We’ll Meet Again: Convergence in the Private Law Treatment of Public Bodies

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The past century witnessed a dramatic transformation in the application of private law to public bodies throughout the common law world. Historically, the Crown enjoyed many privileges and immunities. Actions had to be taken by petition of right. The Sovereign’s immunity in tort forced the burden of liability onto individual servants. Even in contract, the State’s liability was restricted. This privileged status obtained throughout the common law world, before legislators and judges curtailed it in the twentieth century.

Despite the great divergence in our constitutional systems, we have moved in the same direction towards dismantling such privileges. This paper argues that twentieth century evolutions in legal culture across liberal democracies challenged authoritarian ideas underpinning blanket sovereign immunity. Immunities, which favour the interests of the State over individuals, conflict with modern views on individual rights in both public and private law.

Constitutionalist jurisdictions may be especially enthusiastic in their abolition of State privilege. Ireland’s courts vigorously rejected Crown immunity as unconstitutional, eliminating restrictions on suing the State in tort in order to vindicate citizens’ rights. However, our shared commitment to the rule of law and the common law’s liberal values indicate that the objective of protecting the rights of the citizen against the State is not limited to constitutionalist orders. The full subordination of public entities to private law is consistent with a wider cultural shift in liberal democracies. The ideology of fundamental rights, developed in the public domain, has infused private law.

In private law terms, when not exercising the public power of lawful command, the State should not enjoy a privileged position. It must respect the autonomy of other actors and not impose its unilateral will on them. It must be subject to private law claims to corrective justice.

Besides, removing public entities’ immunities fits with a contemporary private law culture in which the courts strive to do justice in every case. The common law aims to vindicate litigants’ rights. This conception displaced an older, nineteenth century mentality, in which upholding legal principle could trump individual justice. The reshaping of restitution law implements this paradigm shift.

Accordingly, blanket immunities benefitting the State have been removed. It is increasingly true that the State’s private law affairs really are adjudicated under the ordinary common law. The locus of debate has moved to specific privileges arising in certain contexts, such as policing and combat. Where there is a sound policy reason to treat the State distinctly, the law will accommodate it within the framework of the rules, rather than as a preliminary bar. Exceptions to the normal rules should be narrowly construed and justified by carefully scrutinised policy reasons. Canada’s vigorous rejection of police immunity demonstrates such scrutiny.
Given largely parallel moves towards increasing the subordination of public bodies to the common law, this paper will assess the extent to which differences remain between national laws. Are today’s differences relics of outmoded privilege, or might common law jurisdictions formulate divergent approaches to State liability in the future?