LOWELL VS. CARUANA AND GOVERNMENTAL LIABILITY IN MALTA

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'Il-poteri tal-esekutiv għandhom jiġu eserċitati legalment, u kull poter li joħroġ minn statut għandu jiġi eżerċitat mill-awtorita preskritta fl-istatut u skond il-kliem u l-intenzjoni tal-leġislatur'. (per Caruana Curran J., Lowell vs. Caruana).[1]

'... f'din il-materja, m'għandux ikun hemm rigoriżmu statiku jew delimitazzjoni indebita tal-"judicial control"'. (per Harding J., Police vs. Gerald Caruana).[2]

The judgement of the Civil Court (1st Hall) in Lowell vs. Caruana, delivered on 14th August, 1972,[3] per the Hon. Mr. Justice Caruana Curran, has cleared the ground for an appreciation of judicial trends in the application, culminating in rejection, of the notion of *ius imperii* where governmental liability is at issue.[4] The judgement, basing itself upon a logic which repays careful examination for the kind of judicial approach which it articulates, insists that the doctrine of sovereign immunity for the Administration when it acts *iure imperii* cannot be considered as forming any longer a part of Maltese Law. The doctrine, at least in its more sweeping applications, has been stultifying the better part of governmental liability, namely that of keeping the Administration within the law, wherever and howsoever necessary. Partly as an effect and partly as a cause thereof, judicial control of administrative action in Malta has been inhibited from growing into a body of public law with direct usefulness for the law of governmental liability. It is my intention in the present article to discuss these and other kindred implications as they arise from this judgement.

[1] 14th August, 1972.
[2] 9th September, 1953.
[3] An Appeal was lodged in 1976 but has not been yet decided.
[4] Vide Gulia: Govemmental Liability in Malta. It must be noted that Lowell vs. Caruana has, to a great extent, superimposed itself upon Dr. Gulia's entirely original legal scholarship in this field.

The Planning Area Permits Board (P.A.P.B.) had issued, to plaintiffs in this case, a permit which should have remained valid 'for one calendar year from date of issue', according to the express terms of the grant of such permit. However, the P.A.P.B. purported to withdraw and to consider as 'cancelled' this permit before its year of validity was out. Plaintiffs sought to impugn the lawfulness of the Board's cancellation of the permit, for the purpose of recovering damages they had suffered as a result thereof. Defendants, claiming that the Board could lawfully do what it had done, submitted (that) '... li, fi kwalunkwe każ, huma aġixxew *iure imperii* u għalhekk m'humiex passibbli tad-danni'.[5]

It is useful to query, even though at this stage: how did the Court react to the issue of governmental liability, confronted as it was by an allegation on the one hand of excess of jurisdiction by an administrative body, and on the other hand by defendants' rebuttal that Government had acted *iure imperii*? Apparently unconcerned with the plea of *iure imperii* the Court defined the issue, calling for decision, in the following unambiguous terms:

> '... jekk cioè il-P.A.P.B. ... jistax jirtira permess minnu formalment maħruġ, qabel ma skada ż-żmien tal-validità ta' dak il-permess, bla ma jirrendi ruħu obbligat li jikkompensa lill-persuna li tkun akkwistat dak il-permess tad-danni li tkun sofriet b'dak l-aġir tal-Board ...'[6]

The point whether a liability to pay damages would arise, remained to be determined by the criterion of the lawfulness or otherwise of the administrative act causing such damages:

> '... m'għandux ikun hemm dubju li jekk l-aġir (tal-Board) tal-konvenuti fir-revoka tal-permess joħroġ barra mill-limiti tal-liġi, dan l-att jista' jagħti lok għal-likwidazzjoni ta' kumpens in linea ta' danni ...'[7]

The plea of *iure imperii* has so far been so clearly precluded from the Court's concern with the point of governmental liability, that one must think the Court considered the plea to be irrelevant to that point. In effect, the plea was examined only after the Court had actually established an excess of jurisdiction by the P.A.P.B., so that plaintiffs as from that moment would have been entitled, if damages should be proved, 'għall-ħlas tad-danni derivanti mill-illeċitu'. More specifically, it emerges that the Court has refused to allow the point of excess of jurisdiction to be bypassed with

[5] Lowell vs. Caruana.
[6] Ibid.
[7] Ibid.

the plea that 'fi kwalunkwe każ' Government had acted *iure imperii*.

The Court's review of the Board's exercise of its powers in issuing permits took the form of a thoroughgoing interpretation of the *ad hoc* legislation which specifically delimited the extent of those powers. The interpretation to be placed by the Court upon the relevant legal provisions would determine whether the impugned act was *ultra vires* the Board's powers:

> 'To a large extent judicial review of administrative action is a specialised branch of statutory interpretation'.[8]

Did the legislation *expressly* grant the power to withdraw and cancel a permit, already formally issued, while that permit was still operative according to the terms of its making? The actual wording of the law specified that a permit could either be granted or else be refused. Therefore:

> 'Meħud rigward għall-importanza tal-materja, cioè il-kummerċ edilizju, u il-pjanifikazzjoni ta' l-iżvilupp, il-Qorti għandha tifhem illi kieku il-leġislatur kellu l-intenzjoni li jagħti ... poter daqshekk drastiku, ma kienx sejjer jonqos li jesprimi dik l-intenzjoni bi kliem adegwati fl-istatut prinċipali stess (*ubi lex voluit dixit*) ...'[9]

If the Board had wanted to reserve the power to withdraw the permit it could and should have done this by making it a *condition* at the same time the permit itself was being issued.

The Court's construction of the law has not been merely verbal, but also functional, in the sense that a certain class of considerations ('il-kummerċ edilizju u l-pjanifikazjoni tal-iżvilupp') have influenced the extent of the appropriate control which the Court deemed it should exercise. If, as Griffith and Street opine, 'no functional consideration of administrative action can ignore statutory interpretation',[10] then statutory interpretation must at times be functional, where legislation conferring powers on the Administration is concerned. It was through a functional interpretation that, in Lowell vs. Caruana, the Court argued most trenchantly for establishing governmental liability. The Court seemed to be asking: What was the nature of plaintiffs' relationship with the P.A.P.B. as soon as they were granted their permit? Was the P.A.P.B.'s alleged power to cancel a permit, as they did here, to be considered as within the lawful scope of their relationship with plaintiffs; or

[8] De Smith: Constitutional and Administrative Law, page 545.
[9] Lowell vs. Caruana.
[10] Griffith and Street: Administrative Law, page 145.

instead was it to be considered as running counter in effect to that relationship? The following answer is certainly trenchant:

> 'Konċepibilment – u jingħad biss konċepibilment għax il-Qorti issibha diffiċli tifhem kif xi ħadd jista' jaċċetta li jidħol għan-negozju tal-bini b'rabta hekk vaga u dissolubili – il-Board seta' kieku ried, impona il-kondizzjoni li l-permess ikun ritirabili anke waqt is-sena, imma dan mgħamlux, u għalhekk ma setgħax jagħmlu wara li laħaq irrilaxxja l-permess. Almenu hekk tifhem il-Qorti għal dak li jirrigwarda l-applikazzjoni serja tal-liġi kif tirriżulta mill-kliem stess tagħha, u tar-*rule of law*, kif ukoll l-istabilità ta' l-operazzjonijiet kummerċjali u tar-rapporti bejn iċ-ċittadini u l-Gvern ...'.[11]

The reference, in the above passage, to the Rule of Law is fundamental within the context. The Rule of Law postulates Responsible Administration, in terms of which concept the Administration 'can only do that which it has power to do'.[12] Whether the Administration has power, in law, to do that which it has done is to be determined by the Courts. Therefore, the subjection of executive discretion to increasingly higher standards of judicial control will have the effect of widening the orbit of governmental responsibility, as I have intended Lowell vs. Caruana to show. The significance of this for the law of governmental liability in Malta may be precisely estimated if we hark back to the Court of Appeal's decision in Cassar Desain vs. Forbes (XXIX.1.43,1935). Now in that decision it was underlined that, whatever the extent of immunity for the Administration in respect of Acts of State, the principle of accountability for any illegal act of the Administration would remain unchanged:

> '... if in the final judgement for some reason or other it is held that there has been a contravention of the law, it cannot be considered as coming under and within the limits of the sovereign authority.'

And in Lowell vs. Caruana this point was as clearly underlined when the Court, for a better understanding of its approach, cited thus from Lord MacDermott's Hamlyn Lecture 'Protection from Power under English Law':

> 'As respects that which is truly administrative, the Executive is generally immune from the Courts, provided that *what has been done has been duly authorised by law* ...'

Lowell vs. Caruana has gone well beyond Cassar Desain vs.

[11] Lowell vs. Caruana.
[12] Griffith and Street: ibid. page 21.

Forbes in so far as it has incorporated, in the principle of accountability, the public law doctrine of excess of jurisdiction.

This notwithstanding, the two abovementioned decisions merge in their approach to the issue of Governmental liability. Out of more than half a century's Maltese decided cases purporting to deal with governmental liability, only Cassar Desain vs. Forbes and Lowell vs. Caruana[13] appear to have loudly invoked the rule of Government's legal accountability in order to force the administration to pay damages to John Citizen. The hydra-headed doctrine of immunity for those governmental acts which are *iure imperii*, in those cases where the doctrine has been espoused as an *a priori* answer to the problem of *ultra vires*, has blocked the way to an investigation of excess of jurisdiction; or worse still, the Courts have failed 'to distinguish between acts *iure imperii* and the execution of acts in terms of executive discretion in terms of law'.[14] In Lowell vs. Caruana, defendants' plea 'li huma aġixxew, *fi kwalunkwe każ, iure imperii*' itself typifies this failure to distinguish between the *ius imperii* and executive discretion in terms of law, although the Court rebutted: 'Il-veru terren tal-kwistjoni ... m'huwiex dak tal-*iure imperii* imma dak tal-possess o meno da parti tal-konvenuti ta' *executive discretion* biex jimxu kif fil-fatt imxew vis-à-vis is-soċjetà attriċi'.

When the Court actually examined the plea of *iure imperii* it unearthed, at long length for our jurisprudence, not merely the outdatedness of the doctrine ('it-teorija antikwata tal-iure imperii'), but also the rationale that had induced jurists and the highest Courts on the Continent to discard the doctrine even while we in Malta were eagerly imbibing it:

> '... għaliex kienet qiegħda timminaċċja li tirrendi l-Istat immuni għall-ġustizzja u għar-reklami l-aktar ekwi u fondati taċ-ċittadini danneġġjati ...'.[15]

Mr. Justice Caruana Curran's direct method of attacking the doctrine raises a significant contrast between Lowell vs. Caruana and

[13] Sed vide Xuereb vs. Micallef per A. Magri J., 3.10.53, in which case the above quoted proposition from Cassar Desain was unreservedly approved by the Court. Having premised that proposition Magri J. proceeded to state: 'Illi jekk il-konvenuti, in rappreżentanza tal-Gvern ... ħarġux millimiti ġusti tad-drittijiet tagħhom, kisrux il-Liġi ... huma ħwejjeġ li jiġu eżaminati fil-mertu tal-kawża; u għalhekk il-konvenuti ma jistgħux *a priori*, u b'mod preġudizjali, jippretendu li l-Gvern mhuwiex responsabbli talħsara reklamata mill-attur'.

[14] Vide Gulia: Governmental Liability, page 14, and the decisions therein referred to.

[15] Lowell vs. Caruana.

Cassar Desdain vs. Forbes. In the latter decision, the Court of Appeal, wholeheartedly citing and approving Dicey's strictures upon French *Droit Administratif*, stated in 1935 that the notion of acts *iure imperii* '*forms the basis* of what is known as *Droit Administratif* in France and *Diritto Amministrativo* in Italy ...'. Such a misconception of what was actually happening on the Continent, and indeed the Judges' Diceyan bias against the French and Italian Public Law systems as a whole, clearly disabled the Court from directly attacking the doctrine. Accordingly, so far as Cassar Desain vs. Forbes could go, we had only reached the proposition that the doctrine was *alien* to Maltese Public Law, because it was non-British and we followed British Public Law principles where our own Law had a lacuna.[16]

Now this argument, basing itself exclusively on British Public Law principles, can be shown not to have been conclusive of the matter. In relation to the conflicts that have arisen in Malta between British Public Law principles and the evolution of new theories that have no place in British Public Law, it has been argued:

> 'This theory of governmental responsibility is admittedly non-British in origin, but there is no reason to consider the position anomalous, for the Maltese Courts are perfectly free in developing those theories which they feel are most suitable for the proper administration of justice ...'.[17]

After Lowell vs. Caruana, it has instead become possible to argue that the anomaly of retaining the doctrine as a part of Maltese law arises, not necessarily because it is non-British, but certainly because enlightened judicial opinion feels that it is no longer suitable in the least for the proper administration of justice. The Court's argumentation itself corroborates this point: after restating in broad terms 'li d-dritt pubbliku amministrativ ta' Malta huwa ormai sostanzjalment adottat mil-liġi Ngliża', nevertheless the Court immediately followed this restatement with: 'imma jekk wieħed ikompli jeżamina dak li ġara per eżempju fi Franza, dwar l-atti tal-poter pubbliku klassifikati ... bħala *actes de gouvernement* insibu li l-eżenzjoni tal-Istat mir-responsabilità għad-danni illum tinsab ristretta għal dawk l-atti li kif jgħid l-istess Street (Governmental Liability, page 16) 'may loosely be compared with Acts of State in English Law"'. It was only through such direct pathfinding in Continental legal experience that it could be re-

[16] Vide Gulia: ibid. page 11.

[17] J.M. Ganado: 'British Public Law and the Civil Law in Malta', Current Legal Problems, 1950.

cognised, at long length, that while the distinction itself between *actes de gestion* and *actes de gouvernement* had been renounced by those systems which after all had been its progenitors, 'to hold otherwise would make the Administration virtually free from any control'.[18]

Now as part and parcel of the judgement the Court propagated the following argument: '... anki kieku qatt it-teorija tal-*ius imperii* jew *actes d'autorité* kellha tiġi kkunsidrata bħala kunċett li b'xi mod għadu jifforma parti mil-Liġi ta' Malta ...', then in that case a Court of Law would be bound logically to follow French practice as our most recent and enlightened guide in this field of law, rather than to hark back to the values inhering in the laws and the jurisprudence of half a century ago. Following French Law would inevitably mean that the Courts could extend sovereign immunity only, and restrictively, to such acts *iure imperii* as could be characterised as falling within the ambit of the only three classes of *actes de gouvernement* recognised by contemporary French practice. These three classes of acts clearly precluded a case of an act in terms of executive discretion in terms of law, such as had been impugned in Lowell vs. Caruana.

The fact that the abovementioned argument should have been incorporated in the judgement denotes, possibly, that our Courts might stop fighting shy of highly developed non-British systems of Public Law, and that they might usefully start considering what Maltese Public Law could appropriately assimilate from such systems, despite the fact that they are non-British systems.[19] The argument, above, referred to having ourselves guided by contemporary French practice in the application of the notion of *actes de gouvernement*. Analogously it has been indicated for example that 'the Continental interpretation of excess of power which is relatively so limited in English Public Law, is much wider and would open out many doors which are now locked and fully bolted'.[20] Admittedly, in Lowell vs. Caruana itself it has been stated 'li d-dritt amministrativ Malti, kif aġġornat fl-aħjar ġurisprudenza reċenti, huwa d-dritt amministrativ Ingliż ...'. But the qualification 'kif aġġornat fl-aħjar ġurisprudenza reċenti' really should mean, I submit, that Maltese Administrative Law is (or more precisely has remained) substantially English Administrative Law because, for one reason, the trend of our more recent decided cases seems to refuse to look beyond British Public Law and into possibly more use-

[18] Lowell vs. Caruana.
[19] Vide Gulia: Governmental Liability, page 17.
[20] Vide Gulia: ibid.

ful Continental legal developments. That British Public Law is the law of Malta where the latter has a lacuna,[21] should not also mean that we must perennially continue to be limited by British Public Law principles; if it does mean that, then it calls for revision as a rule of customary law and interpretation. There is no reason to prohibit the Courts from developing Maltese Public Law in this direction, if only, because it suited better the proper administration of justice, but also because we have no doctrine of judicial precedent in Malta, as is notoriously known in this field especially of governmental liability.[22]

In this connection, it would be revealing to recall, in the case Police vs. Gerald Caruana decided per Harding J. in 1953, that the Court did not fight shy of adducing the French principle of *détournement de pouvoir*, when it was considering the possible grounds for exercising judicial control;

> 'B'hekk il-Council ma eċċeda bl-ebda mod il-poteri tiegħu, *malizzjożament jew bi żball*, b'mod li seta' jiġi kreat dak li l-ġuristi franċiżi isejħu *détournement de pouvoir* ...'.

In the same judgement, significantly, while exploring the limitations, developed 'fil-ġurisprudenza lokali', upon judicial control, the Court made the following reservation: '... salvi żviluppi oħra tagħha 'l quddiem, għaliex ċertament il-ġurisprudenza m'għandiex tkun statika'. Clearly, the description 'statika' is a warning against 'rigoriżmu statiku jew delimitazzjoni indebita tal-*judicial control* ...'. It required a sufficiently comprehensive judicial awareness of the best contemporary legal development to be able, like Mr. Justice Harding in 1953, to adduce pertinently a French Public Law concept which is less constricted than the traditional English principle of abuse of discretion. Yet as far as a comparison between the French and the English principles is concerned, De Smith has indicated that the outstanding House of Lords' decision in Padfield vs. Minister of Agriculture (1968) subjected a wide executive discretion to such judicial standards that 'the case shows unambiguously that English Administrative Law does recognise the principle that the French call *détournement de pouvoir*, or abuse of administrative power ...'.[23] Significantly enough, Padfield vs. Minister of Agriculture is characterised by De Smith as '... the most outstanding recent example of *judicial activism* in this field of the law ...'.[24] One wonders, respectfully, that it

[21] Cassar Desain vs. Forbes.
[22] Vide Gulia: Governmental Liability, page 1.
[23] S.A. de Smith: Constitutional and Administrative Law, page 572.
[24] Ibid. 23, page 572.

should require judicial activism to recognise a perfectly salutary principle of legal control.

It can be shown that if in Lowell vs. Caruana a Continental legal treatment, so to speak, of the question had prevailed, 'il-veru terren tal-kwistjoni' would still have remained 'il-pussess o meno ... ta' *executive discretion*', and certainly not the doctrine of *iure imperii*; that is, if one did not assume that Lowell vs. Caruana had necessarily and inevitably to be decided on the basis of British Public Law exclusively. This can be shown by referring to a case decided by the Italian Corte di Cassazione in 1903, De Nittis – Comune di Foggia (we must be grateful to Dr. Gulia for incorporating this judgement in his 'Governmental Liability'). The following excerpt from the judgement in question should make the point on its own:

'... per stabilire la insindacabilità dell'atto amministrativo sia mestieri esaminare se l'autorità da cui emana avesse podestà discrezionale all'uopo e se ne abbia usato dentro i limiti in cui le è legalmente attribuito. Qualora manchi la podestà per difetto di attribuzione o per violazione dei limiti legali, la *ragione della insindacabilità vien meno; nè approda ad altro diverso risultato la vieta infeconda classificazione degli atti compiuti* iure imperii o iure gestionis, *la quale dovrebbe essere lasciata in disparte, per maggiore utilità e chiarezza delle discussioni;*

Attesochè ponendo a base dell'azione che il regolamento edilizio comunale determinasse la facoltà della amministrazione nella materia che è oggetto di questa controversia e le restringesse entro confini varcati dal provvedimento che vietò all'attrice la edificazione delle fabbriche progettate, fosse stata impugnata la legittimità del provvedimento medesimo, perchè esorbitante dalla misura della podestà discrezionale competente al comune in questa materia;

Attesochè, pertanto, *se l'assunto fosse in fatto e in diritto ben fondato, ne verrebbe la possibilità che il diritto dell'attrice fosse stato leso da un atto illegittimo dell'autorità comunale ...*'.

This Italian decision shows unambiguously that the doctrine of judicial control of administrative action is far from being exclusively the creation of British Public Law, but that it appears instead by the turn of the century already to have distinctly matured as a doctrine within the Italian system. In effect it appears to have matured to an extent which prevented its being confused with, or hampered by, the doctrine of *iure imperii*. The State seemed far, very far, from having it as good as Dicey thought it was; so that one may confidently affirm that if the Judges in Cassar Desain vs. Forbes had to be offered a choice between the

true Italian position in 1903, and our own quandary pre- Lowell vs. Caruana (and indeed after it), those judges would opt for the former

While recognising that judicial review of administrative action could appropriately be invoked 'for a wide range of purposes by a person claiming to be aggrieved' (vide De Smith, Constitutional and Administrative Law, page 546), one would still be bound to consider that the very subtle and abundant nuances which cannot be prescribed with any precision by the slow, cumbersome, unwieldy procedure of judicial precedent'[25] necessitate a separate *ad hoc* law of administrative liability. The absence of such a law was duly noted in Lowell vs. Caruana:

> '... wieħed ma jridx jinsa li, ħażin jew tajjeb, qegħdin fil-kamp tal-*judge-made law*, peress li f'Malta la l-Kostituzzjoni u lanqas liġi oħra speċjali ma tirregola organikament is-suġġett importantissimu ta' l-azzjonabilità tal-Istat fil-konfront maċ-ċittadin'.

I submit that it is precisely when we come to consider the enactment by Parliament of such a law that we should also actively be reconsidering the extent to which our legislators could usefully continue to follow British Public Law in this matter, and on the other hand the extent to which the French innovations, for example, could be learnt from. It is an important exercise because Lowell vs. Caruana trenchantly reminds us of the great amount that we have taken on from British Public Law generally: thus, it was stated by the Court that in the absence of special tribunals like the French Conseil d'Etat Maltese Law vests the power of judicial review in the ordinary courts which can therefore keep the Administration in check. Further, 'il-limiti tal-poteri ġudizzjarji ... għandhom ukoll jiġu mfittxa fil-liġi Ngliża in kwantu din ġiet adottata bħala parti mil-liġi lokali ...'. But would the fact that we chose not to continue to follow British Public Law but other laws in enacting a new law of governmental liability, mean that we had renounced the 'ordinary' jurisdiction of the 'ordinary' courts? Is it this consequence which is implied when O.Hood Phillips writes: 'The [Crown Proceedings] Act adopts the Anglo-American principle of treating the state ... for the purpose of litigation as nearly as possible in the same way as a private citizen, instead of borrowing the Continental idea of a separate system of administrative law' (Constitutional and Administrative Law, page 550).

That the said consequence is not implied by that writer in the phrase 'a separate system of administrative law', may be verified if one asks: why should we not distinguish clearly between the existence, jurisdictionally, of separate courts as in France, and

[25] Gulia: Governmental Liability, page 21.

the existence of a non-private (therefore public) and 'separate' substantive law of administrative liability? Is not the existence of separate tribunals after all a jurisdictional question? While considering the lessons that the French innovations could provide 'for English Law in the future', Griffith and Street have stated that to advocate the enactment by Parliament of a new code governing suits against the Administration, 'is not to concede that the adjudication of these suits need be removed from the ordinary courts'.[26] Therefore it should be possible to retain in our system the principle of adjudication by the ordinary courts and at the same time, with perfect compatibility, to emancipate ourselves, as far as the substantive law is concerned, from having only British Public Law to follow where Maltese Law has a lacuna. To learn from non-British experiments will accordingly not mean that we would be abdicating from the concept which we hold of a government whose acts, if they are impugned, will be reviewed by the ordinary courts. To modify 'l-imsemmija limiti tal-*powers of judicial review* in this sense would mean, not to transfer those powers into different hands, but to develop the law which those powers shall be implementing.

In Lowell vs. Caruana the Court invoked the doctrine of excess of jurisdiction, with clearly important consequences for the issue of governmental liability. Yet, beyond this doctrine which is unavoidably useful because it is a public law doctrine, to what extent can it be said that British Public Law principles have directly and usefully contributed to developing in Malta a law of administrative liability? Griffith and Street state that there is 'no separate English law of administrative liability',[27] by which they mean, as they make clear, that this part of English Law has to a very large extent subjected the Crown, although 'with serious reservations',[28] to private law. Thus English Law has no truly Public (therefore 'separate') law of administrative liability, and the same writers state that 'English judges are plainly desirous of evolving fair principles of administrative liability, but are circumscribed by their adherence to private law concepts'.[29] One may submit, having regard to all this, that it is not logically possible to attempt to distinguish, as the Court of Appeal did in Cassar Desain vs. Forbes, between the 'general' and the 'constitutional' or public law of England: there was, and is, but one English law of ad-

[26] Griffith and Street: Administrative Law, page 248.
[27] Ibid.
[28] Ibid. page 247.
[29] Ibid. page 248.

ministrative liability, and that law is not set apart, saving important reservations (as for example in contract the Crown's 'potentially unrestricted competence to enter into contracts',[30] and the Crown's legal position as employer), from the private law. Certainly that decision of our Courts remains outstanding for its restatement of the English Public Law principle that the Administration must act within the law. But what happens when the Administration is called to account not for the breach of a rule of public law but for a breach of obligations in the private law domain? In this particular regard British Public Law could not directly be of use to us beyond the point of handing down to us the said principle of Responsible Administration; there were no public law principles governing administrative contract or tortious liability which we could take on. All that the Court of Appeal could revert to were our written codes:

> 'Indeed – and this is the one fact and rule governing the whole question under judgement – *our written codes do not* discriminate between the Crown (as the Government is expressly termed in various provisions) and its subjects in regard to the operation and the administration of the law; and *ubi lex non distinguit nec nos distinguere debemus* ...'.[31]

It would appear from this that we too in Malta, who of course had no 'public' law rules in this particular area to start with, have followed the English example and have therefore subjected the State to the private law. It should be said straightaway that this argument, that once our civil laws do not distinguish between the State and private citizens therefore the State is equally liable in civil damages, has been adopted expressly in just one other decision, in Xuereb vs. Micallef (3/10/53) by Alberto Magri J., though I submit the argument has further been adopted impliedly in Camilleri vs. Gatt decided per Giovanni Pullicino J. (XVIII.II.171) and in Apap Bologna vs. Borg Olivier noe decided per Alberto Magri J. (XL.II.903). Xuereb vs. Micallef directly reminds us of the 'one fact and rule governing the whole question' in Cassar Desain vs. Forbes (ibid.):

> 'Illi skond l-art. 1073 (Kod. Ċiv.), kull min jagħmel użu ta' jedd tiegħu fil-qies li jmissu ma jweġlbx għall-ħsara li tiġri b'dana l-użu, u kull wieħed iwieġeb għall-ħsara li tiġri bi ħtija tiegħu, (art. 1074 Kod. Ċiv.). Il-lokuzzjoni tal-liġi hija ġenerika, u ma tagħmel *ebda eċċezzjoni, lanqas għall-Gvern.* Għalhekk anki l-

[30] S.A. de Smith: Constitutional and Administrative Law, page 589.
[31] XXIX.I.43.

Gvern obbligat jagħmel tajjeb għad-danni fil-każ li huwa, fl-eżerċizzju tad-drittijiet tiegħu, joħroġ barra mill-ġusti limiti u jikkaġuna preġudizzju lit-terzi ...'

By way of a weighty rebuttal against any suggestion that the State had acted *iure imperii*, the Court stated: '... il-konvenuti ma jistgħux *a priori*, u b'mod preġudizzjali, jippretendu li l-Gvern mhuwiex responsabbli tal-ħsara reklamata mill-attur'. Magri J., pointing out that '... del resto, ir-rispett għad-dritt tal-proprietà jimponi ruħu anki lill-Gvern (arg. art. 357 Kod. Ċiv.) ...' (cf. now the Constitution), was prepared to hold that even where the State had acted in the public interest, it would still be liable if it thereby caused damage to private property.

In Camilleri vs. Gatt, Pullicino J. appears to have adopted the argument not expressly, but as an 'inarticulate major premise'. How else could it be explained that he unhesitatingly invoked the purely private law notion of quasi-contract (s. 1055 Civil Code) not merely in regard to the government, but in relation to a governmental act which 'falls within the traditional characteristics of *iure imperii*'?[32] Exactly the same may be asked about Apap Bologna vs. Borg Olivier noe (XL.II.903) in which Magri J. thoroughgoingly applied, in the process of determining administrative liability, the Civil Code provisions relating to contributory negligence (s. 1094 Civil Code), *culpa* (s. 1075), the obligation to give a thing (s. 1169), and *force majeure* (s. 1176); and this without a reference to the doctrine of *iure imperii* throughout the judgement.

The judgements in Camilleri vs. Gatt (XVIII.II.171), Xuereb vs. Micallef (XXXVII.II.753), and Apap Bologna vs. Borg Olivier noe (XL.II.903) clearly represent a consistent facet of our 'judge-made' law of governmental liability. But I would disagree with Dr.Gulia's suggestion that Judges Magri and Pullicino were 'administering justice, possibly in spite of the law ...';[33] their intention to administer justice was certainly redoubtable, but they were doing this, I propose, not in spite of the law, but in virtue of the law and because it appeared to these judges that their approach was doubtless the correct legal approach. The said judgements fall in line, expressly or impliedly, with the proposition, in Cassar Desain vs. Forbes (XXIX.I.43), that 'our written codes do not discriminate between the Crown ... and its subjects in regard to the operation

[32] Gulia: Governmental Liability, page 9. A telling point in Camilleri vs. Gatt is the following: 'Atteso che il principio suddetto è sostenuto quasi unanimamente dalla dottrina e dalla giurisprudenza di Francia e di Italia ...'. Pullicino J. was a very enlightened judge.

[33] Gulia: Governmental Liability, page 20.

and the administration of the law; and *ubi lex non distinguit nec nos distinguere debemus ...*'; although of course Cassar Desain vs. Forbes has had wider implications than any of the said judgements, not merely in attempting to attack directly the doctrine of *iure imperii* but in underscoring the accountability of government in the public law sense, so that, as I proposed earlier on, Lowell vs. Caruana carries on where Cassar Desain vs. Forbes left off.

Indeed although the relevance to Lowell vs. Caruana of referring to the judgements above may not be apparent, in so far as the latter have applied the civil law as the basis for decision, yet I would justify their relevance by proposing that they too, like Lowell vs. Caruana, insist upon the same inexorable point in the field of governmental liability: whatever the extent of the doctrine of *iure imperii*, the first point necessarily to be investigated before all else should be whether there has been a 'contravention of the law',[34] be it a contravention of a rule of public law or of private law, whether the Administration has exceeded or abused its powers as laid down in an act of Parliament or whether it has made itself liable in terms of the civil law, in the same way that any ordinary citizen would make himself liable. All this certainly attests a cogental judicial effort to establish convincing legal criteria for the purpose of determining governmental liability, in spite of and whatever the part played by the doctrine of *iure imperii.*

[34] Cassar Desain vs. Forbes.