress directed.

[20] 508 U.S. 106, 113 (1993)
[21] 28 U.S.C. § 1402(b)

Kaler v. United States

To understand better the FCTA, it is going to be presented a real-life case that was into a documentary in 1983. The case is about a water contamination of the well of a whole neighbour.

To contextualize, there are an estimated 50,000 hazardous waste dump sites in the US. Most of them are either leaking or will leak soon.

The case is about the Kaler family of South Brunswick, New Jersey. Frank Kaler is a housepainter, and the family gets their water from their own well, as do their neighbours. The Frank Kaler's case simply begins when he requests a water test. Because the water induced skin rashes, made the Kalers dizzy when they took showers and, according to one expert who finally analysed its contents, might just as well have been cleaning fluid. Consequently, the tests claim that their water, and the rest of the neighbours, is contaminated with deadly poisons from the nearby landfill (ruled by the Jones Industrial Service Landfill) that have seeped into their water supply.

This only happened because the landfill wasn't being held with the necessary security measures. If the dump site was following the government security norms than the water supply wouldn't be contaminated with chemicals. On top of this, the government doesn't inspect the water supply, nor if the security measures are being followed correctly. This is unforgivable since it is at risk the health of a whole neighbourhood.

Since the Kaler's can't afford neither to sell nor abandon their home they have no other option but to stay and fight instead. By drinking bottled water collected from other sources, the Kaler's have begun a six-year campaign to halt the pollution of their water. As a result of knowing that their water is being contaminated from a nearby landfill, they seek to get the government to acknowledge and fix the problem. Their attempts to contact local and then the state Department of Environmental Protection are rebuffed. Mr. Kaler eventually goes to Washington DC to testify at Congressional hearings.

Mr. Kaler visits lawyers and officials of the Environmental Protection Agency, and even tracks him to Washington, where Senator John H. Chafee, Republican of Rhode Island, tells him: "We'll have to just feel our way through this thing, it'll take us a little

while. Appreciate you coming down". The landfill has now been closed by court order, but its owners are appealing the decision, and the Kalers' water remains polluted. So does one of the three municipal wells that supplies South Brunswick with drinking water, although that pollution comes from another source.

Mr. Kaler's efforts to cut through bureaucracy have been maddeningly futile and slow, since, as mentioned, it took six years for the government to act.

Only six years after Frank Kaler began his struggle, the Jones Industrial Service Landfill (JIS) was closed by court order, in the Sate v. JIS case. However, even with its closure the hazardous material deposited in JIS continues to leach into groundwater, flowing in the direction of Jamesburg.

The Reagan Administration has proposed drastic reductions in existing hazardous waste regulations and their enforcement.

Currently, in terms of water contamination, around 80 percent of the world's wastewater is dumped back into the environment, polluting rivers, lakes, and oceans. This widespread problem of water pollution is jeopardizing people's health. Unsafe water kills more people each year than war and all other forms of violence combined.

Although most Americans have access to safe drinking water, a Natural Resources Defence Council (NRDC) study has found that contaminants that harm human health are found in tap water in every state in the United States.

However, established in 1974, the Safe Drinking Water Act is one of the bedrock environmental laws, consisting of rules that regulate about 100 contaminants found in drinking water. NRDC has documented serious problems with the outdated and deteriorating water infrastructure of US, widespread violations, and inadequate enforcement of the Safe Drinking Water Act for more than 25 years.

Analysis shows that in 2015 alone, there were more than 80,000 reported violations of the Safe Drinking Water Act by community water systems. Nearly 77 million people were served by more than 18,000 of these systems with violations in 2015. These violations included exceeding health-based standards, failing to properly test water for contaminants, and failing to report contamination to state authorities or the public. What's worse, 2015 saw more than 12,000 health-based violations in some 5,000 community water systems serving more than 27 million people.

These reports only show that even though there is a legal regulation of the safety of water regulation, not always it is respected. However, and taking in mind the case Kaler v. United States, individuals can act towards the government authorities when their right to have safe drinkable water is violated. And according to the Federal Tort Claims Act, individuals should be protected, and the authorities must be responsible for the violations that they make.

The Kaler's six-year battle with local and federal officials over the chemical pollution of his drinking water shows how ineffective the Federal Tort Claims Act was at the time.

Conclusion

By doing this assignment, for the "Lincoln – FDUL Online Students Exchange Program", I had the opportunity to deepen my knowledge about the Administrative Systems in Portugal and in the United States and how the administrative subjects can be responsible for the damages caused ion people's lives.

With the completion of this work, I also concluded that the Liability is a symbol of how an individual can protect himself from the damages and accidents that may occur on their lives, due to the State's fault. I also learned in more detail how does the American Administrative System and the Agencies Model work since it's not something I have learn in such detail on my Administrative Law Subject.

The Portuguese and the United States liability institute are very different, especially due to the different judicial and administrative systems. The major difference I notice, legally, is that the Portuguese liability institute is foreseen in the constitution, in art.º 271.º, n.º 1 and n.º 4. In addition in art.º 266º, n.º1, from the CRP, "the Public Administration aims to pursue the public interest, respecting the legally protected rights and interests of citizens". Well, we can immediately conclude that it is up to the Public Administration to satisfy collective needs to pursue the public interest, that is, the interest of the community. This task of pursuing the public interest is the responsibility provide a legal means for compensating individuals who have suffered personal injury, death, or property loss or damage caused by the negligent or wrongful act or omission of an employee of the government.

Whereas, the United States doesn't have an explicit article or amendment that states the right from the individuals to be protect from any harm that is made from an employee of the federal government. Nonetheless, the First Amendment implies this right, when it states, in the final part, "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

I really liked to do this work because I got to know better these two institutes and how different they are, even though the base of them is the same: protect the individuals

from neglectful acts from the administration and its employees. I also got to know what led to the establishment of the Administrative Law and how one of the two episodes that led to the creation of the administrative law has now led to the creation of these two institutes of administrative liability. Learning how the Federal Tort Claims Act functions, in theory, was an asset for my formation as a Law student.

On the other side, something that fascinate me was to investigate how these two institutes work in real-life. I chose two cases very different to each other so it would be possible to understand the range of cases that the administrative liability can take. In fact, there aren't any prohibited cases, if the defendant claims to have suffered and injury in their lives caused by a wrongful or omission of an act from the administration and its employees.

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