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Summary

State liability in England and the Netherlands

This thesis seeks to explore the landscape of state liability in England and the Netherlands. The history of state liability in the two countries is first told from a constitutional law perspective. Then two maps are drawn: one of English and one of Dutch law. Finally, a panorama of state liability emerges.

I Problem definition

Why did the ECJ’s Factortame judgments raise so many eyebrows in Britain in the last decade of the twentieth century? Why has the ECtHR’s judgment in Osman v UK been criticized so vehemently? And why had the Court of Appeal struck out the Osmans’ negligence action anyway? Must the police really enjoy immunity from suit?

At the turn of the millennium it was striking that the concept of immunity was apparently still in use in England, whereas much of it had long been banished to the dusty corners of Dutch legal history. This was a first reason for undertaking research on non-contractual state liability in England and the Netherlands. The idea of Europeanization provided for a second motive.

Lawyers from various legal backgrounds tend to take an interest in state liability (or the liability of public authorities, henceforth used interchangeably). In both England and the Netherlands many cases on state liability are dealt with in textbooks on administrative law as well as in those on tort law. Accordingly, neither the private nor the public law perspective has been excluded from this thesis.

Chapter 1 poses three major questions. First, which are the constitutional preconditions for state liability? Secondly, what strikes one most when the maps of the positive law on state liability in England and the Netherlands are compared, side by side? Thirdly, to what extent may the substantive law on state liability in England and the Netherlands converge under European influence?

Both private and public comparative law techniques are used in tackling these problems. State liability is studied at four distinct levels. The first is constitutional in nature. It is about the state, its organisation and most particularly its subordination to the law (chapters 2 to 6). The second is that of the
legal protection offered when public authorities overstep their constitutional powers of administration or, occasionally, to legislate (chapters 7 and 10). At the third level are drawn the general lines of the substantive law on state liability (chapters 8 and 11). The fourth level is the most concrete: it is that of the case law (chapters 9 and 12).

II CONSTITUTIONAL PRECONDITIONS

Chapter 2 tells a story about state liability that goes back to the Middle Ages. In the thirteenth century it is said that the English king is placed under the law. Nevertheless, it is assumed that the king can do no wrong, for there is no court above his court. The king’s servants, though, may be held liable in tort, and so may local communities. Chapter 2 stresses the fact that the kings of England manage to organise their kingdom pretty well. In comparison, the Low Countries are less centralised, dominated as some of them are by the towns, which are numerous. A state there may not be, but bearers of authority most certainly are a presence in the lives of their inhabitants. Such authorities’ lack of immunity from suit is apparent from a series of cases. Feudal lords in the Low Countries are not summoned but petitioned.

On the threshold of a new era, chapter 3 shows that differences between England and the Low Countries become more obvious. On the one hand, the kings of England aspire to become absolutist monarchs. The maxim “The King can do no wrong” develops into a more substantive royal immunity. Also, kings are said to make use more frequently of their privilege to stay proceedings in which Crown servants are involved. The Netherlands, on the other hand, witness developments of a different kind. The Dutch Republic emerges. Diversity prevails. The seven Provincial Councils (de Staten) eventually transmogrify into the new sovereigns. These Provincial Councils allegedly cannot be sued in tort. Chapter 3 casts doubt on whether the underlying reasons for this immunity are the same as the rationale for the rule of common law that The King can do no wrong. It is submitted that the Netherlands provide a fertile breeding ground for state liability. Further, no support has been found for the presumption that the Stadholders (the Provinces’ powerful and often princely servants) cannot be sued in tort.

Chapter 4 argues that the constitutional developments that mark a new era in England and the Netherlands show both similarities and disparities. In both countries absolutist aspirations are eventually defeated. In England the king has been hedged in by Parliament as a result of the Glorious Revolution. From this moment onwards, the King-in-Parliament is sovereign. Simultaneously the common law also becomes victorious. In the Netherlands the Stadholder, who happens to serve all seven Provinces, is chased away some hundred years later. After an interval of almost twenty years, a new kingdom arises. In 1813 its first written constitution takes effect. This feature directs attention to a
disparity between England and the Netherlands: in the British Isles the idea of a written constitution has never been embraced. Apparently, it is felt that there would be no need for it. In fact, the absence of a rigid constitution has become rather influential on the way in which legal protection has taken shape in England. Whereas the Dutch kingdom experiments with the separation of powers, in England parliamentary supremacy develops in such a way that it overshadows the separation of powers, which is felt to be a rather confusing phrase anyway. Meanwhile, it is accepted as early as 1702 that *An Act of Parliament can do no wrong*. Later, the Netherlands also become familiar with the inviolability of primary statutes. This immunity, though, never lives up to its British equivalent, which is called the cornerstone of the constitution. The Dutch king’s liability in tort is a subject that turns out to be of moderate interest, since in the Netherlands the state can be held liable in tort. This is in contrast to England, where the state has been said to be slow to find its way to the law books. One may feel tempted to add that the Crown has been slow to find its way to the courts, too.

In the second half of the nineteenth century, government activity gathers momentum. Both England and the Netherlands gain the same experience. *Chapter 5* poses the question what this means in terms of state liability in the two countries, given the existing constitutional blueprints. The outcome is surprising in more than one way. First, the English concept of vicarious liability does not apply to the Crown. The courts hold that *The King can do no wrong*. Only after the Second World War does the legislature interfere. Secondly, it must be emphasised that not every public authority in England is protected by the tort immunity the Crown enjoys under common law and that local authorities can be held liable in tort as well. This is in contrast to Dutch law. *Chapter 5* discusses four Dutch cases that resemble the English landmark case of Mersey Docks, but are decided differently. Due to a doctrinal clash over the public and private law divide, the Dutch Supreme Court takes the view in the fourth case that claims against public authorities must be declared inadmissible if they are based solely on breach of a public law obligation. The so-called black days in the Dutch history on state liability have begun. They do not last long, though. Shortly after the turn of the century it becomes clear that the legislature will not establish a general administrative court. The Dutch Supreme Court (*Hoge Raad*) holds that civil courts have jurisdiction over a tort action brought against a public authority. The civil courts offer legal protection when the public authorities overstep their statutory powers. The Dutch courts do not have an inherent (or statutory) jurisdiction to review orders made by administrative tribunals or bodies. This is in contrast to England. In the aftermath of the Glorious Revolution judicial review has developed into a means for supervising governmental actions, and at a later stage also for supervising whether administrative tribunals overstep the boundaries of their jurisdiction. In England the Dicean definition of the Rule of Law has proved to be influential: equality before the law firmly rejects the ideas of separate admin-
istrative courts and a distinct body of rules exclusively applicable to the state, its entities and their servants. This idea has left a bold mark on the law of state liability. Thirdly, chapter 5 examines other techniques used by the courts in England and the Netherlands for limiting state liability. It is submitted that the methods introduced by the Dutch courts still show signs of the public and private law divide.

Chapter 6 first explores the impact on state liability of the Council of Europe and the European Union at a constitutional level. Special attention is paid to the British transformation statutes (the HRA 1998 and the ECA 1972) and the provision in the Dutch constitution which states that statutory regulations shall not apply if such application is in conflict with provisions of treaties if those provisions are binding on everyone. These approaches are of importance with regard to actions that citizens can bring before the domestic courts in the event of breach of their convention rights or the rights they have acquired under community law. They have been challenged by the ECJ’s radical approach to the applicability of community law in the domestic legal orders of the Member States. Europe has been the most assiduous (but not the only) questioner of the tenability of the traditional concept of parliamentary sovereignty. The idea of the separation of powers has had new life breathed into it. Therefore the mindset may change and bring England and the Netherlands closer on the constitutional level, where the determination of the preconditions for state liability takes place. Chapter 6 also discusses awards of damages made by the ECtHR for breaches of convention rights. Furthermore, it examines the ECJ’s case law on liability of Member States. What is striking is that immunities enjoyed by the state and its entities under domestic law do not apply in the context of such liability. On the one hand, the purposive approach followed by the ECJ provides an explanation. On the other hand, the rejection of immunities corresponds to a new constitutional reality in which the rule of law is a fundamental principle. What is noticeable, moreover, is that the EC is not a new king who can do no wrong, nor are Brussels regulations new acts that can do no wrong. At least for the time being, though, the court can do no wrong.

III A MAP OF ENGLISH LAW

Signposts guide travellers along the way. They are essential for mapping, too. The striking out of vexatious, scurrilous or obviously ill-founded claims is such a beacon for those who wish to get to know the English law on state liability. Chapter 7 covers this topic, as well as some other aspects of the law on civil procedure, such as the courts’ limited willingness to allow a claim for damages rather than an injunction. It also discusses ordinary claims and claims for judicial review, as well as the differences between judicial review and statutory appeal procedures. In particular problems stemming from the availability of
more than one procedure for acquiring legal protection are examined in depth. How do the courts handle a claim for judicial review if statutory appeal is still available? How do the courts treat ordinary claims if statutory appeal still is (or has been) available? And how do the courts deal with ordinary claims if judicial review still can be (or could have been) sought? Chapter 7 points out that English courts deal with such problems in quite a relaxed way. This is in line with the applicable rules on civil procedure. Besides, all lines of legal protection finally converge in the highest courts of justice. Moreover, in English law there is no such thing as an action for unlawful or illegal administrative action.

Chapter 8 draws the general lines of the substantive law on state liability. The first section emphasizes the absence of an action for illegal administrative or normative action. Subsequent sections examine the law on breach of statutory duty, negligence and misfeasance in public office. Here the alleged reluctance of the courts to consider state liability is pointed out. The proposition that the turn of the century has revealed signs of an increasing willingness to expand the law on state liability has been questioned and put in perspective. The next sections shift the focus to Europe and the way in which domestic courts attend to breaches of community law and to damages for breaches of convention rights on the basis of section 8 HRA 1998. In the following section strict liability and no fault liability are explained and examined. This section emphasizes that English tort law does not recognise strict liability for failing to maintain an equal distribution of public burdens (hereinafter referred to as “equality before the public burdens”). The French call this principle “égalité devant les charges publiques” and so do the Dutch.

Chapter 9 draws a number of specific contour lines on the map of the law on state liability, connecting not points but cases. The sections of this chapter deal with cases concerning the liability of highway authorities, the police, the CPS, the Minister of Defence, the fire services and public authorities performing tasks in the fields of regulation, children, education and planning. A few comments with regard to liability for loss caused by legislation and the administration of justice are made in a separate section. The specific lines confirm that there is more to state liability than the tort of negligence alone and that many cases are still struck out, for instance for policy reasons.

IV A MAP OF DUTCH LAW

According to their own case law on article 112 Gw (Constitution), the civil courts have jurisdiction whenever a claim in tort against public authorities is made under article 6:162 BW (Civil Code) 1992. Hence the first signpost. Chapter 10 further marks the differences between remedies available in the civil courts and those in the administrative courts (regardless of whether they are general or specialized). In the administrative courts claimants may seek
quashing orders and damages. This chapter further discusses the Awb (General Administrative Law Act) 1994 which defines the competence of the (common) administrative courts and has been declared applicable to proceedings brought in the specialized courts by other statutes. The modern administrative courts are the heirs of the administrative adjudicators of the past. Administrative bodies now fulfil a role in the compulsory pre-action protocols. The Dutch Supreme Court, a court of cassation, has no jurisdiction over cases brought in the administrative courts. The contours of legal protection do not converge in the highest courts of justice, and even the various lines of protection provided for by the administrative courts do not end in one point. Moreover, if a citizen is successful in an administrative court so that the decision made by an administrative authority is quashed, he will have a very strong case if he claims damages. In other words, Dutch law does recognise something like an action for illegal administrative action. These two features have strongly influenced the way in which Dutch courts deal with problems stemming from the availability of more than one procedure for acquiring legal protection against public authorities.

First, the civil courts declare tort claims inadmissible, if claimants can still appeal to an administrative court in order to get a quashing order. Here the doctrine of inadmissibility applies. It is recalled here that the jurisdiction of the administrative court is determined by statute. Secondly, the civil courts dismiss tort claims, if claimants have failed to appeal in time to an administrative court to get a quashing order. Here the doctrine of formal legal force of administrative decisions applies. Thirdly, if the administrative court does not allow a claim for a quashing order, a claim for damages will not stand a chance in either the civil or the administrative court. Here the doctrine of formal legal force of administrative decisions also applies. The Dutch Supreme Court (the highest civil court) makes exceptions only very rarely, as do the administrative courts when dealing with claims for damages. Finally, if a quashing order is allowed by the administrative court, the claimant may either continue proceedings in the administrative court in order to obtain damages or bring a tort action in a civil court. There will be no need for him to put forward further evidence of unlawfulness and imputability in the sense of article 6:162 BW (Civil Code) 1992. The doctrine of the force of res judicata in judgments applies.

Chapter 11 discusses the two general lines of the Dutch law on state liability. The first stems from the action based on article 6:162 BW (Civil Code) 1992. There is just one tort, the “onrechtmatige daad”. A person who commits an unlawful act towards another (which can be imputed to him) must repair the damage which the other person suffers as a consequence. Breaches of community law or of convention rights are not regarded as exceptions. If an administrative decision is quashed, it is assumed that a tort has been committed: the act or omission both is unlawful and will usually be held to be imputable to the administrative authority. If a normative act is held to be unlawful, imputability is assumed. Neither foreseeability nor negligence is
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required. In these respects Dutch law is stricter than community law. The second line shows the various possibilities claimants have to obtain damages for loss caused by an act or omission that is in itself lawful. First, the civil courts used to favour damages over injunctions, if that was what the public interest required. Nowadays this case law is codified in article 6:168 BW (Civil Code) 1992. Secondly, the Dutch Supreme Court has held in some cases that it may be unlawful in the sense of article 6:162 BW (Civil Code) 1992 for an administrative authority not to offer compensation. The principle of equality before the public burdens is part of the Dutch case law on tort. The administrative courts have also contributed to the evolution of this principle.

If one sees the general lines on a map, it may still be hard to translate them to the ground. This has been acknowledged in relation to the map of English law, and it also applies to that of Dutch law. Chapter 12 discusses Dutch cases which bear a resemblance to the cases considered in chapter 9. It argues that many cases of state liability are dealt with by the courts as if the defendant were not a public authority.

V PANORAMA

Chapter 13 concludes first that the exploration of the landscape of state liability from a constitutional law perspective has led to the identification of constitutional preconditions for state liability. These preconditions may be either positively or negatively formulated. In a positive sense, the rule of law reveals itself in state liability. In a negative sense, there are immunities and restrictions which are constitutional in nature, reducible to parliamentary supremacy or to concepts of the separation of powers. If they are present, an action is deemed to fail. Immunities seem to be part of the history of state liability more in England than in the Netherlands. It is submitted that a legal system may not be able to shake off such impediments at once. Be that as it may, their traces are still noticeable on the map of the positive law on state liability in England.

When the two maps are put together, the colours on the Dutch map seem to be brighter than those on the English map. That is, if one looks at them from the perspective of the individual citizen in need of legal protection and provided that the focus is on the lines of substantive law. At a general level, what is particularly noticeable is the absence of actions for illegal administrative (and normative) action and for breach of equality before the public burdens in English tort law. Dutch law offers more possibilities for liability for public law illegality and loss caused by administrative decisions and normative acts which are, in themselves, lawful. It is submitted that several specific contour lines on the maps underline the impression that has been given by the general lines, although similarities also exist and must not be overlooked. On the one hand, claimants seem to be better off in England than in the Netherlands when it comes to the ways in which the courts handle problems
stemming from the availability of more than one procedure for acquiring legal protection. On the other hand, it may be neither wise nor necessary to draw far-reaching conclusions in this respect. The problems are similar, but the solutions differ for the reasons which have been indicated above.

Finally, in answer to the third question, it is submitted that aspects of the substantive law on state liability in England and the Netherlands may in particular converge under European influence due to changes on the level of the constitutional preconditions for state liability.