STATE LIABILITY FOR WRONGFUL JUDICIAL DECISIONS

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Abstract: It is not obvious at all whether States should compensate victims of erroneous judicial decisions. In many countries, individuals are entitled to compensation for the time spent in prison or in custody as a consequence of wrongful conviction or wrongful detention. Individuals can also seek damages before certain international courts for the harm suffered as a result of certain breaches of the law committed by national courts. And in a few legal systems the State is liable for the harm caused by last instance judicial decisions which are manifestly illegal. The present paper analyzes whether and under which circumstances is socially desirable to make States pay damages for the harm caused by judicial errors, and concludes such compensation might be eventually efficient in criminal and international cases, but not in civil disputes where the error at issue may eventually be corrected by national courts.

Keywords: tort law; State liability; judicial errors

JEL Classification: K13; K40

I. INTRODUCTION

Courts inevitably make mistakes when adjudicating. They sometimes acquit defendants who actually committed the offences as charged, convict or put in pre-trial detention individuals who really did not, wrongfully interpret or apply the law, erroneously assess the relevant facts, enact illegal or unconstitutional judgments, etc. Such judicial decisions often cause harm to one or more interested parties, who in some legal systems are entitled under certain circumstances to be compensated for those harmful consequences by the State. Damages are eventually paid in three types of cases.

First, a large number of countries compensate the victims of wrongful convictions and/or wrongful pre-trial detentions for the harm suffered as a consequence of the time spent in prison or in custody.

Second, some supranational courts may make States pay damages for breaches of international law committed by national courts. For instance, if the European Court of Human Rights “finds that there has been a violation of the Convention or the Protocols thereto [committed either by the judiciary or any other branch of the corresponding State], and if the internal law of the [State] concerned allows only partial reparation to be made, the [abovementioned] Court shall, if necessary, afford just satisfaction to the injured party”1.

Third, in a few legal systems, compensation is given for wrongful judicial decisions made in civil disputes as well. That is the case, for instance, of Spain. State liability for wrongful conviction has a long tradition in this country, as it was already

1 Article 41 of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950.
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established by the Spanish Parliament in 1899\(^2\). More than one hundred years later, Article 121 of the 1978 Constitution provided for that “[d]amages caused by judicial error as well as those arising from irregularities in the administration of justice shall give rise to a right to compensation by the State, in accordance with the law". Subsequent legislation and case-law have interpreted this constitutional provision in the sense that the State is liable for the harm caused by judicial errors committed not only in criminal cases but also in civil ones. Here, the right to be compensated only arises when the erroneous judicial decision cannot be appealed. Interested parties can apply for the declaration of the error, but even when the challenged decision is reviewed and declared as erroneous, it cannot be modified or revoked. Its legal effects cannot be reversed. If the Supreme Court issued the allegedly wrongful decision, an especial chamber made up of Supreme Court judges shall determine whether it was actually wrongful or not. If a different court did, the Supreme Court shall decide\(^3\).

A similar solution was later established by the European Union Court of Justice in its Köbler judgment\(^4\). In the Court’s opinion, “the principle that Member States are obliged to make good damage caused to individuals by infringements of Community law for which they are responsible is also applicable where the alleged infringement stems from a decision of a court adjudicating at last instance”\(^5\). The Court gave the following arguments: (i) “the full effectiveness of [EU law] would be called in question and the protection of [the rights conferred by EU law] would be weakened if individuals were precluded from being able, under certain conditions, to obtain reparation when their rights are affected by an infringement of [EU] law attributable to a decision of a court of a Member State adjudicating at last instance”\(^6\); “[s]ince an infringement of those rights by a final decision of such a court cannot thereafter normally be corrected, individuals cannot be deprived of the possibility of rendering the State liable in order in that way to obtain legal protection of their rights”\(^7\); (ii) “[i]n international law a State which incurs liability for breach of an international commitment is viewed as a single entity, irrespective of whether the breach which gave rise to the damage is attributable to the legislature, the judiciary or the executive. That principle must apply *a fortiori* in the [EU law] order since all State authorities, including the legislature, are bound in performing their tasks to comply with the rules laid down by [EU] law which directly govern the situation of individuals”; (iii) “the principle of *res judicata* does not preclude recognition of the principle of State liability for the decision of a court adjudicating at last instance” as “[p]roceedings seeking to render the State liable do not have the same purpose and do not necessarily involve the same parties as the proceedings resulting in the decision which has acquired the status of *res judicata*. The applicant in an action to establish the liability of the State will, if successful, secure an order against it for reparation of the damage incurred but not necessarily a declaration invalidating the status of *res judicata* of the judicial decision which was responsible for the damage”\(^8\);

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\(^2\) Under the legislative act of 8 August 1899 (*Gaceta de Madrid*, No. 227, 15 August 1899), such liability was subsidiary: the State had to compensate the victim only if the judge who had negligently or intentionally committed the error was insolvent. Under the legislative act of 24 June 1933 (*Gaceta de Madrid*, No. 181, 30 June 1933), such liability became primary, direct.

\(^3\) See Articles 292-297 of the Judiciary Organic Act (*Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial*).


\(^5\) Ibidem, paragraph 50 and ruling.

\(^6\) Ibidem, paragraph 33.

\(^7\) Ibidem, paragraph 34.

\(^8\) Ibidem, paragraphs 39 and 40.
(iv) given that “the principle of liability in question concerns not the personal liability of the judge but that of the State, [t]he possibility that under certain conditions the State may be rendered liable for judicial decisions contrary to Community law does not appear to entail any particular risk that the independence of a court adjudicating at last instance will be called in question”9, (v) “reparation of the injurious effects of an erroneous judicial decision could also be regarded as enhancing the quality of a legal system and thus in the long run the authority of the judiciary10; (vi) “the difficulty of designating a court competent to determine disputes concerning the reparation of damage resulting from such decisions [cannot compromise the abovementioned] principle”; “it is for the internal legal order of each Member State to designate the competent courts” to protect the rights of citizens11.

In Köbler and Traghetti the Court established the conditions governing this liability. Both judgments underlined that “State liability for an infringement of Community law by a decision of a national court adjudicating at last instance can be incurred only in the exceptional case where the court has \textit{manifestly infringed} the applicable law”. “Such manifest infringement is to be assessed, inter alia, in the light of a number of criteria, such as the degree of clarity and precision of the rule infringed, whether the infringement was intentional, whether the error of law was excusable or inexcusable, and the non-compliance by the court in question with its obligation to make a reference for a preliminary ruling under the third paragraph of Article 234 EC; it is in any event presumed where the decision involved is made in manifest disregard of the case-law of the Court on the subject”12.

This case-law generated a heated debate among European legal scholars. Some of them welcomed it13 and even wondered whether Köbler rule should be applied not only to breaches of UE law but to those of national law as well14, as it already was the case of Spain. In fact, that is what has actually happened: that rule has ended up being transplanted into some national laws, like that of Belgium15. Other commentators have expressed harsh criticism. It has been argued that Köbler: (i) is incongruent with most regimes of State liability within the European Union, where there is no such liability for judicial decisions apart from that for wrongful convictions or detentions; (ii) is practically unenforceable, as national courts will hardly ever find that a national last instance court has manifestly infringed EU law16; (iii) may well increase the number of unnecessary referrals to the EU Court of Justice in order to prevent infringements of the EU law and thus prolong preliminary ruling procedures even more17; (iv) may result in disappointed litigants trying to re-open their lost cases via State liability, thereby excessively increasing the procedural costs of the system18; and (v) undermines the principle of \textit{res iudicata}19.

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9 Ibidem, paragraph 42.
10 Ibidem, paragraph 43.
11 Ibidem, paragraphs 44 and following.
12 Judgments of 30 September 2003 (Köbler, C-224/01, paragraphs 53-56) and 13 June 2006 (Traghetti del Mediterraneo, C-173/03, paragraphs 32 and 43).
13 See, for instance, BREUER (2004).
15 See the recent Judgment of the Belgian Constitutional Court of 30 June 2014 (no. 99/2014).
16 CAMPBELL (2010).
Moreover, Köbler, by establishing a stricter criterion—“manifest infringement”—for State liability when the harmful breach of EU law is attributable to a judicial decision, is incongruent with international law, where the nature—legislative, executive or judicial—of the State’s branch which caused the harm does not influence the requirements of such liability.

The present paper adds to the existing literature on State liability for judicial decisions by analyzing this topic from an economic point of view. It examines the social costs and benefits of imposing the obligation on the State to compensate individuals for the harm suffered as a consequence of such decisions. And it shows that, unlike State liability for errors committed in criminal cases—whether for wrongful conviction or wrongful detention—or in the international field, State liability for errors made by courts when deciding civil disputes does not make sense from an economic perspective.

The paper proceeds as follows. Section II presents the economic rationale of State liability rules. Section III points out that, in order to assess State liability for erroneous judgments, it is necessary to compare its costs and benefits with those of the appeal system. Section IV shows why compensating wrongfully convicted and acquitted pre-trial detainees can be advantageous for the society. Section V shows why the social costs of compensating the victims of judicial errors committed in civil cases exceed its benefits for the society. Section VI explains the rationale of State liability for wrongful judgments in the realm of international law. Section VII concludes. In the appendix we will formally show that, at least under certain conditions, correcting judicial errors is less costly for society than making the State pay damages for them, and also that this latter remedy may be even worse than no remedy at all.

II. RATIONALE OF STATE LIABILITY

Liability rules should be designed so that agents—both potential victims and injurers—have the right incentives to act in a way that maximizes social welfare, that is, in a way that minimizes the social costs arising from accidents, which are fivefold: (i) the disutility they produce for the victims; (ii) the costs of preventing them; (iii) the costs derived from the victims engaging in socially undesirable activities if they know they are not going to be compensated; (iv) the costs of bearing the risk of having an accident or compensating the victims; and (v) the costs of administering the treatment of accidents, e.g. costs of identifying the injurer, determining whether he or she is to be held liable, if so quantifying the compensation and eventually forcing him or her to pay it, and so on.

It is unlikely that State liability can efficiently reduce (iv) the costs of bearing the risk of suffering an accident or compensating the victims. It is conceivable that public and private systems can also provide insurance against this risk with less administrative costs. Anyway, we are not going to consider this question here.

State liability could eventually reduce the remaining costs by: (a) providing incentives for state agents to take precautions aimed at efficiently decreasing the probability and severity of accidents; (b) removing the incentives citizens could have to

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20 See DAVIES (2012).
21 With respect to costs (i), (ii), (iv) and (v), see CALABRESI (1970, pp. 26-31). With respect to costs (iii), see DARI-MATTIACCI, GAROUPA and GÓMEZ-POMAR (2010, pp. 797-799).
engage in socially detrimental behavior if they are not compensated; and (c) generating information about wrongs committed by those public agents.23

As DARI-MATTIACCI, GAROUPA and GÓMEZ-POMAR (2010, pp. 793-797) have well noted, State liability can actually provide incentives to engage in accident-reducing behavior only if the “chain of command” does not fail to transmit incentives from the liable public organization to the decision-making agents who can take precautions to efficiently prevent the corresponding accidents. State liability can only provide such incentives if the public agents who are in the higher echelons of government –let us call them “politicians”– and bear the political and opportunity costs of paying damages can somehow control the behavior of the referred decision-making agents and penalize them for not having taken those precautions. Otherwise, State liability may even have counterproductive effects. It can end up increasing the number and/or the severity of accidents by diluting the incentives of potential victims to adopt second-best safety measures.

It is hence easy to see why State liability for judicial decisions can hardly generate such incentives. The independence of the Judiciary, a constitutional principle of fundamental importance in modern legal systems, would be substantially undermined if government –i.e. politicians– could command judges when they decide cases and impose sanctions on them for having decided wrongfully. The independence of the Judiciary is incompatible with the abovementioned “chain of command” and, therefore, constitutes a very substantial obstacle for State liability to prevent judicial errors.

We will see later, by contrast, that State liability can both reduce incentives of potential victims to perform certain socially undesirable activities and generate useful information about judicial wrongs.

III. REMEDIES FOR WRONGFUL JUDICIAL DECISIONS

State –or eventually judges– liability is neither the only nor even the most common remedy for erroneous judicial decisions. Under certain circumstances, these can also be appealed by interested parties and eventually revoked by the relevant higher courts. Appeals provide a primary remedy. They allow rectifying judicial errors by declaring void the appealed erroneous decisions and restoring the rights these decisions violated.

State liability for wrongful judicial decisions, on the contrary, is a secondary remedy. It does not invalidate the legal effects (unlawfully) created by those decisions, nor restitute the rights they violated. It merely provides a monetary compensation to the victims of such violations.

In order to assess State liability for judicial wrongs, it is therefore necessary to compare its advantages and disadvantages with those of the appeal system. In this regard, it must be noted that there are some social costs and benefits which are equal for both remedies and can, therefore, be ignored when making that comparison.

Indeed, one can reasonably assume that the procedural costs of both remedies, $C_p$, are equal. In both cases, a court has to review a certain judicial decision and to examine whether it is wrongful or not. The time, effort and other scarce resources interested parties and the relevant court will invest in reviewing such decision do not depend on the type of remedy. Once the error has been declared, nothing suggests the implementation of one remedy might be systematically more costly than that of the

other. Let us suppose, for example, that a defendant was erroneously not held liable for having caused an accident. If the appeal brought by the victim against such error is upheld, the relevant court will have to quantify the damages the defendant must now pay. If, on the contrary, the State is obliged to compensate the victim once that error has been declared, a similar process will be carried out in order to determine the compensation.

One can also assume that some benefits derived from both remedies are equal: those derived from preventing future similar wrongful judicial decisions by generating information on the error committed, $B_i$. Both the appeal process and the procedure established to rule on State liability for judicial wrongs can produce the same information on the performance of courts, on the errors they should not commit, on how they ought to interpret and apply the law, assess the relevant facts, and so on. Both remedies could be used for detecting and preventing the same errors. The information both procedures generate are equally useful for other judges to avoid similar mistakes. Nothing suggests the State liability procedure can produce better information than the appeal process in that regard. The magnitude of these benefits, $B_i$, will depend on several factors, such as the prevalence of erroneous judicial decisions, the probability of detecting them, their severity, and the likelihood of judges using the abovementioned information to not commit similar errors in the future, but not on the types of remedies sought.

The determinant factors to make the referred comparison are thus the costs and benefits distinctively derived from State liability for judicial decisions but not from appeals, and vice versa. These costs and benefits are typically different in civil, criminal and international cases.

IV. CRIMINAL CASES: STATE LIABILITY COULD MAKE SENSE

1. State liability for wrongful convictions

Criminal courts sometimes convict innocent people, who did not commit the crime as charged (type-I errors), or acquit guilty individuals, who actually did (type-II errors). It is said that the former errors are worse than the latter ones. According to the famous Blackstonian sentence, “it is better that ten guilty persons escape than that one innocent suffer”24. The idea formulated in this assertion, and by many other authors in different ways throughout history25, is a cornerstone of criminal law in modern societies. Courts should try to especially avoid wrongful convictions, rather than wrongful acquittals. Criminal procedure should be designed in a “biased” way, in favor of defendants26.

In the law and economics literature it is well established that both type of errors have the same negative impact on deterrence27. Wrongful acquittals obviously make criminal activity more attractive by reducing its expected cost, whereas wrongful convictions lessen the relative benefits of being honest, thus lowering the opportunity

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24 See BLACKSTONE (1769), at p. 352.
26 See HYLTON and KAHNNA (2007); MICELI (2009).
27 Nonetheless, RIZZOLLI and STANCA (2012) have also shown that, if individuals are risk averse, wrongful convictions have a stronger negative impact on deterrence than wrongful acquittals.
cost of committing such offences\textsuperscript{28}. But, as RIZZOLLI and SARACENO (2013) have shown, those type-I errors are socially costlier than type-II ones at least because of the costs of punishment\textsuperscript{29}. When an innocent individual is wrongfully convicted both this person and the rest of society have to bear the costs derived from his or her imprisonment. These costs, by contrast, do not arise at all when an actually guilty accused is acquitted.

Let us suppose punishment does not take the form of fines, but imprisonment. The social costs of one actually innocent individual being wrongfully convicted and serving the corresponding sentence can be expressed as

\[ C_{\text{conv}} = y(c_i + c_s + d) \]  

[1]

Here, \( y \) denotes the length of the sentence in years, \( c_i \) the direct cost per year of the sentence for this person, \( c_s \) the direct cost per year of the sentence for the rest of society, and \( d \) the negative impact on deterrence derived from him or her being in prison for one year, which we assume to be constant. For simplicity reasons, we do not take the stigmatizing effects of criminal convictions into account\textsuperscript{30}, although these effects might be quite relevant: in some countries, criminal convictions can be appealed and revoked also after convicted individuals have already served their sentences entirely or even died\textsuperscript{31}; it could be argued that the rationale behind this rule is mostly to eliminate the stigma wrongful convictions impose on both convicted individuals and their close relatives. For similar reasons, we suppose that the disutility imprisonment causes to inmates is a linear function of its length\textsuperscript{32}.

The social costs of a wrongful acquittal, by contrast, may be expressed as follows:

\[ C_{\text{acq}} = y d \]  

[2]

These costs equal thus the length of the sentence in years the wrongfully acquitted should have been imposed, \( y \), times the negative impact on deterrence per each one of the years he or she should have been imprisoned, \( d \).

One of the most important manifestation of the abovementioned asymmetric design is the requirement of a high standard of evidence in order to reach a verdict of guilty: defendants may not be convicted unless their guilt is proved “beyond a
reasonable doubt". Another expression of this principle is that the conditions under which convictions can be appealed are much easier to be met than the conditions under which acquittals can. In fact, in some legal systems acquittals cannot be appealed: prosecutors, unlike defendants, have only one shoot. Convictions, on the contrary, can always be reviewed by means of a retrial when new evidence indicating the innocence of the convicted appears. The rationale behind this rule is that, under certain circumstances, the expected social benefits of correcting type-I errors—and additionally those of generating information on how the courts should decide similar cases in the future—exceed the procedural costs of reviewing the conviction.

Let us suppose that, as a result of a retrial, a type-I error has been detected and declared. The question which now arises is which remedy should be given to the wrongfully convicted. There are at least five possible solutions.

The first one is maintaining the status quo, i.e. leaving the things as they currently are. If so, social costs derived from wrongful conviction are, as already said:

\[ C_{\text{wconv}} = y(c_i + c_s + d) \]  

The second one is just correcting the error or, in other words, immediately releasing the wrongfully convicted prisoner. It must be noted that such correction only eliminates a fraction of the costs of wrongful convictions, as these judicial errors are usually declared after the victims have already served part of their sentence. Let \( s \) denote the percentage of the sentence the wrongfully convicted individual has already served at the time the error is declared. Once it has been corrected in this way, social costs are:

\[ C_{\text{wconv+corr}} = ys(c_i + c_s + d) \]  

The third possibility consists in keeping the wrongfully convicted individual in prison and compensating him or her for the remaining part of the sentence. In this case, if we assume compensation—which equals \( y(1 - s)c_i \) here—is a mere transfer of money that does not imply any social cost, social costs are:

\[ C_{\text{wconv+pcomp}} = y(c_i + c_s + sd) \]  

Fourth, the State can maintain the affected individual in prison and compensate him or her for both the time already spent in prison and for the time he or she is still going to spend there. If compensation—which here equals \( yc_i \)—is also socially costless, then social costs derived from wrongful conviction are:

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34 See STITH (1990); STEINGLASS (1998); VIKRAMADITYA (2002); RIZZOLLI (2010).

35 Under the fifth amendment of the U.S. Constitution, “nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb”.

36 See KHANA (2002).
Lastly, the State can immediately release the victim and compensate him or her for the time spent in prison. Then, social costs are:

\[ C_{wconvfcomp} = y(c_i + c_s) \]  \[ \text{[6]} \]

It is easy to see that the last solution is the optimal one. If type-I errors have been eventually detected and declared as a result of a retrial, they are to be corrected as far as possible. Correction –primary remedy– should prevail over compensation –secondary remedy–. It must be noted that both remedies have the same impact on deterrence as the wrongfully convicted are indifferent between being released and being compensated for serving the remaining part of the sentence. Correction presents, nonetheless, a clear advantage over compensation, insofar as it eliminates direct costs of punishment, \( c_i + c_s \). Unfortunately, full correction is not possible when, as usually happens, the error is detected after the convicted has already served a part of his or her sentence. The State cannot travel in time to eliminate past deprivations of liberty. It can only compensate them, and it should do so. As FON and SCHÄFER (2007) have shown, compensating wrongfully convicted can lower crime levels by diminishing the cost of remaining honest and, therefore, lessening the negative consequences of wrongful convictions on deterrence. This secondary remedy allows eliminating \( ysd \) “for free”, insofar as –let us remember– the compensation given to the wrongful convicted consists in a transfer of money which does not entail any social cost. In fact, this is the solution a lot of legal systems have established\(^\text{37}\).

2. **State liability for wrongful detentions**

Under certain circumstances, suspects of having committed a crime may be detained and held on remand until they are tried and subsequently condemned or acquitted. This pre-trial detention can be justified on the ground of preventing some risks such as those of the suspects fleeing and avoiding prosecution or punishment, destroying evidence, influencing witnesses or committing any additional criminal offence.

If these defendants are sentenced to imprisonment, pre-trial detention does not cause them additional harm, since the period spent on remand is deducted from prison time. The problem arises when they are acquitted. Although not proven guilty, detainees have then suffered egregious harm –the deprivation of their liberty– which cannot be compensated in kind –i.e. through the aforementioned deduction–. Correction is hence not possible. This poses the question whether they should receive monetary compensation for such harm.

DOMÉNECH and PUCHADES (2014) have shown that indemnifying acquitted pre-trial detainees who are factually innocent lowers crime levels by reducing the costs of being a law-abiding citizen. The problem is, once again, that criminal courts make mistakes when adjudicating. We cannot dismiss at all the possibility that they acquit

\(^{37}\) See, for instance, COSTA (2005).
individuals who actually committed the crime as charged, nor the possibility of the accused being wrongfully acquitted. On the contrary, the probability of such type-II errors is relatively high, insofar as conviction requires the prosecution to prove the accused’s guilt beyond a reasonable doubt. Paying damages to actually guilty individuals would foster crime by increasing the expected private benefits of infringing the law. Compensating every acquitted pre-trial detainee for the time spent on remand does not necessarily have, on aggregate, a deterrent effect on crime. This effect only occurs when the likelihood of factually innocents being indemnified exceeds the likelihood of actually guilty individuals receiving compensation. This depends, in turn, on the probabilities of being detained that guilty and innocent individuals face, the accuracy of the judicial system and the standard of evidence established to compensate.

DOMÉNÉCH and PUCHADES (2014) argue that, leaving aside possible incentive effects of compensating acquitted pre-trial detainees on judges, deterrence is maximized and the social costs of crime are minimized when the State does not compensate every acquitted defendant for the harm suffered as a consequence of having been held on remand, but only those with respect to whom incriminating evidence does not reach a certain threshold lower than the amount of such evidence required to convict them.

V. CIVIL DISPUTES: STATE LIABILITY MAKES NO SENSE

Civil lawsuits typically involve two or more private parties. Let us suppose, for the sake of simplicity, one of them asks a court to do something against the other party (i.e. to make this latter one pay damages), who, in turn, asks the court to dismiss that claim. Civil courts make mistakes as well. They sometimes grant the remedies plaintiffs sought although these were actually not supported by the law (type-I error) or vice versa, refuse claims which were actually well founded (type-II error).

One can arguably assume that both types of wrongs usually entail the same costs for society. That is the reason why the civil procedure, unlike the criminal one, is symmetrically designed. That is why, for instance, the standard of proof in civil disputes is usually the “preponderance of the evidence” rule, according to which the plaintiff prevails if she manages to prove that her allegations are more likely to be true than not true. Another expression of this symmetry is that type-I and type-II errors can be reviewed, as a general rule, under more or less the same conditions, which are stricter than those for appealing convictions and less narrow than those for reviewing acquittals in criminal law.

Erroneous judicial decisions made in civil cases can produce two detrimental effects on social welfare. On the one hand, by conferring an unjust benefit to some litigants, these mistakes incentivize individuals who could find in a similar situation to engage in socially undesirable behavior. For instance, if the firms having recklessly caused some kind of accidents and injured certain plaintiffs do not pay damages because the relevant courts erroneously declare that there was no negligence, the incentives of those firms to prevent such accidents will be diluted. On the other hand, by inefficiently imposing a cost on the opposite parties, such judicial decisions can provide them with incentives to deviate from socially optimal behavior. In the abovementioned example, potential victims may either take measures that are harmful for the society or refrain from engaging in socially beneficial activities in order to reduce the risk of suffering similar accidents. Let us denote both effects as $E_i$ and $E_v$, respectively.

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Under certain circumstances, judicial decisions can be appealed by interested parties and eventually revoked by courts. If the reviewing court considers the contested judgment illegal, it must declare it so and invalidate its wrongful effects, if possible. This is arguably the most effective means of mitigating the social costs of such error. In fact, in most legal systems, it is the only remedy parties can seek for that purpose. If these effects are corrected, the abovementioned impacts $E_i$ and $E_v$ disappear because none of the interested parties will end up getting an unjust benefit or suffering a harm as a consequence of the error. That is what will happen, in our previous example, if the challenged judicial decision is set aside and the injurer is imposed the obligation to pay damages to the victim.

State liability is clearly a less efficient tool to deal with wrongful judicial decisions than correction, insofar as it only neutralizes part of the aforementioned costs: those derived from one of the parties suffering a harm as a consequence of an erroneous judgment. See the appendix for this result. State liability does not eliminate the detrimental effects arising from the opposite party being conferred an unjust benefit. Let us say, *grosso modo*, State liability eliminates $E_v$ but not $E_i$. For this remedy to be preferable to correction, $E_i$ should be socially desirable: judicial errors should have a social welfare increasing impact on the behavior of injurers. In other words, the higher the marginal probability of wrongful judicial decisions being made is, the better aligned with social welfare the incentives of injurers should be. We have not found any theoretical model predicting such result.

Even more, State liability might well end up increasing the total social costs wrongful decisions produce. That may happen when the reaction from the victims in response to an uncompensated error has a positive marginal impact on social welfare. Indeed, let us suppose both parties could have taken precaution to reduce the expected accident harm, albeit injurers were the cheapest-cost avoiders or, in other words, the individuals who could have prevented the accident efficiently. If these injurers are not held liable because of wrongful judgments, they will probably not take that first-best precaution. And, subsequently, if victims expect this optimal precaution to be omitted, they will probably take second-best safety measures in order to try to avoid being harmed. In this situation, State liability creates a moral hazard problem. It removes incentives for the victims to take second-best precaution, without incentivizing injurers to reach the first-best solution. If victims know they are entitled to receive full compensation from the State for the harm suffered, they will not invest any resources to prevent it. State liability for wrongful judicial decisions could hence end up even increasing the number and/or severity of accidents. See the appendix for this result.

State liability is therefore clearly inferior to correction as a remedy for wrongful judicial decisions. If it is actually possible to revoke them and invalidate their legal effects, there should be no place for such liability. That is the main reason why the Köbler rule does not make any sense.

If the legislature has established that some judicial decisions cannot be appealed — they are hence established as last instance decisions—, it is arguably because the social costs of the appeal process exceed its expected benefits. The costs of carrying out a procedure which might end up with the revocation of the contested judgment are greater than the expected benefits of correcting it. Under these circumstances, the costs of
carrying out a procedure that could end up with the State paying damages for the wrongful decision must necessarily exceed the expected benefits of this liability as well. On the one hand, because, as explained above, procedural costs, \( C_p \), and informational benefits, \( B_i \), of both remedies are equivalent. On the other hand, because correcting a wrongful judicial decision is more advantageous for society than making Government pay damages for it. Indeed, let us denote by \( B_c \) and \( B_l \) the direct social benefits of State liability and correction, respectively. Given that \( B_c > B_l \), and \( C_p \) and \( B_i \) are equal for both remedies, then if the social costs of reviewing and eventually correcting a wrongful judicial decision are greater than its benefits, \( C_p > B_l + B_c \), then, obviously, the social costs of reviewing such decision and eventually holding the State liable for it will also be greater than the benefits derived from this remedy, \( C_p > B_l + B_l \). When the former remedy is inefficient, the latter one is even more so.

It is, therefore, not surprising at all that national courts have interpreted the Köbler rule and, in particular, the requirement of a “manifest infringement” in a very restrictive way\(^{40}\). Ironically, the Köbler judgment itself did so by declaring that the infringement of European Union law committed by the Austrian Supreme Court in that case “[did] not have the requisite manifest character for liability under Community law to be incurred by a Member State for a decision of one of its courts adjudicating at last instance”\(^{41}\). Similarly, the Spanish Supreme Court has also interpreted in a very narrow sense the concept of “judicial error” by establishing it must be “obvious”, “manifest”, “plain”, “evident” in order to give rise to State liability\(^{42}\).

VI. INTERNATIONAL CASES

Some judgments issued by national courts can be appealed to certain international judicial bodies, such like the European Court of Human Rights and the Inter-American Court of Human Rights. If these courts find there has been any violation of the corresponding Conventions, they have to declare so and provide some relief to the claimant. Additionally, some courts are explicitly given the power to take any measure necessary to correct such violation. Under Article 6.1 of the American Convention of Human Rights, for instance, “[i]f the [referred] Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party”. Other courts, by contrast, apparently may only make the concerned State pay damages to the claimant for the harm suffered as a consequence of the violation. Under Article 41 of the European Convention of Human Rights, “[i]f the [Strasbourg] Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party”.

In general terms, international law relies on secondary remedies much more than national law\(^{43}\). Providing for State liability, instead of primary correction, for cases


\(^{41}\) Judgment of 30 September 2003 (Köbler, C-224/01, paragraph 126).

\(^{42}\) See TOLIVAR ALAS (2009).

\(^{43}\) See VAN AAKEN (2010).
where national courts have applied international law wrongfully is just one of the instances of that trend.

It is clear that the expected benefits of allowing individuals to appeal before international courts certain decisions issued by national courts can exceed the resulting procedural costs, even when those individuals may not seek any injunctive relief, but only the declaration of their rights having been violated and eventually the payment of damages. For several reasons it can be argued that those expected benefits are high enough with that regard. First, because of the very important legal interests – i.e. human rights – at stake. Second, because of the especial nature of the court competent to hear those appeals, which is obviously better suited than national courts to avoid home-bias and to protect some interests. Third, because of the wide-ranging informational benefits the decisions of the relevant international courts may produce. Their rulings on appeal can generate information which can be used by national bodies from many countries to better construe and apply the law.

The question is why individuals are usually given the possibility of seeking only just compensation but not injunctive relief before these international courts. Several reasons are put forward in order to explain why States are reluctant to give injunctive powers to international courts. First, problems related to separation of powers could arise. It could be difficult for the international court to determine which national authorities are responsible for having breached the law and which ones have to take what measures in order to restore legality. Second, legitimacy problems may arise, especially if the international court orders a national parliament to make some decisions. Third, national governments may well consider that pecuniary remedies are less intrusive into their sovereignty than injunctions. State liability can thus reduce the reluctance of those governments to accept the jurisdiction of supranational courts.

None of these reasons are valid to justify State liability for civil disputes under national or UE law “à la Köbler”. It must be noted, first, that the Köbler rule applies not only where there are fundamental rights at issue, but to the infringement of any EU legal provision conferring rights to individuals. Second, under Köbler the competence to determine whether a last instance judgment issued by a national court was manifestly erroneous lies also with a national court. Third, as this competence lies with a national court, the informational effects of the resulting decisions will probably not be as wide-ranging as those of an international court. Lastly, it goes without saying that the legitimacy, separation of powers and sovereignty objections cannot be invoked against national courts providing primary remedies.

VII. CONCLUSIONS

In order to assess the efficiency of State liability for wrongful judicial decisions we must take into account not only its costs and benefits, but also the costs and benefits of the alternative remedy, i.e. correcting the effects of the decision at issue.

We can assume that both remedies imply the same procedural costs. The resources interested parties and courts will invest in reviewing wrongful judicial decisions do not depend on the type of remedy sought. One can also assume that the informational benefits of both remedies are equal. Both the appeal process and the procedure established to rule on such liability can produce information on the performance of courts which can be equally useful to avoid similar wrongs.

Before national courts, correction is always more efficient than State liability, both in criminal and civil cases.

In criminal law, convictions can always be reviewed when new and relatively strong evidence indicating the innocence of the convicted appears. Wrongful convictions generate two types of social costs: on the one hand, they lower deterrence by reducing the benefits of abiding by the law; on the other hand, punishment implies direct costs for both the sanctioned individuals and the rest of society. Once convictions are declared erroneous, they are to be corrected as far as possible. Correction and compensation have arguably the same impact on deterrence, as the victims of wrongful convictions convicted are indifferent between being released and being compensated for serving the remaining part of the sentence, but correction eliminates the direct costs of punishment. If full correction is not feasible, compensation should be given to the victims because at least it lowers crime levels by diminishing the cost of remaining honest. Indemnifying (some) acquitted pre-trial detainees can also reduce crime levels by reducing the costs of being a law-abiding citizen.

In civil cases, wrongful judicial decisions can produce two negative effects on social welfare. First, by conferring an unjust benefit to some litigants, these decisions incentivize individuals who could find in a similar situation to engage in socially undesirable behavior. Second, by inefficiently imposing a cost on the opposite parties, they can give these individuals incentives to deviate from the socially optimal behavior.

Correction neutralizes both detrimental effects. State liability, by contrast, only eliminates part of them: those derived from one of the parties being harmed as a consequence of an erroneous judgment. Even more, this remedy might result in an increase of the total social costs wrongful decisions produce, by removing incentives for the victims to take second-best precaution.

Consequently, if the legislature has established that some judicial decisions made in civil cases cannot be appealed and eventually revoked because the social costs of the appeal process exceed their expected benefits, it is obviously inefficient to review those decisions with the purpose of examining whether they are wrongful and, if so, making Government pay damages for it.

Cases of national judgements appealed before international courts are different. Here, State liability could be preferable to correction, on the one hand, because it could be difficult for the international court to determine which national authorities have to take what measures in order to restore legality and, on the other hand, because secondary remedies may be easier to accept by national governments and the general public than injunctions, thereby encouraging States to voluntarily accept the jurisdiction of international courts.

VIII. APPENDIX

In this appendix we will show that, at least under certain conditions: (i) correcting judicial errors, if possible, is less costly for society than making the State pay damages for them; and (ii) State liability might result in an increase of the total social costs wrongful decisions produce.

Let us suppose that both potential victims and injurers can take care to prevent accidents. Let \( x \) be the amount of care taken by injurers and \( y \) be that taken by victims. Both \( x \) and \( y \) decrease the expected costs of such accidents, \( H(x,y) \), and they do so at a
decreasing rate, \( H_x < 0, H_{xx} > 0, H_y < 0, H_{yy} > 0 \). We also suppose that \( x \) and \( y \) are substitutes so that \( H_{xy} > 0 \). Social costs are thus:

\[
S(x,y) = x + y + H(x, y) \tag{8}
\]

First-order conditions to minimize these costs are:

\[
1 + H_x(x, y) = 0 \tag{9}
\]
\[
1 + H_y(x, y) = 0 \tag{10}
\]

Let denote \( x^* \) and \( y^* \) the levels of care that solve both equations. We assume that both of them are positive, \( x^* > 0, y^* > 0 \). It follows from \( x \) and \( y \) being substitutes that if one party reduces his or her level of care it will be efficient for the other one to increase his or hers:

\[
\frac{\partial x^*}{\partial y} = -\frac{H_{xy}}{H_{xx}} < 0 \tag{11}
\]
\[
\frac{\partial y^*}{\partial x} = -\frac{H_{xy}}{H_{yy}} < 0 \tag{12}
\]

Liability is determined under a negligence rule with a defense of contributory negligence. Injurers should be liable only for damages derived from their failure to take due care, that is, \( H(x) - H(x^*) \). They should not be liable thus for damages that would have occurred even when they had acted diligently\textsuperscript{45}.

Let us suppose first instance Courts set due care at first best levels, \( x^* \) and \( y^* \), but make mistakes when assessing damages. They systematically understate losses caused by accidents. Damages are thus only a fraction \( q \) of the social costs of negligence, \( H(x) - H(x^*) \), where \( 0 < q < 1 \).

For simplicity reasons, we assume that decisions holding defendants liable are always reviewed. Let \( p \) be the probability of the relevant Court accurately assessing damages when reviewing first instance decisions, where \( 0 < p < 1 \). The costs of such review \( p \) are not borne by litigants, but by taxpayers in general.

Parties chose the level of care that minimizes their own costs. Let us see how they behave and what the social costs are depending on the remedies –either correction of errors, State liability or no remedy at all– provided for in cases of first instance decisions being declared as wrongful.

A) Correction of errors

Under this remedy, injurers face the following costs, \( I(x) \):

\textsuperscript{45} See KAHAN (1989).
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\[ I(x) = x, \quad \text{if} \ x \geq x^* \quad [13] \]
\[ I(x) = x + q(1 - p)[H(x, y) - H(x^*, y)] + p[H(x, y) - H(x^*, y)], \text{if} \ x < x^* \quad [14] \]

The first derivative of \( I(x) \) with respect to \( x \) is:

\[ I_x(x) = 1, \quad \text{if} \ x > x^* \quad [15] \]
\[ I_x(x) = 1 + (q + p - pq)H_x(x, y), \quad \text{if} \ x < x^* \quad [16] \]

As \( H_x(x, y) < 0 \) and \( q + p - pq < 1 \), then \( 1 + (q + p - pq)H_x(x, y) > 1 + H_x(x, y) \) and, therefore, since \( H_{xx}(x, y) > 0 \), \( I(x) \) must have a minimum at \( x < x^* \). First order condition to minimize \( I(x) \) is thus:

\[ 1 + (q + p - pq)H_x(x, y) = 0 \quad [17] \]

Let \( \bar{x} \) denote the amount of care taken by injurers that minimize their costs in this scenario where judicial errors are corrected if detected. After doing some comparative statics, we can see that \( \bar{x} \) will be lower the lower \( q \) and \( p \) (and therefore \( q + p - pq \)) are.

Potential victims face the following costs:

\[ V(y) = y + (1 - q)(1 - p)[H(\bar{x}, y) - H(x^*, y)] + H(x^*, y), \quad \text{if} \ y \geq y^* \quad [18] \]
\[ V(y) = y + H(\bar{x}, y), \quad \text{if} \ y < y^* \quad [19] \]

First derivative of \( V(y) \) with respect to \( y \) is:

\[ V_y(y) = 1 + (1 - q)(1 - p)[H_y(\bar{x}, y) - H_y(x^*, y)] + H_y(x^*, y), \quad \text{if} \ y > y^* \quad [20] \]
\[ V_y(y) = 1 + H_y(\bar{x}, y), \quad \text{if} \ y < y^* \quad [21] \]

Given that \( \bar{x} < x^* \), \( q < 0 \) and \( p < 0 \), then \( y + H(\bar{x}, y) > y + (1 - q)(1 - p)[H(\bar{x}, y) - H(x^*, y)] + H(x^*, y) \), so victims will choose a level of care \( \bar{y} \geq y^* \).

One can see that the costs victims face are decreasing at the point where they take first best care, which means that they should increase their care level in order to minimize such costs. Indeed, as injurers choose \( \bar{x} < x^* \), and given that \( H_y(x, y) < 0 \), and \( H_{xy} > 0 \), then \( H_y(\bar{x}, y) < H_y(x^*, y) \) and \( 1 + (1 - q)(1 - p)[H_y(\bar{x}, y) - H_y(x^*, y)] + H_y(x^*, y) < 0 \) at \( y = y^* \), so victims will set their level of precaution at \( \bar{y} > y^* \).

First order condition to minimize those costs is thus:

\[ 1 + (1 - q)(1 - p)[H_y(\bar{x}, y) - H_y(x^*, y)] + H_y(x^*, y) = 0 \quad [22] \]
It is easy to see that the level of care that solves this equation, $\bar{y}$, will be higher: the lower the level of care taken by injurers, $\bar{x}$, is; the greater the underassessment of damages carried out by first instance decisions, $(1 - q)$, is; and the higher the probability of these errors not being corrected, $(1 - p)$, is.

$$\frac{\partial \bar{y}}{\partial \bar{x}} < 0 \tag{23}$$

$$\frac{\partial \bar{y}}{\partial (1 - q)} > 0 \tag{24}$$

$$\frac{\partial \bar{y}}{\partial (1 - p)} > 0 \tag{25}$$

B) State liability

Under this remedy, injurers face the following costs, $I(x)$:

$$I(x) = x, \quad \text{if } x \geq x^* \tag{26}$$

$$I(x) = x + q[H(x, y) - H(x^*, y)], \quad \text{if } x < x^* \tag{27}$$

The first derivative of $I(x)$ with respect to $x$ is:

$$I_x(x) = 1, \quad \text{if } x > x^* \tag{28}$$

$$I_x(x) = 1 + qH_x(x, y), \quad \text{if } x < x^* \tag{29}$$

As $H_x(x, y) < 0$, then $1 + qH_x(x, y) > 1 + H_x(x, y)$ and, therefore, $I(x)$ must have a minimum at $x < x^*$. First order condition to minimize $I(x)$ is:

$$1 + qH_x(x, y) = 0 \tag{30}$$

Let $\bar{x}$ denote the amount of care taken by injurers that minimize their costs in this scenario. By comparing [17] and [30], and since $H_x(x, y) < 0$ and $q < p + q - pq$, we can see that $1 + qH_x(x, y) > 1 + (q + p - pq)H_x(x, y)$ and, therefore, we can conclude that the level of care taken by injurers when judicial errors are eventually corrected is higher than that chosen by them when instead the State is liable for those mistakes, $\bar{x} > \bar{x}$.

Victims face the following costs:

$$V(y) = y + (1 - q)(1 - p)[H(\bar{x}, y) - H(x^*, y)] + H(x^*, y), \quad \text{if } y \geq y^* \tag{31}$$

$$V(y) = y + H(\bar{x}, y), \quad \text{if } y < y^* \tag{32}$$

First derivative of $V(y)$ with respect to $y$ is:
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\[ V_y(y) = 1 + (1 - q)(1 - p)[H_y(\bar{x}, y) - H_y(x^*, y)] + H_y(x^*, y), \quad \text{if } y > y^* \quad [33] \]

\[ V_y(y) = 1 + H_y(\bar{x}, y), \quad \text{if } y < y^* \quad [34] \]

There is only one difference between these equations and [20] and [21]: now injurers set their care level at \( \bar{x} \) instead of \( \bar{x} \). Thus, since \( \bar{x} < \bar{x} \) and \( \frac{\partial y}{\partial x} < 0 \), we can also conclude that \( \bar{y} > y^* \).

As both \( \bar{x} \) and \( \bar{y} \) are further than \( \bar{x} \) and \( \bar{y} \) from the socially optimal levels of care \( x^* \) and \( y^* \) respectively, it is clear that social costs in the scenario of error correction are lower than those under the State liability rule, \( S(\bar{x}, \bar{y}) < S(\bar{x}, \bar{y}) \). In order to prove this result, let us suppose that victims choose \( \bar{y} \). If that is the case, the level of care injurers should take in order to minimize social costs, which we denote by \( \bar{x} \), solves the following equation:

\[ 1 + H_x(x, \bar{y}) = 0 \quad [35] \]

From equations [9], [17] and [30], and given that \( H_x(x, y) < 0 \), one can see that \( H_x(x, \bar{y}) < (q + p - pq)H_x(x, \bar{y}) < q H_x(x, y) \), which, since \( H_{xx}(x, y) > 0 \), implies that \( \bar{x} < \bar{x} < \bar{x} < x^* \). Consequently, as \( S(x, y) \) are decreasing in \( x \) when \( x < \bar{x} \), it must be true that

\[ S(\bar{x}, \bar{y}) > S(\bar{x}, \bar{y}) \quad [36] \]

Let us suppose now that injurers choose \( \bar{x} \). The level of care victims should take in order to minimize social costs, denoted by \( \bar{y} \), solves the following equation:

\[ 1 + H_y(\bar{x}, y) = 0 \quad [37] \]

By comparing equations [10], [31] and [34], and given that \( H_y(x, y) < 0 \), one can see that \( H_y(\bar{x}, y) < (1 - q)(1 - p)[H_y(\bar{x}, y) - H_y(x^*, y)] + H_y(x^*, y) \), which, since \( H_{yy}(x, y) > 0 \), implies that \( \bar{y} < \bar{y} \). And we already know that \( \bar{y} < \bar{y} \). Consequently, as \( S(\bar{x}, y) \) are decreasing in \( y \) when \( y < \bar{y} \), it must be true that

\[ S(\bar{x}, \bar{y}) > S(\bar{x}, \bar{y}) \quad [38] \]

From [29] and [31], we can conclude that:

\[ S(\bar{x}, \bar{y}) > S(\bar{x}, \bar{y}) \quad [39] \]
C) Neither correction nor State liability

Under this rule, injurers face the same costs as in the case of State liability, so they will set their level of care at $\bar{x}$.

The costs of the victims are as follows:

- If $y \geq y^*$:
  \[
  V(y) = y + (1 - q)[H(\bar{x}, y) - H(x^*, y)] + H(x^*, y),
  \]

- If $y < y^*$:
  \[
  V(y) = y + H(\bar{x}, y),
  \]

By comparing these equations with [31] and [32] we can see that these costs differ in one respect from those faced by the victims in the case of State liability: now the probability of underassessment of damages being detected and corrected or compensated, $1 - p$, is lower, namely zero. From $\frac{\partial \bar{y}}{\partial (1 - p)} > 0$, it derives that the level of care taken by victims in this scenario, denoted by $\bar{y}$, will be higher than that chosen under the State liability rule, $\bar{y} > \bar{y}$.

Let us show now why the social costs in this scenario are lower than those under the State liability rule. As in both cases injurers choose $\bar{x}$, the level of care victims should take in order to minimize social costs, which we denoted by $\bar{y}$, solves the following equation:

\[
1 + H_y(\bar{x}, y) = 0
\]

By comparing equations [10], [33] and [40], and given that $H_x(x, y) < 0$, one can see that $H_y(\bar{x}, y) < (1 - q)[H_y(\bar{x}, y) - H_y(x^*, y)] + H_y(x^*, y) < (1 - q)(1 - p)[H_y(x, y) - H_y(x^*, y)] + H_y(x^*, y)$. Since $H_{yy}(x, y) > 0$, it implies that $\bar{y} < \bar{y} < \bar{y}$. Consequently, as $S(\bar{x}, y)$ are decreasing in $y$ when $y < \bar{y}$, it must be true that

\[
S(\bar{x}, \bar{y}) > S(\bar{x}, \bar{y})
\]

IX. References


