GOVERNMENTAL RESPONSIBILITY IN TORT: VII*

HISTORY AND THEORY, CONTINUED

In addition to the historical doctrines justifying governmental irresponsibility, already discussed,¹ it seems proper to review the more modern doctrines and theories advanced in the nineteenth and twentieth centuries either to deny or to support the responsibility of the State or other public corporation for the torts of its officers.

The recognition of governmental responsibility for the torts of officers required certain political and social conditions which, until comparatively modern times, hardly prevailed in the western world. It was necessary for political theory to mature to a position according the individual a large measure of recognition for his personal rights, even against the group—a condition possible only in a highly developed political and legal system.² Both state and official responsibility advanced with the growth of individualism, demanding protection against invasion of private rights by public officials. On the other hand, a well-developed social sense is required to realize that exceptional losses, due to the imperfections of governmental machinery or the torts of officers, should not be permitted to rest where they happen to fall, but should be distributed over the group as a whole.

Modern laissez-faire, while admitting wide claims on the part of the individual, has been opposed to a system of group responsibility, or at least was not inclined to regard an officer's tort as a group tort. In that view, it was supported by centuries of legal development, which asserted that fault could be personal only, that a corporation could not commit a tort,—which required an act of "will,"—and could not even be held responsible for torts committed by an officer or employee; that a public officer was not an agent of the State except for contractual mat-

¹ The first six parts of this study have appeared in volumes 34 and 36 of the Yale Law Journal.
² The doctrines that a corporation is incapable of tort, that the King can do no wrong and that the State is above the law. (1926) 36 Yale L. J. 1, 757, 1039.
³ Possibly Montesquieu in a famous passage of his Esprit des Lois (Nugent ed., London, 1923), Book XXVI, c. 15, may be regarded as the first modern publicist, certainly in France, to emphasize the two essential elements of governmental responsibility, namely, that individuals have legal rights against the group (the State), and that there must be a legal (judicial) sanction against invasions of such rights. Montesquieu's doctrine was embodied in article 17 of the “Declaration of the Rights of Man” to the effect that private property cannot be taken except for public purposes, legally established, and under condition precedent of a just indemnity. After the French Revolution it was admitted that the public obligations of the state were equally enforceable legally, regardless of change in Government. The next step was to make the State responsible to a certain extent for the integrity and good conduct of its officers.
ters within the scope of his employment; that his power in any event was limited to acting rightfully and that when he acted wrongfully he was ultra vires and made himself alone liable; and that the individual was adequately protected if he could sue the officer. Even after the possibility of corporate torts had been admitted, and down to the end of the nineteenth century, it was still widely believed that the demands of individual justice and public security were adequately satisfied by leaving the individual to seek redress from the wrong-doing officer. With minor exceptions, that is still at the present writing, though with strong possibilities of early change, the general position of the Anglo-American law with respect to the largest units of government—empire, kingdom, federal and state government.

The continent has gone further. Recognizing the inadequacy of individual relief against public officers, if not the frequent injustice of exposing public officers to full pecuniary responsibility for official mistakes, several of the countries of continental Europe and some of the British colonies, stimulated by the writings of jurists, have by statute removed the barriers to State responsibility which the older theory had found it impossible or inexpedient to remove or overcome. They recognized the agency theory as applied to public officers, and they abandoned or qualified the doctrine of sovereignty as applied to official torts, by permitting direct suit by the injured individual against the State.

This development was aided by several factors. They had, at least in central Europe, long been familiar with suits against the Government in "fiscal" (fiscus) matters, and the courts, without express statutory authority, had subjected the State or minor governmental subdivision to the rules of private law in the matter of the management of its public property, contract relations and the operation of public utilities, such as state railroads, telegraphs and even postal services—such matters as would be characterized, in the American law of municipal corporations, as "corporate" functions. They had seen the Government entering into an ever greater number of activities and had found it difficult to maintain the classic distinction between "governmental" and "corporate" functions and acts. They had become familiar, through centuries of legal development, with the crystallization of the doctrines of eminent domain, which, acquiring constitutional protection in all western countries in the eighteenth and nineteenth centuries, had evolved enforceable limitations against governmental invasion of the rights of private property. They had observed that such institutions as workmen's compen-

---

8 The institution of eminent domain, requiring compensation and public purpose as conditions precedent to the expropriation of and, later, damage to private property, is but one illustration of the recognition of private rights.
sation and other forms of social insurance were introducing into the law new theories of responsibility, resting upon objective risk rather than upon personal fault or negligence, and that as to its own employees, the State by employer's liability statutes recognized its responsibilities as a corporate employer. They found the doctrine of sovereignty attacked as a remnant of political theology and an unnecessary encumbrance on governmental institutions. Thus endowed with an emancipated social vision, the jurists of the late nineteenth and the twentieth centuries who, notably in France and Germany, so largely influenced the

against public impairment. It had a rudimentary form in the Roman law with compensation voluntary, in that no right of action was accorded.

In Italy, the postglossators recognized the doctrine and in central Europe, both through feudal times and after the institution of the modern State, it was highly developed. The school of natural law vigorously defended private property against impairment by the State. The Fifth Amendment embraces such protection. In France, however, the ancien régime, abusing what they believed were the absolute rights of sovereignty, gave little legal protection to private property. One of the principal features of the Declaration of the Rights of Man of 1793 is the constitutional protection demanded for private property against expropriation by the State. Statutes, particularly one of 1810, gave eminent domain a precise and judicial form. It is an interesting legal phenomenon that the comparatively late statutory recognition of eminent domain in France has resulted in a more vigorous protection than anywhere else against all public invasions, rightful or wrongful, of the rights of the individual. The equalization of sacrifice, involved in compensation under eminent domain, is but one aspect of the compensation accorded for invasions of other private rights in the conduct of public business. See Gierke, Johannes Althusius, (3d ed. Breslau, 1913), 264 et seq. Meyer, Das Recht des Expropriation, (Leipzig, 1868), §§ 1 et seq. esp. § 6. Layer, Principien des Enteigungsrechtes (Leipzig, 1902), 64 et seq. Grünhut, Das Enteignungsrecht (Wien, 1873), § 3. Anschütz, Der Ersatzanspruch aus Vermögensbeschädigungen durch rechtmissige Handhabung der Staatsgewalt (Berlin, 1897), 28 et seq. For an outline of the historical development in France down to the French Revolution, see Dareste, Une expropriation sous l'ancienne monarchie (1872) Revue de Legislation, 179; La justice administrative en France, (2d ed. Paris, 1896) c. 17. Marcq, La responsabilité de la puissance publique (Paris-Bruxelles, 1911) 278 et seq. Picot, De la responsabilité de l'Etat pour les actes de ses préposés (Paris, 1920) 28 et seq.

Eminent domain statutes, prior to the nineteenth century, are rare.

In England, though all land came from the King, private property had constitutional protection against kingly or official impairment before it had such protection elsewhere. Its origin is said to be Germanic, whereas the Middle Age practice in Europe rests largely on Roman origins (Meyer, § 6). Magna Carta (1215) provided, cc. 39, 52, that no freeman was to be disseized except by the lawful judgment of his peers or the law of the land (due process of law). This required compensation. McKechnie, Magna Carta, (2d ed. 1914) 383, 448. Blackstone, I, *138; 2 Pollock and Maitland, History of English Law, (1899) 3 et seq. 2 Cooley, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS (8th ed. 1927) cc. 11, 15. It is strange that the early recognition of the duty to make compensation for the statutory or authorized impairment of real property in Anglo-American law, and, in England, for many tortious injuries to property by petition of right, should have left public opinion and the law oblivious to the analogous duty to repair other tortious official injuries to persons or property. While the impairment or invasion of private right in eminent domain is based on a formal government act, so are many tortious invasions of private rights. See the interesting case of McMahon v. Telluride, 79 Colo. 281, 244 (1926) in which the erroneous destruction of a building as a nuisance, by order of the mayor and council, was deemed a taking for the "public use," thereby escaping the inhibition against suit in tort.
courts and legislatures in adopting the modern view of governmental responsibility for the torts of officers, confined their differences to varying explanations of the basis of the new responsibility and to diverse views of the limitations and exceptions to be placed upon its application.

Thus the continental historical development proceeds, in the main, from an insistence, in principle, upon State non-responsibility for tortious "governmental" acts, with certain exceptions, to the admission, in principle, of State responsibility, with certain qualifications. It will be our purpose to survey this development and to observe the legal theories which have accompanied it.

THE DOCTRINE OF IRRESPONSIBILITY

As the problem of governmental responsibility in tort was essentially a legal one, it is natural that both advocates and opponents of such responsibility should look to the Roman law for authority. Neither group can find much satisfaction in that source. The Roman law was unfamiliar with those conceptions of individualism and legal protection of the individual against the group which make the present problem a practical one. The Roman State could not be a party to a suit, although an ingenious system of assignments and confession of judgment was worked out which enabled the State to collect its claims and enabled a creditor by novation to sue some debtor of the State. The rudiments of eminent domain were known, though only as a practice of equitably granting the expropriated owner some other property, certain privileges or money, and not as a legal right of the individual to sue. Tax farmers and other concessionaires of public revenues could be sued if they collected too much. Public works were constructed under the direction

4Coulznet, Etude sur la responsabilité des groupements administratifs (Paris, 1911) 11. At the beginning of the Empire, so long as the distinction lasted between the aëarium (treasury of the Empire) and the fisc (private fortune of the Emperor) the individual was not helpless. He could sue the Emperor (fisc) personally in "corporate" matters (public works, construction of roads, etc.). But this liability ceased with the unification of the imperial budget. 1 Serrigny, Droit public et administratif roman (Paris, 1862) 96, 97, 104; 2 ibid. 1 et seq. See also Jones, The early history of the Fiscus (1927) 43 L. Q. Rev. 499.

5There is some dispute among the authorities as to the extent of the practice and the conditions of making compensation for private property taken. It is agreed that the taking gave rise to no legal claim of the individual. A considerable technical procedure had, however, developed, notwithstanding that the claim was not judiciously enforceable against the State. de Fresquet, Principes de l'expropriation pour cause d'utilité publique à Rome. . . . (1890) 6 Rev. Historique de Droit Français, 97 et seq. 2 Serrigny, op. cit. supra note 4, 247 et seq. Coulznet, op. cit. supra note 4, 14, citing Tacitus and the article of Fresquet, states that compensation was made, in certain cases, to grain merchants by the legislative fixing of maximum prices and also to the unconsenting owner of slaves, freed by legislative decree. For an outline of the status of expropriation in Rome, see Picot, op. cit. supra note 3, 19 et seq.

of certain officials (curatores operum), a kind of supervising architects, who dealt with the building contractors. For fifteen years, they remained responsible for the sound construction of the works. The Roman municipalities could be held to a considerable responsibility, even penal, but only to the State and not to individual citizens. But the responsibility of municipal and provincial officers for their management and more particularly the responsibility of judges was well known in the Roman law. Their responsibility to the people or the Senate or the Emperor was also highly developed.

Fault was essential to legal responsibility for damages, and as fault presupposed an act of "will," only individuals could commit fault. The corporation, the universitas, which up to the Empire existed in public law alone, was a legal concept only; its activities were determined by its organs, who could not by their torts make the universitas responsible. Thus all forms of universitas, including the State, were incapable of tort, and were responsible only if they had been unjustly enriched.
The agency theory in Roman law was equally barren of helpful analogies for governmental responsibility. Agency was practically limited to the conclusion of contracts, and the principal was liable only within the scope of the agent's power. The agent's tort was a violation of his power, not imposing responsibility on the principal, but only on the tort-feasoer, who by his illegal act had ceased to be an agent. While the *exercitor* and *institor* relation, under the Praetor's law, made the employer liable for certain torts of the employee, the analogy was of little value in the case of corporations, who could not be made liable in tort. At most, it was in contractual relations, such as purchase, sale and contract generally, that the doctrines of agency could be employed to bind corporations, who could deal only through agents acting within the scope of their powers. In this limited field, however, the Government, in its "corporate" (*fiscus*) capacity, was subject to many of the rules of law governing private corporations, and thus the ground was laid for that distinction between the private and public law relations of the State which so greatly influenced modern continental law. But a responsibility for *culpa in eligendo* or *custodiendo* could not be charged against corporations, who were incapable either of will or fault.

As already observed, the Middle Age Germanic conception of individual rights and group obligations was quite different. The association, public and private, was not conceived as a separate entity, but as a collectivity, which was responsible for all acts of its individual members and *a fortiori*, of its organs, managers and officers. Public law and private law were not clearly distinguished. While certain noblemen, later feudal lords, arrogated to themselves certain prerogatives which by custom gained common acquiescence, the legal conception of "State".

---

14 Ibid. 6 et seq.
35 The *Fiscus*, as the private fortune of the Emperor, though it achieved the same status as the *aerarium publicum* and ultimately submerged the latter, remained nevertheless subject to rules of private law. It appears in late Roman times even to have been deemed theoretically a juristic person—though Gierke says that the Roman jurists did not so regard it—yet with so many exceptions from the ordinary rules of responsibility that Gierke says the exceptions reversed the principle, *op. cit. supra* note 12, III, 60. 1 MITTEIS, *Römisches Privatrecht* (Leipzig, 1908) 348 et seq. 2 MOMMSEN, *Römisches Staatsrecht* (Leipzig, 1876) 998. FROMBERG, *Die Haftung des Fiskus für seine Vertreter* (Leipzig, 1908) 9. See 36 Yale L. J. 5, note 8.
16 Ibid. 8 et seq.
17 1 GIERKE, *Deutsches Privatrecht* (1895) §§ 68, 75, 76.
2 GIERKE, *Das Deutsche Genossenschaftsrecht* (1873) 386, 522, 817; 3 ibid. 168.
18 SCHÜTZ, *op. cit. supra* note 10, 9.

Nor was the *Fiscus* as a subject of rights and duties known to early German law. It was simple later to carry the rules of law from city to state. 2 GIERKE, *Genossenschaftsrecht* (1873) 831.

The city was the highest unit, as a subject of law, known to the early German law. It was simple later to carry the rules of law from city to state. 2 GIERKE, *Genossenschaftsrecht* (1873) 831.

The city was the highest unit, as a subject of law, known to the early German law. It was simple later to carry the rules of law from city to state. 2 GIERKE, *Genossenschaftsrecht* (1873) 831.
was unknown and it is not possible to speak of a State responsibility for torts of officers. When later the State conception did develop, the Roman law conceptions of corporate immunity in tort, with the narrow qualifications admitted by the postglossators came with it. Then also, from the sixteenth to the eighteenth centuries, there flourished the notions of sovereignty and royal prerogative, deemed to imply irresponsibility, a view which still prevails in England and the United States more strongly than anywhere else, but which retarded the development of the responsible State everywhere.

Notwithstanding the popular convictions respecting group responsibility, and the efforts of jurists to find in isolated institutions of the Roman law some authority or analogy for such responsibility, it was not until the political theories of the eighteenth century, culminating in the French Revolution, endowed the individual with constitutional protection for his rights against group invasions, that the present problem acquired an immediate practical importance enlisting in its solution the cooperation of legislatures, courts and jurists. The issue became one of the leading problems of the nineteenth century. That century is marked by a gradual progression from a conviction against State responsibility to one in its favor. The movement was incidental to changing political theories which openly challenged the consequences of the alleged divine right of kings and sovereign infallibility and unaccountability and substituted notions of democracy, of self-government, and social theories which envisaged the end and purpose of society in individual security and social welfare. Lawyers who opposed responsibility invoked the silence of the Roman law, the historic immunity of corporations in tort, the dissimilarity between an officer and an agent, the conception of sovereignty and the adequacy of suits against officers; those who favored it invoked isolated texts of the Roman law, the Germanic conception of group

---

20 See 36 YALE L. J. 10.

The postglossators first recognized distinctions between the State as a Fiscus (corporation) and the State as a governing power. Fiscus was defined as a property concept, and the corresponding legal owner the head of the State and later the State itself. The State was then also acknowledged as a juristic person. 3 GIERKE, op. cit. supra note 18, 359, 397, 405. Thus the doctrine arrived in Germany at the time of the "Reception" (1495). The German conceptions of the Fiscus began to prevail over the Roman. But it was not until the nineteenth century that public attention was directed to the markedly different legal consequences attached to the Fiscus and to the State as a governing authority. When Sundheim wrote his celebrated monograph in 1827 (infra) he made no distinction in State responsibility between "corporate" and "governmental" acts. Some of the modern civilists who advocate general State responsibility also do not admit the distinction. CHIRONT, La Colpa nel diritto civile odiero. Colpa contrattuale, (2d ed. Torino, 1897) 490 et seq., ibid. Colpa extracontrattuale, (2d ed. 1903) I, 354; II, 1.
responsibility for official, even individual, torts, the growing recognition of corporate responsibility in tort, the similarity between the officer and the agent, the analogy between private and public corporations, the decadence of the doctrine of sovereignty and the inadequacy of relief against officers.

Down to the eighties of the last century, an influential section of the scientific world, which on the continent always exerted a strong influence over legislatures and courts, seems to have been impressed with the arguments against responsibility, though exceptions were always admitted. Heffter,20 von Mohl,21 Bluntschi,22 Loening,23 Gabba,24

20 Heffter, Beiträge zum deutschen Staats und Fürstenrecht (Berlin, 1829) 162 et seq. See also Von der Becke, Von Staatsämtern und Staatsdienern (Heilbron, 1797) 177 quoted by Zachariae, loc. cit. supra note 10, 596, and Richelmann (1832) 2 Magazin für hannoversches Recht, 343 cited by Zachariae, 614, 615, and paraphrased by Schelcher, Die Haftung des Staates für Eingriffe in Privatrechte (Leipzig, 1921) 30. Heffter later (1851) changed his mind and predicted that the principle of state responsibility would be generally recognized. Archiv des Criminalrechts (1851) 455 cited by Zachariae, 598.

21 Von Mohl, System der Präventiv-Justiz oder Rechtspolizei (2d ed. 1845) 555 et seq.

22 Bluntschi, (1865) 1 Verhandlungen des 6. Deutschen Juristentags, 45-52. The same general view, unless statute expressly provides otherwise, is adopted by Lorenz von Stein, Zorn, v. Rönne, Dernburg, Förster, Jellinek, v. Seydel, Rehm, Cosack and Bornhak. See the citations to the works of these eminent jurists in Dock, Die Haftung des Staates aus rechtswidrigen Handlungen seiner Beamten, in (1900) 16 Archiv für Öffentl. Recht, 244, at 250. See also Schelcher, op. cit. supra note 20, 29. Some of the supposed arguments against responsibility, notably the postulate that "the State" is incapable of wrongdoing, are set forth in Copertin, Monographies de droit public, (Paris, 1909) 148 et seq.; and in Rayces, Responsabilidad del poder publico, (1917) 34 Revista Juridica y de Ciencias Sociales, 15 et seq.; and in Rayces, Responsabilidad del poder publico, (1917) 34 Revista Juridica y de Ciencias Sociales, 15 et seq.; and in Rayces, Responsabilidad del poder publico, (1917) 34 Revista Juridica y de Ciencias Sociales, 15 et seq.; and in Rayces, Responsabilidad del poder publico, (1917) 34 Revista Juridica y de Ciencias Sociales, 15 et seq.; and in Rayces, Responsabilidad del poder publico, (1917) 34 Revista Juridica y de Ciencias Sociales, 15 et seq.; and in Rayces, Responsabilidad del poder publico, (1917) 34 Revista Juridica y de Ciencias Sociales, 15 et seq.; and in Rayces, Responsabilidad del poder publico, (1917) 34 Revista Juridica y de Ciencias Sociales, 15 et seq.; and in Rayces, Responsabilidad del poder publico, (1917) 34 Revista Juridica y de Ciencias Sociales, 15 et seq.; and in Rayces, Responsabilidad del poder publico, (1917) 34 Revista Juridica y de Ciencias Sociales, 15 et seq.; and in Rayces, Responsabilidad del poder publico, (1917) 34 Revista Juridica y de Ciencias Sociales, 15 et seq.; and in Rayces, Responsabilidad del poder publico, (1917) 34 Revista Juridica y de Ciencias Sociales, 15 et seq.; and in Rayces, Responsabilidad del poder publico, (1917) 34 Revista Juridica y de Ciencias Sociales, 15 et seq.; and in Rayces, Responsabilidad del poder publico, (1917) 34 Revista Juridica y de Ciencias Sociales, 15 et seq.; and in Rayces, Responsabilité du pouvoir public, (Paris, 1921) 78 n.

23 Loening, Die Haftung des Staates aus rechtswidrigen Handlungen seiner Beamten (Dorpat, 1879) 134. This monograph, which has become a classic, is one of the ablest ever written on the subject. Loening maintains that no general principle of State responsibility can be predicated on the relation of State to officer or officer to individual but that each activity must be independently investigated to determine whether responsibility is justified or not. His position is not therefore one of outright opposition to State responsibility, but approximates that of the Tribunal of Conflicts in its celebrated decision in the Blanco case (1873), Lebon, 61, Teissier, La responsabilité de la puissance publique (Paris, 1906) 78 n.

24 Gabba, Della responsabilità dello stato per danno dato ingiustamente ai privati da pubblici funzionari nell' esercizio delle loro attribuzioni, (1831) 6 Foro Italiano, Part I, col. 932. See comment in Meucci, Instituzioni di diritto amministrativo (6th ed. Torino, 1909), 252-255, citing Italian decisions and literature, and 5 Giorgi, Teoria delle obbligazioni (7th ed. 1909) 552 et seq. While the classical theory of irresponsibility for "governmental" acts still predominates in Italy, it is being broken down by the opinions of jurists and numerous decisions of the courts. See Sicilian, Le responsabilità dello Stato e degli enti pubblici per i fatti illeciti dei loro funzionari (1904) 38 Rivista Ital. per le scienze giuridiche 1 at 81, 83, 88. Trentin, La responsabilità collegiale. (Milano, 1910) 337 et seq. 431 et seq. Forti, Studi e questioni di diritto amministrativo. (Torino, 1906), c. VII. For a criticism of the theory of irresponsibility, see Giorgi, op. cit. 536 et seq. and ibid., Dottrina delle persone giuridiche (2d ed. Firenze, 1900) 151 et seq. Also Chiodoni, op. cit. supra note 19 (Colpa contrattuale) 497.
GOVERNMENTAL RESPONSIBILITY IN TORT

Sarwey, Piloty, Laferrière, Michoud, Larombière, Sourdat, and leading decisions of the German, French, Swiss, Italian and other courts adopted the catagorical view that in all matters affecting the State or minor public corporation in a capacity other than as a property owner or contractor, the tort of an officer was personal to him alone. For their authority, these jurists rely upon the older views that fault is personal, that a corporation cannot commit a tort or that an officer committing a tort is either no agent at all or acts *ultra vires*. Their main thought, however, to support which they rationalize legal rules, is that there is no adequate ground of public policy justifying the State in its

---

25 Sarwey, *Das öffentliche Recht und die Verwaltungsgerechtigkeitspflege* (Tübingen, 1880), 304, citing Stein, von Röane, and others in support.


28 Michoud, *De la Responsabilité de l'Etat à raison des fautes de ses agents*, (1895) 3 *Rev. de Droit Pub. *401. Michoud in 1895, insisted on the validity of the classical distinction between acts of *gestion* (public and private) and acts of *puissance publique*. To the former, he would apply articles 1382 et. seq. of the civil code. For the latter, he held the State not responsible because he could find no legal principle that was applicable. "Public law" and "equity" he deemed too vague. He advocated progressive legislation making the State responsible. By 1909, when he published his *Théorie de la personnalité morale* (2d ed. 1924) 258 et seq., he confessed that he could find "principles" of public law on which to hold the State responsible even as a *puissance publique*. See Marco, *op. cit. supra*, note 3, 246.

29 Larombière, *Théorie et pratique des Obligations* (Paris, 1885) 617, commentary on Article 1384 C. C.


34 See the decisions cited by Gabba in 6 *Foro Italiano*, (1881) 935 and in Raneletti, *Per la distinzione tra gli atti d'impero et di gestioni*, in *Studi in onore di Vittorio Scialoja* (Milan, 1905) 701 et seq.
"public" as distinguished from its "private" capacity, in assuming responsibility for the torts of officers.

Bluntschli discussed the subject in 1865, when there was already, as we shall see, a considerable popular and professional demand for the assumption by the State of responsibility in tort, at least in a subsidiary way. After attempting to show that the legal theories of fault and agency excluded State liability, he added that equitable considerations also negatived such responsibility. He contended that it was a mistake to believe that severe burdens should be borne by the State to the relief of the citizen; that the citizen pays no premium for such insurance, as he does in the case of state fire insurance; that taxes would be greatly increased and state economy disturbed; that the tendency of legislation was to protect officers against promiscuous suit, thus narrowing the claims of the individual, and that the assumption by the State of the officer's responsibility would be likely to restrict still more the individual's right of recourse. Bluntschli admitted exceptions to irresponsibility in case (a) an individual deposited money with a court or other public officer, in which case the office rather than the officer was trusted; (b) in case the State takes control of property by compulsion, as in sequestrations, search of prisoners, etc., and (c) in case the State operates public utilities as a private corporation might, in which event it was subject to the ordinary rules of private law. To exception (a) court deposits, Heffter would apply the qualification, as some American courts still do that the State responsibility can only be sustained if the State has expressly assumed a guaranty or control and supervision over the money or function, e.g., the keeping of a mortgage register. But Heffter would admit (d) responsibility for the misuse or abuse of governmental powers which the State has directly commanded or for failure to exercise proper supervision, and (e) in the event of the unconstitutional appointment of a wrong-doing officer.

Piloty rejects the doctrine of State responsibility by disputing, as unsubstantial fictions, the arguments upon which responsibility has been founded. He denies the validity of the artificial public law "personality"

---

35 Bluntschli, loc. cit. supra note 22. For an excellent critique of Bluntschli's views, with the general conclusion of which he agrees, see Loening, op. cit. supra note 23, 108.

36 The public officer entrusted with public moneys is held to a high degree of responsibility, often almost that of an insurer. In most jurisdictions, he is held personally responsible for loss through the failure of a bank in which he has deposited the funds. U. S. v. Prescott, 3 How. 578 (U. S. 1845); Shelton v. State, 53 Ind. 331, 334 (1876); Wiley v. Sparta, 154 Ga. 1, 114 S. E. 45 (1922). See 22 R. C. L. § 136 et seq. 191 et seq. The suggestion that the State ought to assume responsibility to citizens for the safety of funds turned over to public depositaries is hard to find in American decisions.

of the State, in order to impose responsibility as upon a private corporation; he denies that this artificial "personality" appoints officers; or that their acts are equivalent to acts of the State; or that the citizen is bound to obey the artificial "personality" called State or its officers. Only the State's assumption of responsibility by contract or statute or its "own" fault, says Piloty, could impose responsibility. The suggestion that by appointment of the officer the State impliedly assumes such contractual responsibility or guaranty, Piloty contests by asserting that this is merely a roundabout way of basing liability on fault; he demands, on the contrary, some express assumption of responsibility. The argument that the State is responsible because it has appointed the officer, Piloty says, arrives by indirection at the old private law fault in selection under the mandate theory, though actually the modern French theory is very partial to the view that because the State, by appointment, has enabled the officer to commit injury, the State should bear the resulting responsibility. Piloty states that a mere feeling that justice requires State responsibility is insufficient; he insists upon an established legal theory in support and finds none that is logical on private law conceptions. Gabba qualifies his "principle" of non-responsibility by exceptions which practically destroy it. After declaring the practically universally admitted continental rule that the principle of irresponsibility does not apply to matters of State contracts and property relations, including torts committed in the operation of public utilities, leasing, concessions—what he calls the incidental ("corporate?") rather than the natural ("governmental?") functions of the State—he recognizes responsibility for the torts of two important classes of officials: (1) those under the immediate direction and supervision of the Government, such as the military and customs officers, forest guards and others of similar nature, and (2) officers who deal with the citizen's property, such as tax collectors, depositaries of public funds or merchandise, etc. The exception for military and customs officers is explained on the ground that they are

38 Piloty, op. cit. supra note 26, 245, at 271 et seq. A somewhat similar rejection of practically all the theories, private and public, upon which State responsibility has been justified, will be found in Coesters, Die Haftung des Staates für Amtsdelikte bei Ausübung der öffentlichen Gewalt nach preussischem Rechte (1911) 5 JAHRBUCH DES ÖFFENTLICHEN RECHTES, 285. An argument to the effect that all forms of assumption of State responsibility or indemnification, except its responsibility as a Fiscus, rest on public law grounds, even when the State assumes the identical duty to pay which in private law rests on the officer (See German, law of 1910, Prussian law of 1909, infra and H. R. 9285, 70th Cong. 1st Sess.) will be found in Mayer, Haftung des Staats für rechtswidrige Amtshandlungen (1913) Sächsisches Archiv für Rechtspflege, 1-22.
not really officials or else that they are so closely identified with the State as its organs and instruments that they cannot be considered as agents or employees—a distinction which weakens materially the alleged principle of non-responsibility, for it would be equally applicable to police officers, firemen, and others who are vested with a considerable degree of discretion. Why they are not officials is not explained. The second exception for public depositaries is justified, as it was by Bluntschli, on the ground that the office is trusted and not the officer.

Finally, to the frequent exception that the State is responsible for its negligence by failing to appoint competent officers or to exercise proper supervision, (culpa in eligendo or custodiendo), a ground more theoretical than practical, it has been answered that “the State” does not appoint or supervise, but some higher official or body, so that we are in no stronger position to assert State responsibility than we were before. Moreover, it has been said, the State is under no duty to appoint competent officers and hence cannot be charged with responsibility for negligence in appointing incompetent or inefficient officers.

A great many of the so-called “civilians” in France and elsewhere, those jurists who would support responsibility only on the authority of principles of private or civil law, limit their admission of responsibility to those cases in which the State acts as a private corporation might, that is, in the administration of State property, the conclusion of contracts, the operation of certain public utilities, variously designated as actes de gestion privée, acts of the “Fiscus,” administrative or “corporate” acts. The inapplicability, in their judgment, of principles of private law to the activities of the State as a governing institution, leads them to conclude that there can be no State responsibility for “governmental” or “sovereign” acts, known as actes d’autorité, actes de gouvernement, “puissance publique,” “Staatsakte,” in the absence of special legislation according compensation. In this view, they are joined by numerous “publicists,” that is, specialists in public law, who find in the existence of special statutes, such as those granting State indemnity for errors of criminal justice, for the establishment of State monopolies, etc., a convincing indication that in principle there is no State responsibility for injuries inflicted in the performance of “governmental” functions. They claim that for

---

30 Richelmann, loc. cit. supra note 20, quoted in Schemcher, op. cit. supra note 20, 30.
fault of officers in the performance of "corporate" functions the State is responsible, not on private law grounds, but on equitable considerations, found in no legal text. From this premise, and from the postulate that the State as a "governing authority" (puissance publique) is unlimited in its liberty of action, they conclude that there can be no responsibility for "governmental" acts. The supposed logic is as follows: "Fault," the only basis of responsibility admitted, implies a breach of duty. But such duty implies a restraint on freedom of action. Now, as a "governing authority" the State's freedom of action is ex hypothesi unlimited. Hence, the State as a "governing authority" (sovereign) cannot commit a fault or incur responsibility. They add that irresponsibility for actes d' autorité (governmental determinations) is required in the interests both of the government and of the citizens. The administration would lose the initiative which is essential to it, if it were continually threatened with suits for damages and the budget endangered; besides, they assert, the individual is more interested in having the injurious action annulled, withdrawn or repealed, than in obtaining damages.

While there may be good grounds of public policy why certain acts of government should escape judicial accountability to individuals injuriously affected by them, the reasoning just suggested can hardly make any convincing appeal or afford any serious criteria for determining what those acts shall be. The postulates on which the deductive reasoning is based, such as the State's unrestrained liberty of action and the impossibility of "sovereign" torts, can only be deemed assertions and not arguments. The characterization of "sovereign" acts is often likely

---

droit civil français (5th ed. Paris, 1920) 387 § 447. The editor of the 5th ed., Prof. Bartin, shows the great changes experienced by French law since the publication of the earlier editions, note 18 bis; Laromière, op. cit. supra note 29; 20 Laurent, Principes de droit civil (Brussels, 1876) No. 418 (really a Belgian).

Among the French "publicists" who share this view are Laferrière, op. cit. supra note 27, I, 184 et seq., 680 et seq. Barthélémy, Traité élémentaire de droit administratif (10th ed. Paris, 1923) 86. The author notes the changes effected by court decisions.

Michoud, De la responsabilité de l'Etat (1895) 3 Rev. de Droit Pub. 401. Though a writer on public law, Michoud is usually classified as a "civilian," because he admits the application of the civil code to the State for all acts of gestion. Daireste, La justice administrative en France (2d ed. 1914) 525 et seq. 1 Aucoc, Conférences sur l'administration (3d ed. 1885) § 288. Brémond, Traité ... de la compétence administrative (Paris, 1894) § 1507. Roger, De la responsabilité de l'Etat (Paris, 1900) 42. The principal German "civilists," before the enactment of the civil code, are Carnberg, Förster, Cosack, Endemann. The principal German "publicists" are Bluntschi, Loening, Sarwey, Piloty, Jellinek, Rehm. The principal Italian civilists are Gabba, Giorgi (op. cit. note 24, Obbligazioni V, 556 et seq.). The principal Italian publicists are Meucci, Orlando, Siciliani, Forti. The unwillingness to admit the applicability of civil law principles has led some writers to deny that the State is responsible at all in tort, and others to assert that it is responsible on principles of public law only. See infra, p. 615, and note 99.

This is somewhat analogous to the reasoning of Mr. Justice Holmes in the "Western Maid." 257 U. S. 419, 433, 42 Sup. Ct. 159 (1922); (1927) 36 Yale L. J. 794.
to be a premise or label, mistaken for a reasoned conclusion, purporting to justify irresponsibility.

Duguit had the support of a growing line of decisions when he disputed the validity of the time-honored distinction between non-sovereign "corporate" (gestion) and sovereign "governmental" (autorité) acts, and when he contended that the mysterious concept of "sovereignty," supposedly inconsistent with responsibility, had to be exposed and dissipated. He therefore undertook to unmask the illusions and metaphysics of sovereignty, and by substituting for it the idea of "public service," he has deprived the theory of irresponsibility of one of its staunchest supports.43 No longer overwhelmed and disarmed by the mesmeric word "sovereignty," the problem can be approached in the cold light of reason and social expediency to determine how far the State or political group ought under given circumstances to assume responsibility for injuries sustained at the hands of the official machine.

While it was once thought that there was some clearly distinguished line of division between administrative or "corporate" acts, on the one hand, and "governmental" or sovereign acts, on the other hand, which could make this classification useful, time has shown that the dividing line varies not only from country to country, but shifts from decade to decade in the same country. Not only has there been a uniform movement of the line in the direction of an enlargement of the category of "corporate" acts and a narrowing of the field of "governmental" acts, minimizing the intrinsic value of the classification, but the belief that there was an inherent non-responsibility for "governmental" acts has been shattered by the development of legislation and court decisions.44 The movement has gone so far as to suggest that there is no essential difference in principle or theory between injuries inflicted wrongfully and those inflicted rightfully in exercise of the police power.45 It must also be recorded that many writers, like Loening and others, following the view of the French Council of State in the Blanco case46 assert that it is impossible to predicate non-responsibility or responsibility on any

---

43 Duguit, The concept of public service (1923) 32 YALE L. J. 425, 433; Law in the Modern State (1919) ch. II, VII. (Laski's translation of Duguit's, Les transformations de droit public); Traité de droit constitutionnel (2d ed. 1923) III, §§ 81-83. We may support this result, without fully subscribing to Duguit's belief in the entire uselessness or obsolescence of the concept "sovereignty." Cf. (1927) 36 YALE L. J. 760 et seq.


45Von Bernegg, 97 et seq.

46 (1873) Sirey, 1873, 2, 153. On this decision see Duguit, Law in the Modern State (1919) 156.
general or absolute rule, but that the issue must be determined on the special facts of each case with a view to harmonizing the interests of the State with the interests of the injured individual. All this will be more fully discussed hereafter. For the present, we are primarily interested in examining the theories on which non-responsibility or responsibility has been maintained.

THEORIES OF RESPONSIBILITY

The classification of the theories of State responsibility may be made on the basis (a) of the grounds on which responsibility is predicated or (b) of the extent to which it is admitted. So far as concerns the latter class, there are those who have admitted State responsibility for the tortious acts of all officers, whether superior or inferior in rank, whether judicial or administrative, whether arising out of fraud, wilful act or negligence, whether acting in "corporate" or "governmental" matters. Most of the writers, the legislatures and the courts, however, have imposed qualifications on the generality of these admissions. Some approve a primary responsibility of the State, others only a subsidiary liability, after the vain exhaustion of remedies against the officers. Some uphold a general primary responsibility, others only a limited responsibility, others still a general subsidiary responsibility. The examination of these classifications of the extent of responsibility we shall reserve until we come to study the incidence of responsibility as between State and officer in the positive law of various countries.

We are now interested in an examination of the scientific and doctrinal explanations which have been advanced in support of the responsibility of the State.

The older theories of State responsibility, expounded by jurists before the nineteenth century, rested largely on a supposed State negligence in selecting or supervising the wrongdoing officer (culpa in eligendo or

---

47 In general, this closely approximates the view of Loening, op. cit. supra note 23, 109, 110; Schelcher, op. cit. supra note 20, 33-36. Loening claimed (1879) that State responsibility could not be predicated on any particular legal theory or even on principles of justice. In general, therefore, he opposed responsibility. He was willing to make certain concessions to responsibility where the citizen was forced to enter into relations with certain officials, particularly in the conclusion of public contracts and deposit of money in court. See the views of the school that denies the validity of any single principle in Giorgi, op. cit. supra note 24 (Obbligazioni) 553.

48 The views of German writers of the nineteenth century are partly classified, according to the extent of responsibility admitted, by Pilroy, op. cit. supra note 26, 245, 249 et seq. See also Dock, loc. cit. supra note 22, 248. The several views are also set out, with citations, in the works of Giorgi and of Chironi, op. cit. supra notes 24 and 19, at pages cited.
This, for the most part, was usually a pure fiction and the nineteenth century practically abandoned it.\(^4\)

Again, the Roman \textit{mandatum} was relied upon. But, like most of the isolated texts and institutions that have been invoked from the Roman law, the theory of \textit{mandatum}, the nearest approach to the modern notion of agency, was of extremely limited application, even in contract, and in the matter of torts, it could be invoked only by tenuous analogy to justify the doctrine of \textit{respondeat superior}.\(^5\)

The very term "responsibility of the State" has been subjected to challenge. "Responsibility," it is alleged, arose out of civil law conceptions implying a competent and cognizant wrongdoer, wrongful act, and a penalty. The State, it is said, does not meet these tests. As an entity, it rarely orders a wrongful act; the private law tests of tort may apply to individuals, including officers, but only by doubtful analogy can they be imputed to the State; and the only penalty possible is money damages, not specific performance or fine. Even the limited suability admitted in eminent domain, in contract, in property relations, constitutes, it is claimed, no evidence in principle contradicting absolute sovereignty and hence irresponsibility.

If responsibility is based solely on some wrongful or erroneous or even injurious act causing damage, as private law assumes, then the term "responsibility" can be ascribed to the State only within narrow limits. In fact, the modern State has by statute or decision assumed responsibility for damages sustained in innumerable ways—through the acts of mobs, through erroneous criminal convictions and arrests, through war, through the defective condition of roads and streets, through the unexpected collapse of walls, through the accidental explosion of shells left in the field, through artillery fire across one's land, through the suppression of private industry on behalf of a State monopoly and through all

\(^{4}\) The works and theories of the older writers on our subject, such as Paulus de Castris (d. 1441), Ludovicus Romanus (1409-1439), Hieronymus Schürpf (1481-1554), Nikolaus Myler von Ehrenbach (1678), SAMUEL STRYK, \textit{De obligatio- tione principis ex facto ministri} (1682), Nikolaus Hert (1709), J. P. Kress (1732), von Kreitmayer (1756), J. F. W. de Neumann (1751), together with numerous court decisions of the period are reviewed by LOENING, \textit{op. cit. supra} note 23, 38 et seq., by Zachariae, \textit{loc. cit. supra} note 10, 591 et seq. and by F. Mecacci in (1877) 2 \textit{FOrO ITALIANO}, 78 et seq. Heffter and a few others still admitted a responsibility for negligent selection or supervision. The objection is not to the ground itself, but to its truth in fact.

Yet the French Council of State recently held that where a soldier quartered in a house, while in a fit of drunkenness killed a child, the implied "absence of supervision" imposed responsibility on the State. Lhuillier, Nov. 14, 1919, Leb. 819, 38 REV. DR. PUB. 345.

\(^{5}\) On \textit{mandatum} and liability for third parties in Roman law, see BUCKLAND, \textit{Elementary Principles of the Roman Private Law} (1912) 281, 325, 327. See also (1926) 36 YALE L. J. 4 et seq.

forms of eminent domain—cases in which a wrongful act attributable to the State would be difficult to identify. Hence the suggestion that the term “responsibility,” when applied to the State, is a misnomer, for the principles and facts out of which arises the payment of compensation differ materially from our conceptions of private law responsibility. The term “indemnification” might be preferable, when describing those compensations made by statute or decision under circumstances implying no wrongful or erroneous act, or where “fault” is invoked as a fiction merely to furnish a basis for assessing damages. Yet the connotations of the term “responsibility” have been broadened, perhaps in imitation of its private law extension, to cover not only the traditional concept, but also cases of indemnification without fault. The great variety of circumstances giving rise to successful claims for compensation, ranging from an official tort to the purest accident, demonstrates that no single legal theory can sustain all the cases, however general the underlying philosophy. The extension of State responsibility in France and Germany has induced the proposal of new theories, notably that of “social risk,” without necessarily causing an abandonment of the older theories based on “fault.”

The early juristic obstacles to the assignment of fault to corporations and hence to the State have long since been overcome, and notwithstanding Duguit’s assertion that the State is merely a collection of public services and not a corporation, legislatures and courts are daily assessing damages against it as an entity. Yet by reason of its very nature, its responsibility cannot always be determined and measured by the identical rules governing the activities of individuals and private corporations. While in some respects, it assumes by statute a greater responsibility than would rest on individuals or private corporations, as in the case of mob violence, injuries sustained on public roads, and through errors of criminal justice, it incurs on the whole a responsibility less and different than do the subjects of private law. In legislative and judicial functions, it escapes responsibility for injury to the individual, unless it expressly assumes it, and this it rarely does. In administrative matters, while possessing prerogatives not claimable by private individuals or corporations, its responsibility is growing ever greater—not necessarily, however, by extension of the rules of private law but, as in France, by the decisions of administrative courts creating or applying principles of so-called public law, which again place the State under a legal régime differing from that governing private individuals or corporations. How much difference in actual result the two systems display may be open to question, for in Germany a system operating with the conceptions of the civil code has had no difficulty in working out responsibility for the
torts of officers. So in England and the United States, where pending legislative reforms contemplate the assumption of State responsibility for wrongful acts or omissions of officers acting within the scope of their employment, there would seem to be little difficulty in transferring from the officer to the State those conceptions of tort responsibility which have long governed the relations between officers and private citizens. Inasmuch as these countries are not proposing any wide assumption of responsibility for accidents or for injuries inflicted under the police power, the European theories of responsibility in cases not involving the torts of officers, will be recognized as included in this study for scientific completeness only.

DISTINCTION BETWEEN "GOVERNMENTAL" AND "CORPORATE" FUNCTIONS

Before entering upon an examination of the theories of responsibility, it seems necessary to note the distinction made in most of the countries of Europe between the "governmental" and the "corporate" functions of the State. The history and theory of public responsibility, as in the case of our municipal corporation, are closely identified with this distinction. It was deemed indispensable, because of the historical identification of "sovereignty" with irresponsibility and because of the growing recognition that in some cases the State, continually broadening its activities, must assume responsibility for the torts of its officers. Emphasis upon the distinction was encouraged by the desire to widen the scope of responsibility and to restrict the field of irresponsibility. It was fostered by jurisdictional considerations, such as the theory that only the State as a "corporation" could be made judicially responsible, that the rules of the civil law could be applied only to a "corporation" or else, as in Belgium, that there was no court which could assume jurisdiction over acts performed in the exercise of "governmental" functions. That the distinction has either broken down or lost much of its importance, in countries like France and Germany, is due to the fact either that legislation has opened to the citizen a right of action in tort even in "governmental" matters, as in Germany, or else that the administrative courts, as in France, have modified their conception of the "corporate" function of the State or have found it inexpedient to maintain a distinction which had become artificial and academic. The French courts, in fact, by extending responsibility into fields theretofore deemed exclusively "governmental," as in the case of acts of police, and by continually enlarging the domain of "corporate" or "proprietary" acts, have undermined both the purpose and the grounds of the distinction. It has, however, a great historical interest and still has in many countries a very practical impor-
tance. It must be remembered that it was invented by jurists largely for the purpose of limiting the irresponsibility attached to the so-called "sovereign" activity of the State.

From the days of the Roman law the continental jurist had been familiar with the conception of the Roman Empire or State in its property or pecuniary relations. The postglossators emphasized the distinction between the Respublica and the Fiscus, between the State in its governmental and in its property relations, between imperium and dominium. While there is much historical dispute as to whether the fiscus was a corporation in Roman law and thus deemed a subject of law, and if not, when the fiscus concept was received in continental jurisprudence as a corporation, suing and suable as such, there is no doubt that by the nineteenth century, with the complete separation of the State's imperium from its dominium, the doctrine was fully accepted. The doctrine of State property arose in the European towns of the Middle Ages, when the Holy Roman Empire had begun to decay. They combined the facts of their corporate life with the texts of the Roman law relating to the Fiscus, and thus developed a conception which was later applied, like the doctrine of the corporation itself, to the Germanic territorial State. The confusion and uncertainty during the Middle Ages was due to the fact that the feudal lords were deemed sovereigns as well as proprietors and carried their regal prerogatives throughout all their functions, a position which survived the growth of the doctrines of monarchy and of sovereignty. It was only when the separation of imperium and dominium was again insisted upon by the publicists of the school of natural law of the seventeenth and eighteenth centuries, that we had a renewed recognition of the differentiation of functions in the State into "corporate" and "governmental." The suability and re-

---

52 Digest XLIX, 14, 3, 6, De jure fisci. See on the Roman law development of the Fiscus and the discussion as to whether it was then deemed a juristic person. HATSCHEK, Die rechtliche Stellung des Fieksus (Berlin, 1899) 24 et seq., and 3 GIERKE, Deutsches Genossenschaftsrecht (1887) 60 et seq. 1 Mittheis, op. cit. supra note 15, 348 et seq.; 2 Mommsen, op. cit. supra note 15, 998; BUCKLAND, A TEXT-BOOK OF ROMAN LAW (1921) 176 et seq.; VASSALLI, Concetto e natura del fisico (from Studi Senesi, v. 25, Turin, 1908) 27 et seq. and the excellent review by Koschaker in (1911) 32 Ztschel. der Savigny-Stiftung, Rom. Amt., 407 et seq. Jones, The early history of the Fiscus (1927) 43 L. Q. Rev. 499 et seq. Vingradoff in (1924) 12 Calif. L. Rev. 443. On the origin of the Roman fiscus as the personal treasury of the Emperor, and its confusion with the public aerarium, see SERRIG, op. cit. supra note 4, 96 et seq. 2 ibid. 1 et seq.

53 WOOLF, BARTOLUS OF SASSOFORE, (1913) 119-122. HATSCHEK, op. cit. supra note 52, 26. The medieval development of the Fiscus in the Frankish Kingdom and the Leges Barbarorum is well described by Jones, loc. cit. supra note 52, 504 et seq. and by VASSALLI, op. cit. supra note 52.

54 The history of the Fiscus conception and its development in continental law is treated, in addition to Hatschek, by 1 MAYER, Deutsches Verwaltungs recht, (3d ed. 1924), 49 et seq. RICHTER, Der Reichsfiskus, (Tubingen, 1908) 3 et seq. 3 GIERKE, Deutsches Genossenschaftsrecht, 54 et seq. by Jones, loc. cit. supra note 52, 499, and VASSALLI, op. cit. supra note 52.
sponsibility of the State in Central Europe developed along lines quite different from those prevailing in England, and more nearly analogous to those with which we have become familiar in the American law of municipal corporations. In France, the conception of Fiscus was sub-
merged by the wider concept of State property (domaine privé and public.) Yet the legal result was not far different in subjecting publicly owned property to the legal relations customary for private property and in subjecting the State in its function as a business entrepreneur to rules of law analogous to those which governed other corporations; although in the operation of the public service (gestion publique) the French administrative courts reached the result by the application of rules of what was called "public law."

The content of the concept Fiscus has varied and is not now certain. In imperial Rome, it was a term designating the Emperor's and then the State Treasury. In modern Europe, it was extended to cover the Treasury and fiscal relations of the State and its "private" and "public" property—such a distinction having developed—and the State when exercising "corporate" functions. It is thus but one aspect of the State and of other public corporations as well. It involves in a general way the administration of the Treasury, including tax collections, money deposits with official bodies, including courts, custom houses and other depositorys; the operation of railroads, forests, mines, and postal telegraph services and public utilities in general, including business enterprises such as the tobacco, match, liquor, porcelain and other monopolies; and the ownership and management of publicly owned land, buildings and other physical property.

Doubts have arisen, for jurisdictional purposes—when the State undertakes administrative acts with public property,—whether the fiscal or the administrative feature predominates. Europeans have had as much difficulty in delimiting the exact boundaries of the State or city as a Fiscus as we have had in determining the "corporate" functions of our municipalities. In France, the distinction between acts of gestion privée, the management of public property, and gestion publique, of public services, was not always clear, the former, like the Fiscus in Germany, being subject to the jurisdiction of the civil courts and the rules of civil law, the latter to the administrative courts and so-called rules of public

---

55 The distinction between the "public" and the "private" property of the State is well established in France, though it is not logically carried out. The "private" property is alienable, though not the "public" property. See Civil Code, Arts. 537 et seq. Hatscherk, op. cit. supra note 52, 36 et seq.

56 Primker in the Ninth DEUTSCHER JURISTENTAG (1870) III, p. 28 lists some of the enterprises and activities included in the conception of Fiscus.

law developed by them. The main distinction lay in the fact that in *gestion privée* the State is deemed a corporation of private law, in *gestion publique*, of public law, a distinction which since 1873; has determined the jurisdiction, respectively, of the ordinary courts and of the administrative courts. In both, however, the doctrine of *respondeat superior* is applied to the State and minor public corporations, though the administrative courts have advanced beyond this technical position.

By articles 31 and 89 of the German Civil Code the State and other public corporations acting in their “corporate” (*Fiscus*) or private law capacity—designated as the Railroad *Fiscus*, the Postal *Fiscus*, etc.—are responsible, like any private corporation, for tortious injuries inflicted upon third persons by their constitutional or directing officials acting within the scope of their official duties. Their acts are deemed acts of the corporation itself. For the acts of minor employees and agents, the *Fiscus* assumes responsibility under sections 831 and 278 of the code, which enables the State acting and sued as a *Fiscus*, to escape responsibility by proving that it was guilty of no fault in selecting or supervising the employee or supplying equipment or that the injury would have happened regardless of the State’s blamelessness in these respects. Strangely, in “governmental” matters, a wider public responsibility has been imposed by a statute of 1909 in Prussia and by a statute of 1910 and by article 131 of the Weimar Constitution of 1919 in the Reich.

The courts of France reach somewhat the same conclusion—though a more unqualified responsibility in “corporate” matters—either by the application of articles 1382 and 1384 of the Civil Code making a “person” responsible for his own torts and a master for those of his employees86 or by the application of a somewhat analogous principle of so-called “public law.” In “corporate” functions of the State, many countries of Europe and Latin-America follow the French practice.

---

86 Article 1382: “Any act by which a person causes damage to another binds the person by whose fault the damage occurred to repair it.”

Article 1384: “A person is responsible not only for the damage which he causes by his personal acts, but also for the damage caused by the acts of persons for whom he is responsible.” The Belgian, Italian and Roumanian codes contain identical provisions. *Cf.* ROGER, *op. cit. supra* note 41, 29-32.

TIRARD, *op. cit. supra* note 27, 15 et seq. The State, in its acts of *gestion publique* is deemed to act as a private person or corporation might in the management of his property. BERTHELEMY, *op. cit. supra* note 41 (10th ed. 1923) 87; Michoud, *loc. cit. supra* note 41, 14. BAILBY, *De la responsabilité de l’État envers les particuliers* (Bordeaux, 1901) 50, 78.

Somewhat similar provisions are to be found in the Swiss Codes: Art. 55 of the *Civil Code* makes the public corporation responsible, when it enters into private law relations, for the acts of its “organs”; article 61 of the *Code of Obligations* (1911) imposes the same duty when the officer is engaged in private or “industrial” matters (*gewerbliche Verrichtungen*).

VON BERNEGG, *op. cit. supra* note 31, 70.

SCHÜTZ, *op. cit. supra* note 10, 20, who states that these articles impose no responsibility for “governmental” acts. VON BERNEGG (p. 70) agrees. But *cf.* 1 ROSELL ET MENTHA, *Manuel du droit civil suisse* (2d ed. 1922) 118.
The French law, under the ancien régime, and down through the eighteenth century, dominated by notions of royal and sovereign infallibility and unaccountability, found much difficulty in conceiving of any legal theory of public responsibility. After the French Revolution, which merely transferred sovereignty to the people, came certain definite innovations, namely, the creation of the Council of State with administrative control over the administrative hierarchy, the recognition of private rights of the individual against the group, the enactment of statutes making the State judicially responsible for injuries inflicted in the construction and operation of public works. These developments induced jurists and courts, notwithstanding the doctrine of separation of powers, to develop a theory and a practice protecting the individual against invasion of his rights by the administration. Influenced by the tradition of irresponsibility, public acts, apart from legislation and judicial decisions, were divided into two great groups, the actes de gouvernement (Government) and actes d'administration (administration)—a classification to which, after a long and circuitous evolution, legal theory now seems to have recurred. In the former category, which has varied in content, were included political acts which escape judicial review looking to damages, such as high executive acts, diplomatic functions, acts to promote the public safety, acts of war, etc. For "reasons of State" it is said, these acts, the criterion of which is political rather than legal, should not admit of an action for damages on the part of those who may be injured by them, unless special legislation permits. Actually, no acceptable criterion to establish "acts of government" has been devised. The old criterion of "political aim" has been replaced by "nature of the act," too vague a clue for utility, so that enumeration has become the practice of courts and jurists. The distinction between "acts of government" and "acts of administration" is political.

Hauriou, Précis de droit administratif (10th ed. 1921) 433; Appleton, Traité élémentaire du contentieux administratif, (Paris, 1927) 287 et seq. Actually, no acceptable criterion to establish "acts of government" has been devised. The old criterion of "political aim" has been replaced by "nature of the act," too vague a clue for utility, so that enumeration has become the practice of courts and jurists. The distinction between "acts of government" and "acts of administration" is political. 2 Duguit, Traité de droit constitutionnel (2d ed. Paris, 1923) 245, 3 ibid. 695. For a list of "acts of government" see Hauriou, Précis de droit administratif (10th ed. 1921) 433; Appleton, op. cit. 290-300. Such legislation exists in the matter of judicial errors, for the statutory suppression of certain businesses, and in other respects to be noted hereafter.

The classification is not exact, and the fact is that for numerous acts of the highest executive officers and for the acts of diplomats, such as improper refusal of a visa, an action lies.

Several writers contend that these so-called "actes de gouvernement" are merely a class of administrative acts, for which it seems wise not to permit...
Acts of administration include all other executive or administrative acts, and are divided according to the classic distinction of the nineteenth century, into *actes d’ autorité* and *actes de gestion*. The distinction goes back to Merlin and Locré, who protested the suggestion that contracts made by the Government could not be challenged before the regular courts. They proposed the two categories of administrative acts, acts of authority (*autorité*) and management (*gestion*). The former, down to recent times, were described as acts of command, of decision, which give rise to no action for damages; the latter, the ex-
cution of such acts by administrative officers, which may entail responsibility. The former, in a broad sense, then usually characterized as acts of public power (puissance publique) would include legislation and decisions of courts and of administrative commissions, the execution of the laws, police and judicial acts, or such "governmental" acts as a private person could not perform; the latter, such "corporate" acts of management or administration as a private person might perform, e.g., the management of public property, the making of ordinary contracts, and engaging in State commercial enterprises. This was known as gestion privée, as distinguished from the operation of public services such as health and fire protection, railroad operation, gas, water and electric supply, known as gestion publique.

The endeavor to work out these classifications resulted in nearly as many artificial distinctions as the efforts of the American courts to dis-

Whether the trespass was wrongful or rightful seems to be immaterial, as well as the issue whether domaine privé or puissance publique is involved. MARCQ, op. cit. supra note 3, 111, 260 et seq. 2 MICHOUD, Théorie de la personnalité morale, (2d ed. Paris, 1924) 258 et seq. For the Italian view of the distinction, see RANELLITI, op. cit. supra note 34, and GIORGI, op. cit. supra note 24 (obbligazioni) 166 et seq.

Duguit never admitted the validity of the classical distinction, but proposed a distinction between contractual administrative acts and noncontractual (unilateral) administrative acts. LAW IN THE MODERN STATE, c. V.

Numerous writers point out the impossibility of separating clearly the act of gestion from that of puissance publique. The governmental authority (puissance publique) is a factor in all State acts, but is not believed sufficient to enable the State to escape subjection to the ordinary rules of law in cases which have been labelled gestion. MARCQ, op. cit. 312; HAURIER, op. cit. supra note 57 (9th ed.) 518 et seq. CHIRONI, op. cit. supra note 19, 505, 515 et seq.

The division for jurisdictional purposes between gestion privée and gestion publique is logical. The former come before the ordinary courts, applying the rules of the civil code, the latter before the administrative courts, applying rules of public law. The difficulty arises in applying the distinction between gestion privée and publique to actual cases, DUEZ, op. cit., 340 ff. Contracts entered into by the public service fall sometimes into one, sometimes into the other class. DUEZ, 342, discusses some of the criteria of the distinction.

The suggestion of Berthélemy, op. cit. supra note 41, 57, that in both types of gestion the State (or political subdivision or establishment) acts as a private person, seems a little difficult to support. At least, Berthélemy seems now the only distinguished authority to espouse this view, though Michoud once shared it with him. Indeed, the analogy of the "private person" has in France been applied by the courts as a test of gestion privée, thus openly admitting the inapplicability of the test to gestion publique. But in Belgium, gestion privée, involving the "private person" analogy, is about the only type of activity that has engaged the responsibility of the State, apart from the management of State property and invasions of private real property by the operation of public works and roads. MARCQ, op. cit. supra note 3, 244 et seq.
tistinguish "governmental" from "corporate" acts of municipalities. The method of making the State responsible for *actes de gestion* was conceptually to erect the State (or political subdivision) into a public "corporation" or "person," and thus to apply to it the civil law doctrines of agency and of "fault"—responsible either for its "own" faults under article 1382 of the Code or vicariously for those of its employees under article 1384. Possibly this result was aided by the fact that statutes of 1790, 1807 and 1836 had made the State responsible for injuries inflicted in the execution and operation of public works, a responsibility for which culpability or fault had not been required by the courts. But when the State acted in a "governmental" capacity, *(d' autorité)* or as a *puissance publique*, it was not a "corporation," and its officer not an agent; it was a sovereign incapable of "fault." Thus, the same officer might perhaps simultaneously perform a "corporate" and "governmental" act, and be and not be an agent. Moreover, while an *acte d' autorité* could be challenged and annulled for excess or abuse of power, and thus be subject to judicial control, it could not give rise to an indemnity.

---

66 COUZINET, *op. cit. supra* note 4, 129, n. 1, 3 DUGUIT, *Traité de dr. const.* (2d ed. 1923) § 82. Damage to private property occasioned by the execution of public works may be deemed a branch of eminent domain. In this matter the courts have made a distinction. If the State erects a building or does any other act that an individual might, invoking no exceptional rights, it is responsible like an individual for fault only; but if the public work is so important or unusual that an individual could not carry it out, and if exceptional public powers are invoked, such as operating the public highways, building railroads or canals, constructing tunnels, etc., the State is responsible, even without fault, for the damages it inflicts, whether because of a defective plan or official negligence or other reason. HAURIOT, *op. cit. supra* note 57 (9th ed.), 543 et seq. 2 AUÇOC, *op. cit. supra* note 41 (2d ed.) 155 et seq. 2 DUCROCQ, *Cours de droit administratif* (7th ed. 1897) 590. MARCQ, *op. cit. supra* note 3, 322.

67 Exereux, *op. cit. supra* note 41, 87 et seq. seems to adhere to this "logical" system, notwithstanding that the courts have abandoned it. He maintains that the State is not responsible for *actes d'autorité*, because it is not a corporation but a sovereign, and that it is responsible for *actes de gestion*, under article 1384 C. C., as a corporation.

PICOT, *op. cit. supra* note 3, 108-127, outlines the classifications of administrative acts proposed by numerous publicists. Some, like Michoud, (in 1895) admitted the "dual personality" theory; others denied it. All admitted a category of acts of sovereignty (*puissance publique*) and of management (*gestion*). Laferrière subdivided the latter into *publique* and *privée*. But they never agreed upon the criteria of classification, whether nature of the act or character of the officer or some other test. Michoud sagaciously affirmed that there was no criterion to distinguish *a priori* the two great classes. The Council of State made classifications empirically, without stating any tests. It began to be admitted that any public service might involve acts of both or either type, sovereign ("governmental") or non-sovereign ("corporate"). So the seizure of property for police purposes might be an act *d'autorité*, but its detention, like a deposit, would be an act *de gestion*. Such possibilities are known to our law [Building sewer governmental failure to remove obstruction corporate.] Judd v. Hartford, 72 Conn. 350, 44 Atl. 510 (1899); Perrotti v. Bennett, 94 Conn. 333, 109 Atl. 890 (1920). Doddridge, *Distinction between governmental and proprietary functions of municipal corporations* (1925) 23 Mich. L. Rev. 325. The effort to distinguish *gestion publique* from *gestion privée*, created for jurisdictional purposes, proved equally futile, and the results elusive, except that substantive responsibility was a consequence in both forums, administrative and judicial, respectively. Lafer-
A system so artificial was bound to break down. While the "private person" analogy may well apply to the State as a property-owner or manufacturer, contractor and merchant, (gestion privée) and thus justify the application of the rules of private law in the ordinary courts, it could hardly apply fully to the State as the administrator of the public services (gestion publique). The Council of State assumed jurisdiction over injuries inflicted in the conduct of the public services, and awarded damages not, it was said, under the rules of the Civil Code but on principles of public law, which in practice, however, resulted in compensation by the State for the acts of its officials. The division of jurisdiction helped to undermine the classical distinctions. The State "corporation" was an invention of the jurists. If it was a "corporation" for managing the railroads or giving fire protection, why was it not a corporation in extending police protection? The alleged distinction between the "governmental" State and the "corporate" State was by many jurists ridiculed. The fatuity of erecting the State into a corporation to make it responsible, and in another case denying responsibility because it was not a corporation did not escape notice. The State, like a municipality, never acts in its private interests, but always for the public, and it is always the same State or municipality, whatever public function it performs, a fact by no means fully appreciated by many American courts dealing with municipal responsibility.

The weakness of the traditional classification in France was disclosed by the fact that the Tribunal of Conflicts and the Council of State, not bound by any code, began to extend the category of "public services" (gestion publique) so as to include acts of police and other functions theretofore assigned to the field of acts of autorité or puissance publique, and to narrow the class of acts of gestion privée, over which the ordinary courts exercised jurisdiction. Thereafter the distinction

rière's proposal to confine the class of acts of gestion privée to the administration of State property and the railroads has not been successful. The whole effort at classification represents an attempt to find some scientific method of distinguishing acts for which the State is not responsible from those for which it is. As the Council of State has gradually extended responsibility to acts of police and similar acts formerly deemed to be privileged as within the State's "sovereign" functions (puissance publique or autorité), the old classifications and the supposed tests that distinguished them had of necessity to be abandoned.


Berthélémy and Michoud at one time denied that there was any legitimate distinction between acts of gestion du domaine privé and gestion du service public. To both, they would apply principles of private law, and hold the State responsible. They have had to take note of the development of jurisprudence in the Council of State, which, until recently particularly, has emphasized the distinction and declined to apply the rules of the Civil Code to acts of gestion du service public. Michoud has changed his opinion. 2 Personnalité morale, (2d ed.) 281 et seq. Mancò, op. cit. supra note 3, 245 et seq.
was practically abandoned, to be replaced by the test of *faute de service* or defect or error of the public service.\(^7\) Sovereignty and irresponsibility are no longer interchangeable or identical conceptions, and indeed "sovereignty" is no longer deemed a useful term in analyzing problems of responsibility. Moreover, the modern judicial evolution of the new conception of "administrative" acts or acts of public service, and of *faute de service* as the basis of responsibility, has resulted in a broad interpretation of the conception of "fault" and has even produced certain decisions imposing damages in which no fault, but only an accident could be established. The evolution of responsibility has gone so far as to alarm Professor Hauriou,\(^7\) though most of the jurists welcome it as a sign of progress.

While, it may well be that certain public acts should escape private action for pecuniary damages, and while it may be that the distinction between "governmental" and "corporate" acts or functions has outlived its usefulness, it must nevertheless be recognized that the invention of the "corporation" and the "corporate" function was the jurist's device for breaking down the shibboleth of sovereignty and the resulting irresponsibility. In England and the United States, statute alone can abolish the anachronisms of Kings that do no wrong and States that are above the law and cannot even be sued. And while in the law of municipal corporations, we have made some inroads into "sovereign immunity" in tort by discovering the "corporate" function, we still have a long way to go to rid our law of the artifices, fictions, symbols and phrases which have served as excuses to make the group irresponsible.\(^3\)

---

\(^7\) *Cor*, *op. cit. supra* note 62, 236 et seq. *Duez*, *op. cit. supra* note 60, 21, 31. The tendency of the Tribunal of Conflicts and of the Council of State is to segregate a narrow class of *gestion privée*, left to the jurisdiction of the ordinary courts, and a narrow class of *actes de gouvernement*, in which no responsibility is admitted. For the rest, aside from legislation and judicial decisions, where irresponsibility, subject to special statutes is the rule, all the public services are deemed *puissance publique*, in which the test of responsibility is "fault of the service" (*faute de service publique*) with the *faute* often tenuous and in many cases not required, responsibility following from the damage rather than from the fault. See *Duez* in (1926) 45 Rev. Critique 591.

\(^7\) Hauriou, in note to case of Regnault-Desroziers, Sirey 1918, III, 25, 26, where the State was held liable for damages due to the explosion of shells accumulated in a fort. Having created a dangerous situation, the State was deemed responsible for the results. See also *Cor*, *op. cit. supra* note 62, 238 et seq. 244, 315, 324. Such wide responsibility, whether fault of the service or not, has long been demanded by *Duguit*, *Transformations du droit public* (Paris, 1913) 250; *Law in the Modern State*, 206. Cf. *Garner*, *op. cit. supra* note 63, 624.

\(^3\) E.g., that the city derives no pecuniary benefit from the function; that the police officer was an agent of the State and not of the city and that hence *respondeat superior* does not apply; that cities cannot perform their functions if made liable for torts of their employees; that the city is not liable for duties imposed on it by the legislature, but only for those voluntarily assumed; that powers exercised for the benefit of the public at large are governmental, but those conferred for its own benefit and by reason of its nature as a municipal corporation are ministerial or corporate. These and other alleged grounds for decision will be found, with citations, in *Borchard*, *supra* note 69. 130. 132 et seq.
While reserving for later examination the provisions of positive law applying the supposed distinction between "corporate" and "governmental" functions or their surviving analogies, it may here be observed that among the principal reasons for the classical distinction was not only its historical origin, but the differentiation (in France) between the judiciary and the administration, and on occasion between private law and public law. These distinctions may appear strange to the American and English lawyer, accustomed to judicial control over the acts of private citizens and of officers (personally) and to whom the term "public law" is still an exotic classification. But on the continent where the administration was supposed to be free from interference by the judiciary, other methods had to be devised for protecting the individual against violation of his rights by public officials. Hence the development of independent administrative courts and the assumption that they applied rules of law different from those prevailing in the ordinary judicial courts. Hence also, the accentuated necessity for distinguishing the "corporate" activities of the State, which through a long evolution had come to be subjected to the rules of private law and to the jurisdiction of the regular courts, from the "governmental" functions of the State, which were deemed subject not to private law, but to rules of public policy declarable by public agencies. The gradual weakening of these distinctions in recent times, both by legislation and judicial construction, so far as concerns State responsibility for the torts of officers, and the application even in administrative courts of rules closely approximating those of the civil law, have diminished the practical importance of much of the theoretical discussion of the nineteenth century. The distinctions have, however, left their mark in the matter of jurisdiction and they are deeply imbedded in the evolution of tort responsibility. They are still embodied in statutory provisions and in the decisions of the courts. They cannot, therefore, be left out of account. Long familiarity with the subjection of the State and other public corporations to tort responsibility in "corporate" matters, according to principles of private law, easily led continental jurists to seek in the principles of private law the justification and foundation of responsibility in "governmental" matters.

Private Law Theories

Although it had become common in the nineteenth century to recognize that the relation of the officer to the State or other political group was founded in peculiar institutions of public law and had no precise
private law equivalent or analogy, efforts were nevertheless made to apply to the official relation the principles of the Roman mandatun—somewhat similar to but in many respects, notably in tort, radically different from the modern principles of agency—and of the Roman responsibility of the owner (dominus) for the acts of his manager (institor) or captain of a vessel (exercitor navis.) It had also been suggested that the State was primarily liable not only when "it" was negligent in the appointment or supervision of officers, but also when insufficient provision had been made for an adequate number of officers or for other governmental arrangements to accomplish a particular State purpose or where the officer's jurisdiction had been insufficiently delimited. These delinquencies, both by way of commission and omission, were deemed to impose governmental liability on a private law basis.

These conceptions are far removed from Anglo-American law and were also, up to recently, rejected on the continent on the ground that there was no private law duty resting upon the State—even where it was admitted that "legal" duties could be ascribed to the State—to provide adequate governmental machinery to protect the individual against loss or injury. Such a duty, within reasonable limits, is imposed on the State in international law with respect to aliens; and as we shall observe, the French administrative courts have recently come close to supporting such a theory, on "public" law grounds, as to residents of France. It had been early pointed out that the private law analogy was inappropriate, because of the difference between citizen, officer and State, among whom there were said to be no ordinary legal relations, on the one hand, and contractor, agent and principal, on the other hand. Yet this proposition assumed its premise, for not only is there a legal relation between officer and citizen in Anglo-American law, but the establishment of such legal relation in other countries was early a sub-

---

74 Laband, Das Staatsrecht des deutschen Reichs (5th ed. 1911) 429 et seq. This is the most modern view of the relation. The numerous views which have prevailed in history are set forth by Zschnitz, Der Beamtenbegriff, nach preussischem Staatsrecht (Breslau, 1913) 14 et seq. The subject will be examined in another article.

75 See Radin, Handbook of Roman Law (1927) 285 et seq. Zopf, Grundzüge des gemeinen Deutschen Staatsrechts (2d ed. 1846) 217. Schelcher, op. cit. supra note 20, 16. Reference has already been made to the private law theory of negligence in appointment or supervision, which is now rejected in the doctrine (supra p. 587) but is still occasionally invoked in the courts. It was rejected in the United States in Lamont v. Stavanough, 129 Minn. 321, 152 N. W. 720 (1915), where the city was sought to be held responsible for appointing an incompetent policeman. Cf. Borchard, Government Liability in Tort (1925) 34 Yale L. J. 229, 241; 19 R. C. L. 1119, 1120.

For unjust enrichment, the State seems to have been suable on quasi-contractual theories. No tort theory was necessary to justify recovery. Cf. Hauriou, op. cit. supra note 57, 547 and note.

76 Meisterlin, Die Verhältnisse der Staatsdiener (1838) 99 et seq. paraphrased in Schelcher, op. cit. supra note 20, 18.
ject of legislative and judicial declaration. Whether the State was a party to the legal relation was the very matter in issue. The theories advanced rationalized the desire to make it a party.

The early private law analogies and theories of tort responsibility made no particular distinction between the State as a "corporate" subject of private law and as a sovereign. Curiously, after the evolution of a century in which that distinction became the essential element in the problem, we are now returning, by legislation in Germany and certain other countries in Central Europe, and by judicial construction in France and other countries, to a point where the distinction is again nearly disregarded. In the proposed British and American legislation it remains unmentioned.

Otto Gierke, one of the most learned jurists of modern times, to whom Maitland paid a tribute rarely equalled, is the spiritual father of the far-reaching German legislation, now strengthened by constitutional provision, making the State responsible for the torts of its officers even in "governmental" matters. Having worked out a "real" theory of the corporation in two monumental works, he had come to the conclusion, supported by a formidable armory of historical material and presented with the persuasiveness and authority of a distinguished scholar, that the corporation was a "real person," that it had a "will" manifested by its "organs," that the "organ" and the "corporation" were one, like the hand or mouth is to man, that the State and subordinate political organizations were "corporations," and that an officer was an "organ" whose torts were necessarily the torts of the "corporation" and made it liable. The duty to make compensation for torts, said Gierke, is based on private law, and group "persons" or corporations are as much subject to the private law—in contrast to the criminal law—as are individuals. The corporate subjection to rules of law is as applicable in the field of tort as in that of contract. The public corporation's responsibility, added Gierke, is by no means an unusual responsibility determin-

77 Maitland, Introduction to Gierke, Political Theories of the Middle Age (1900) viii.
78 Gierke, Das deutsche Genossenschaftsrecht (Berlin, 1868-1913) 4v.
79 Gierke, Die deutsche Genossenschaftstheorie und die deutsche Rechtsprechung (Berlin, 1887).
80 See Borchard, Government Responsibility in Tort (1926) 36 Yale L.J. 1, 7.
81 This assumption of the unity between corporation and officer, the so-called "organ" theory, is one of the striking postulates of the "real" theory of the corporation. Gierke, Genossenschaftstheorie (1887) 743, 750 et seq.
82 Hafter, Die Delikts und Straffähigkeit der Personenverbände (Berlin, 1903) 25 et seq.
83 Michoud, op. cit. supra note 28, 401, at 419. The view that the act of the officer is the act of the corporation is also shared by Windscheid, Stobbe and other jurists. See citations in Schelcher, op. cit. supra note 20, 20, n. 2, and in Giorgi, op. cit. supra note 24, 543 and his Dottrina delle persone giuridiche (2d ed. 1900) III, 153.
able by public law principles; it is based strictly on private law principles, the unlawful violation of a private right by an official, though he may be such by public law and violate public law by his act. Perhaps it should here be said that much of the theoretical difficulty of classifying the doctrines of State responsibility arises from the fact that the officer is an institution of public law, but in his relations with private individuals is subjected in most countries to many, though not all, of the rules or analogies to rules prevailing between private individuals. Thus, Gierke finds theoretical support for his private law classification of the doctrine by asserting—and assuming—that the action against the State rests on the same legal basis as the action against the officer. Gierke necessarily assumes what Story and others denied, namely, that the officer of the political group, State, province, county or city, was in legal theory in the same position as the “organ,” representative or agent of a corporation, and also, that he was not an agent with limited powers, representing a principal, and hence subject to the doctrine of ultra vires, but that he was identical with the State and that when he acted, the State acted.

8 Story, Agency (9th ed. 1882) § 319. See the labored effort of Judge Dillon to determine when the officer is an “agent” of the municipal corporation, the doctrine of respondeat superior being applicable. 4 Dillon, Municipal Corporations (5th ed. 1911) § 1655, and comments in (1924) 34 Yale L. J. 132 and (1926) 36 ibid. 40, note 29. Meucci, op. cit. supra note 24, 186 et seq. undertakes to show that the officer is a private law agent of the State, but in a character sui generis.

The continental distinction between the donee of a power of attorney (mandatory) and the servant (préposé) is well-known. The powers of the former are limited and express, and the principal’s (mandator’s) responsibility limited to the exercise of the specific powers granted. Ultra vires, therefore, is a common defense. For the préposé, the general employee, the employer is responsible in French (§ 1384 C. C.) as in English law, for all torts committed within the scope of the employment. The French, like the Anglo-American law, has given a broad construction to the phrase “within the scope” so as to include “on the occasion of” the employment. The German law has made the principal’s responsibility somewhat narrower. Under § 831 of the Civil Code the employer’s responsibility in tort exists only if the employer has himself been chargeable with fault, either in the selection of the employee, in the instruction or order given, in the furnishing of equipment or in the requisite supervision. The employer, however, has the burden of proving that he is not so chargeable, or that in spite of his care in these respects the injury would have happened anyway. In contractual matters, the obligor is responsible to his obligee for his representatives or assistants, though special contract may provide otherwise. (§278 B. G. B.) 1 Enneccerus, Kipp & Wolff. Lehrbuch des bürgerlichen Rechts (18-20 ed., part 2, Marburg, 1923) §§459, 267.

In France, the responsibility of the employer, even in the old droit coutumier, taken over by section 1384, rested on a presumed bad choice of the wrong-doing servant. A considerable authority supports the responsibility upon a supposed free and voluntary selection of the employee by the employer, the employer's presumed power of supervision, and, in view of the legally privileged extension of the employer's range of action, an implied guaranty of the employee's skill, honesty and character. See Picot, op. cit. supra note 3, 83 et seq. citing authorities. It is probably more correct to say that vicarious responsibility in such cases is not based on the employer's express or implied fault, but on...
The responsibility of corporations for the torts of their constitutional or managing officers or directors, embodied in most modern codes and specifically extended to the State when acting in its Priscus or "corporate" capacity by section 89 of the German civil code, was deemed by Gierke not an exceptional rule but inherent in the nature of a corporation. He therefore insisted that this general rule was equally applicable where the "organ" or officer acted in the exercise of "governmental" functions. Gierke thus in 1905 began to deny the validity of the distinctions which had grown up through the nineteenth century between public policy which requires him who profits by the service of employees to assume responsibility for their "official" as distinguished from their private misdeeds. ZINGHER, De la responsabilité civile du commettant (Paris, 1923) 14, 24, 26, 29, 39, 42, 52, 75. Dewissel, La notion du préposé en droit civil (1908) 91 et seq. Cf. Holmes, Agency (1891) 4 HARV. L. Rev. 345, 347, 348, 354 et seq., 5 ibid. 1, 22. Holmes favors the identification theory as the basis of the master's responsibility. Since Edward I the common law has made sheriffs and others liable for inferior officers unless the latter are independently appointed. Ibid. 356. Cf. Betz, Vicarious Liability, (1916) 15, 16, 27.

For the distinction between responsibility for a mandatory and for an employee, see PicoT, op. cit. supra note 3, 101 et seq. The French judicial courts, having jurisdiction over actes de gestion privee have usually invoked article 1384 C. C. to hold the State or subdivision responsible as an employer for the acts of officers. In Germany, the Priscus (State in its "corporate" functions) is responsible for the torts of its constitutional "organs" or managing officials by virtue of §§ 89 and 31 B. G. B. For the acts of its employees of minor grade, it is responsible only under the qualifications of §§ 831 and 278 B. G. G. supra. In its character as a "public power" ("governmental" or "sovereign" functions) the State has by statute (1909 for Prussia, 1910 for the Reich, and Constitution of 1919, art. 131) been made responsible for the torts of officers injuring citizens, thus assuming a responsibility which § 839 B. G. B. had theretofore left with the officer personally. 1 ENNECERUS, KIPP & WOLFF, op. cit. (22-24 ed. Marburg, 1924) 1, §§ 103, 112.

Gierke's principal contributions to this theory will be found in his Gesellschaftstheorie; op. cit. supra note 80, c. 4, 620, 642, 743, 766, 784, 788; in his Deutsches Privatrecht (1895) 1, § 61; and in (1905) 28 Deutscher Juristen tag 1, 102.

The view that governmental responsibility has a private law basis is shared by many courts and writers. See decision of German Supreme Court, March 30, 1903. Reichsmilitärfiskus, 54 R. G. 198, and of the Swiss Supreme Court, Comp. de la Suisse Occidentale v. Confederation, Dec. 21, 1877, 3 B. G. 780, 790. Banque Populaire v. Canton of Vaud (law of 1904 on State responsibility) Oct. 13, 1909, 35 B. G. (2) 721, 728, Bossi v. Ticino, Apr. 27, 1912. 38 B. G. (2) 260. Balzaretti v. Geneva, May 9, 1912, ibid. 393, 397. JELLINEK, System der subjektiven öffentlichen Rechte (2d ed. 1905) 245. Oertmann, Die Haftung des Staates für Verschulden von Beamten, (1906) 11 Deutsche Juristenzeitung 922 et seq. FRAENKEL, Haftet in Preussen der Beamte aus rechtswidrigen Handlungen bei Ausübung von Hoheitsrechten dem Geschädigten unmittelbar? (Borna-Leipzig, 1916) 24 et seq. The determining fact is the tortious invasion of a private right. The argument often advanced in Germany and Switzerland in favor of the "public law" basis of responsibility for "governmental" acts, namely, that such responsibility was specifically left by the civil codes to the option of the constituent states of the federation (German Civil Code, Introduction, art. 77, Swiss Civil Code, arts. 6, 59), and that it required therefore special legislation to impose such responsibility, is not deemed conclusive by some writers; they argue that the responsibility itself, though resting on statute, may nevertheless be subject to the rules of private law. See e.g. SCHÜTZ, op. cit. supra note 19, 15, 16, 66; von BERNECK, op. cit. supra note 31, 74-76; Dock, op. cit. supra note 22, 244 at 277; CHIRONI, op. cit. supra note 19 (Colpa contrattuale) 515 et seq.
"governmental" and "corporate" acts and the resulting rules as to responsibility. In France, the distinction began to break down at about the same time. Only in the American law of municipal corporations does the distinction,—which is not without some factual basis,—and its very important legal consequences, persist with all the conviction of a theological creed. Its historical utility for predicking a limited responsibility may be admitted without conceding its permanent value, or, in practical application, its logic or expediency. Gierke, like others after him, maintained that it was always the same officer and the same State whether acting in one or the other capacity, and he added that the distinction between “State” (governmental sovereign) and “Fiscus” (administrator of public property) was outworn and useless. Indeed, the distinction is now in the main one of convenience only, for purposes of theory, though it was long of the utmost practical importance, not only in its procedural aspects, where it still plays an important part, but also in the matter of substantive responsibility. With the extension of responsibility to “governmental” activities, it naturally has lost not only much of its practical importance, but some of its theoretical justification.

Gierke settled his classification when he assumed his major premise that the action for compensation based on “fault” must be one of private law. He then adduced private law grounds to justify his premise, believed by him to be a conclusion. German jurists do not seem to have paid much attention to the anomaly created by the fact that in Fiscus matters, the State or public corporation is unqualifiedly responsible only for the faults of its higher directing officials, whereas for minor officials and employees it is responsible only if it cannot rebut the presumption of fault; whereas in “governmental” matters, the Reich and most of

641 GIERKE, Deutsches Privatrecht (Berlin, 1895) 476. While many jurists agree that there are not two separate institutions, “State” and “Fiskus,” as the older theory had assumed, the majority probably still insist that the one single State or other public corporation enters into legal relations with its citizens, through its officers, in two different capacities, as a governing authority (“governmental”), “öffentliche Gewalt”) and as a manager of property (“corporate”). Perhaps this is merely a different way of expressing the same phenomenon.

It must be remembered that §§ 89 and 31 B. G. B. apply only to the higher managing officials. For minor employees the Fiscus is responsible like any other employer under § 831, which enables the employer to escape responsibility by proving a complete absence of fault on his part (supra). The French employer’s responsibility is not thus qualified or rebuttable. But in “governmental” matters, the German statutes of 1909 and 1910 and the Constitution of 1919 speak only of Beamte (officers) without distinction as to rank.

65 In this respect it is analogous to the Swiss law, Code of Obligations, art. 55 (333 Z. G. B.). ROSSEL ET MENTHA, Manuel du droit fédéral des obligations (4th ed. Laussanne, 1920) 107; Oser, Das Obligationenrecht (Zurich, 1915) 230. The presumption of fault of the master, rebuttable by proof to the contrary, common to both German and Swiss law, is modified in the case of corporations (in German law) by imposing absolute responsibility for the torts of directing officials. It is often extremely difficult to determine who is a "constitutionally designated representative" or "higher" official within the meaning of § 31 B. G. B. To
the States have by statute assumed without qualification, the responsibility which theretofore had rested on the officer, without distinction of rank. This assumption of responsibility is regarded by some as further evidence of the private law nature of the obligation—vicarious liability *ex lege* for the fault of a servant.86 One writer, whose theory, however, has found little support, has suggested that this statutory responsibility may be deemed a statutory assignment of a debt or novation, though the statutes have simply substituted the State for the officer, leaving direct legal relations subsisting only between the injured individual and the State.87 Others regard the State merely as a principal under article 831 of the Civil Code, which creates a rebuttable presumption of fault on the part of the master for the torts of his servant;88 but in fact the statutory responsibility of the State is not founded on a rebuttable presumption—a rule of law—either that the torts of its “organs” are its own,89 or that the State has assumed absolute responsibility for the torts of its servants.

make the *Fiscus* responsible, such higher official must himself be chargeable with responsibility, usually for “fault.” Under § 831, which covers minor employees and agents as well, the employee or agent need not be personally responsible for the damage done, but the responsibility of the employing *Fiscus* is not unconditional, as under sec. 31; it is conditional on its inability to prove that it was not negligent in appointing or supervising the employee or that it had not by its own negligence “caused” the damage. For the torts of minor employees, therefore, State responsibility in *Fiscus* matters is limited. GECHTER, *Haftung des preussischen Eisenbahnfiskus* (Berlin, 1911) 66 et seq. On the difficulty of determining who is an “organ” or “higher official” under § 31 see decision of German Supreme Court (1897) 19 R. G. no. 67, and FRONBERG, *Die Haftung des Fiskus für seine Vertreter* (Borna-Leipzig, 1908) 27 et seq.

For Austrian law on the responsibility of the *Fiscus*, which closely resembles that of Germany, see 1 STUBENRAUCH, *Kommentar zum österr. A. B. G. B.* (6th ed. 1892) §§ 26, 27.

In Swiss law, in general, the tort-feasor is alone responsible. Hence, a general responsibility of the State for private-law acts of officers, except in given cantons like Schwyz, is not recognized. Where the State conducts an industry, however, liability is imposed unless the State can prove that it took all necessary measures to prevent the damage (art. 62 of the LAW OF OBLIGATIONS). SCHNEIDER-FICK, *Das schweizerische Obligationenrecht* (2d ed. 1896) art. 64, n. 8. On the evolution of the “organ” from the “representative” or “agent” see FROMBERG, op. cit. supra note 85, 11.

85 FRANZ, op. cit. supra note 83, 31. This is the principle underlying the pending Act of Congress, H. R. 9285, 70th Cong., 1st sess., sec. 1. This corresponds in the case of corporations, who can only act through representatives, to acting at their peril. OERTMANN, *Bayerisches Landesprivatrecht* (Halle, 1903) 256 et seq. See also MEUCC, op. cit. supra note 24, 186 et seq.; CHIRONI, op. cit. supra note 19, 515 et seq., and authorities cited by GIORGI, op. cit. supra note 24 (Obbligazioni) 542.

86 Bechmann, quoted by OERTMANN, op. cit. supra note 86, 256. Whether the officer actually is excluded from all obligation to the citizen, we shall have occasion later to examine.

87 Jakubeczky, cited by FRANZ, op. cit. supra note 83, 30.

Section 31 avoids the use of the word “organ,” which Gierke emphasized. It has been doubted in view of the *Motive* of the Civil Code [1 MUGDAN, *Die gesamten Materialien zum B. G. B.*, (Berlin, 1899) 408, 615] whether section 31 intended to adopt the Gierke theory, as is usually assumed. FRANZ, op. cit. supra note 83, 31. Minor employees or officials can hardly be deemed “organs,” however.
The French jurists who have dealt with this question have on the whole divided their allegiance to theories along the lines of the classical distinction between "corporate" and "governmental" acts, which at one time reflected moderately a jurisdictional distinction between the judicial and the administrative courts. For actes de gestion—which in his view included domaine privé and service public—Michoud, for example, supported by certain decisions of the Court of Cassation, was willing to concede that the State was a corporation, governed by the civil law rules of direct responsibility for the acts of its "organs," under article 1382 C. C. and indirect responsibility for the acts of its employees (préposés) under 1384 C. C. Whether adopting the "fiction" or the "real" theory of a corporation, both jurists and courts found theories upon which to sustain corporate responsibility for the torts of corporate officers and employees. So long as the judicial courts had jurisdiction

---

80 Op. cit. supra note 28, at 419. Curiously, down to 1905, the judicial courts assumed jurisdiction of actions in tort against communes and departments and held them liable under application of the civil code, not only for acts of private gestion, but of public gestion as well, and also for acts of police, usually classified as puissance publique. TEISSIER, op. cit. supra note 23, 101 and notes. MARÇQ, op. cit. supra note 3, 244.

81 The Belgian code (art. 1384) the Italian code (art. 1153) and the Roumanian code (art. 1101) are identical with the French code. Probably most of the writers on these codes have adopted the theory that vicarious responsibility of the master for the torts of his servant is based not on fault, express or implied, but on a rule of policy that he who profits by service must assume the risks of the servant's torts committed in the course of the service. ZINCHER, op. cit. supra note 82, 105 et seq., MAAG, Zivilrechtliche Haftung für schädigendes Verhalten Dritter (Affoltern, 1924) 40 et seq. It thus becomes but one aspect of the public law "risk" theory. Numerous French and other writers have found little difficulty in applying the rules of civil responsibility to the State as the "commettant" or master of its "préposés" officers, when engaged in actes de gestion, i.e., proprietary or corporate activities. See the authorities quoted in PROCT, op. cit. supra note 3, 128 et seq. MARÇQ, op. cit. supra note 3, 324 et seq. The Germans have little doubt on this point, 1 MUGDAN, op. cit. supra note 89, 409. Some of the earlier French civilians were even willing to apply article 1382 et seq. to the State when acting as a puissance publique. 5 MARCABÉ, Explication théorique et pratique du code Napoléon, (6th ed. Paris, 1869) 281, n. 2. AUBRY ET RAY, Cours de droit civil français, (4th ed. 1869) IV, 761. [The editor of the 5th ed. (1920), Prof. Barth, points out that the courts and donnees have now repudiated these views, 1, 589, note] DEMOLOMBE, Cours de code napoléon (1882) XXXI, 637. See the decisions of the Court of Cassation, Adm. d. Postes v. Depeyre, April 1, 1845. Sirey 1845, I, 363, and Adm. des Postes v. Brun, Dec. 19, 1854, Sirey 1855, I, 265. In actions against departments and communes, the Court of Cassation has often applied the civil code [see decision of May 2, 1906, quoted by TEISSIER, op. cit. supra note 23, 108, note] but more recently has declined to do so. Adm. des Douanes v. Zwaertwaeghe, Feb. 19, 1918, Dalloz 1921, I, 215, and VAN DER DRIESCHE, De la faute de fonction du préposé . . . (Lille, 1924), 101. Chironi makes no distinction as to function, corporate or governmental, op. cit. supra note 19, 520.

82 For minor employees (préposés) there seems to be agreement that article 1384 applies. For managers and higher officials, different views prevail, both in the courts and among jurists. One school considers them all representatives of the corporation, and applies article 1384. Another (the "real" theory school) considers them mandararies with strictly limited powers, and applies article 1382. Another (the "fiction" theory school) considers them mandararies with strictly limited powers, and applies article 1382. Another (the "fiction" theory school) considers them mandararies with strictly limited powers, and applies article 1382. Another (the "real" theory school) considers them mandararies with strictly limited powers, and applies article 1382.

---

83 Note 19, 520.
over *actes de gestion*, particularly of those of the minor political subdivisions of the State, and necessarily applied the rules of the civil code, the private law explanation of State responsibility presented little difficulty,\(^9\) regardless of the varying justifications for vicarious responsibility in having authorized the tort, or chosen a dangerous employee, or facilitated the injury by their own act, article 1382 is applied. The decisions of the courts seem in confusion. As vicarious responsibility can best be explained not on any theory of fault and as it seems natural to regard all officers of the corporation as agents or employees, there hardly seems much reason to introduce so much confusion into the doctrine of corporate responsibility for the torts of its employees. See *Zimmer*, *op. cit. supra* note 82, 75 et seq. The effort to distinguish "organs" from "employees," i.e., higher from lower officials, and to attach different legal consequences to the distinction is prevalent in the writings of many jurists. It probably finds its source in the peculiar doctrines of the German law of corporations, largely promoted by Gierke, which distinguish corporate responsibility for "organs" or governing officials (art. 31 B. G. B.) and that for employees (art. 839 B. G. B.). The distinction is explained in *Michoud, La théorie de la personnalité morale* (2d ed. Paris 1924) 128 et seq. The application of the distinction to different types of officers is not always easy, and in France it has theoretical interest only, because the responsibility of the public corporation is the same in both cases.

"Down to 1850 in France, scientific doctrine was but little concerned with the theory of State responsibility. Within the limited field of acts (*gestion privée*) for which responsibility was judicially imposed, article 1384 cc. was deemed sufficient support. After 1860, and especially after the Blanco decision of 1873, the question of theory was vigorously agitated. *Larsonière, op. cit. supra* note 29, VII, 637, art. 1384. To the State "the same responsibility as an ordinary master for the acts of its officers performing "corporate" (*gestion*) functions, such as tax collectors, public depositaries, customs, postal, railroad, and other like officials. The function, not the particular act, is determinative. Sourdat [*Traité général de la responsabilité* (6th ed. 1911) art. 1384, No. 15] adopts somewhat the same view, and insists that the officer is not merely a mandatary, with limited responsibility, but a general employee under art. 1384. He emphasizes, however, the nature of the act as more determinative than the particular function. These views are based on the premise that the State may freely choose and control its employees. *Laurent, op. cit. supra* note 41, XX, § 593, divides officers into those acting in the name and for the account of the State, such as postal, telegraph, and State factory employees, and others, such as judges, teachers, etc., who are not "employees" but "organs." Only for the former should the State be theoretically responsible. This view has been criticized. *Picot, op. cit. supra* note 335; *Michoud, op. cit. supra* note 3, 329. Laurent makes a supposed distinction between "sovereignty," which he deems irresponsible, and the exercise of sovereign powers, which require analysis, some entailing responsibility, others not, *ibid.* XX, §§ 418 et seq., 590 et seq. Legislative and judicial acts escape responsibility; executive or administrative acts, in principle, do not. All administrative powers must be used so as not to injure private rights, and to these art. 1382 et seq. apply, *ibid.* § 420, p. 440. Lawfulness or unlawfulness of the act is thus immaterial, and there is no distinction between "governmental" and "corporate" acts, though he seems to admit that that distinction indirectly when he distinguishes "employees" from "organs." Eminent domain theories and the so-called doctrine of vested rights have influenced Laurent strongly. The theory of vested rights as a limitation on governmental powers, though given statutory expression for takings by eminent domain largely furnishes a sufficiently concrete basis for governmental pecuniary responsibility for other official injuries. See *infra*. This would be true even if for argument's sake, it could be admitted that § 1382 et seq. justifies governmental responsibility or responsibility without fault, and even if it may be said that eminent domain admits away the case for "sovereign" irresponsibility. Nor is it satisfactory to say that when the "government" is made responsible, it is as a "corporation" and not a "government." See *Marcq, op. cit. supra* note 3, 335 et seq.

Michoud has adopted Gierke's view of direct responsibility for "organs" (art. 1382), but prefers to consider minor employees as *préposés* under art. 1384. The private law theory, as advanced by its principal supporters, is discussed in *Le Roux, Essai sur la notion de la responsabilité de l'État* (1909) 40 et seq.
bility of the master for the servant—fault in appointment or supervision, personal act by representation, or merely the public policy that he who obtains the benefit of another's service must assume the risks of unlawful injuries inflicted in the course of the employment. But when the administrative courts assumed jurisdiction of all *actes de gestion publique*, both of the State and its political subdivisions and independent establishments, confining the judicial courts to a limited class of acts *de gestion privée*, it became more difficult to sustain a private law explanation of responsibility. The administrative courts were not bound by the civil code, did not profess to apply it and in late years have departed from the strict requirements of individual culpability or fault by inventing the concept of *faute de service* and have even imposed responsibility in certain cases for mere accidents in the public service.

Possibly because the French *gestion publique* was somewhat wider

---

94 The votaries of administrative law, whose doctrinal views, instead of searching for principles historically and analytically, as do the civilians, follow and rationalize the decisions of the courts, seemed to believe, down to about 1885, that when the officer could be deemed a servant or *préposé* of a group acting as a corporation (*gestion*), the group was responsible under art. 1384, but that when it acted as a "public power" or "sovereign" (*puissance publique*) there was no responsibility. See the views of Dufour, Cotelle and Dareste set forth by Picor, *op. cit.* supra note 3, 139 et seq. But when the Council of State developed the new intermediate category of *actes de gestion publique* and imposed responsibility, new theories were advanced, which declined to admit any private law basis for State responsibility. The main attack lay against the common view that the State was a master or the officer a servant (*préposé*). It was argued that the Civil Code articles 1382 et seq. contemplated only individual or collective private "persons," that the State acting in its "governmental" capacity (*puissance publique*) was not a "private person," that the draftsmen of the Code never thought of including the public administration under such terms as master (*commettant*) servant (*préposé*) or men (*hommes*), and that the private law theory was inherently unsound. The most celebrated spokesman of this school was Laferrière, *op. cit.* supra note 27, I, 677 et seq. He remarks that masters and mandators appoint servants and mandatories for their own private interests, whereas the State appoints officials for the administration of the general interests. *Ibid.* I, 624. The official relation is not an *acte de gestion* or *contract* between employer and employee, and State responsibility is not founded on any code text, but on general principles of justice, which, however, he admits, also underlie the code provisions governing the relation of individual to individual. While Laferrière has been sharply challenged on all these contentions, he has nevertheless deeply influenced the Council of State, which apparently considers itself emancipated from any dependence on texts or particular legal doctrines, and is more inclined to follow its own precedents, informed by an enlightened policy gradually extending the range of State responsibility.

The historical mistrust of the judicial courts in France and the manifest Revolutionary purpose of refusing to permit them to control the administration or interfere with its relations with private citizens, lend support to the view that it was not intended by the draftsmen of the Code or by legislatures that private law was to apply to relations between citizen and State. Writers who, like Michaud, argued for the application of rules of private law to the State in the administration of the public services (*gestion publique*) admitted the historical data but maintained that the legislators of the time did not prohibit the application of the civil code. From the evidence, René Marcq reaches a contrary conclusion. See *Marcq*, *op. cit.* supra note 3, 291 et seq.

95 *Supra*, p. 603.
in its field of application than the German Fiscus, there was less concurrence in France than in Germany in agreeing on a private law explanation of responsibility even in “corporate” matters. Those who adhered to a public law solution pointed out that by the civil code, even slight negligence would make the officer responsible, whereas in fact in such cases only the State is held. Only serious torts make the officer jointly responsible and if actuated by malice or passion or if guilty of gross delinquency (faits personnels), at least down to 1916, the officer alone was responsible, whereas under article 1384 the employer would be responsible even in that event. Since 1916, as we shall see, the State has been held responsible even for “personal” acts of officers, if committed on the occasion of public service. The disciples of “public law” point out the numerous differences in freedom of choice and action between State and private corporation and show that whereas the civil code predicates liability on fault, the State is responsible on different principles in many cases, for it is not responsible for all torts, nor is it responsible merely for tort, as, for example, in eminent domain and injuries inflicted in the construction of public works. Indeed, as we shall see, the French administrative courts have built up a jurisprudence of governmental responsibility founded on the fact of injury due to the defective operation of the public service (faute administrative or faute de service) without inquiring whether any particular officer was personally negligent.

It is further argued that the State in its relation to the individual

68 It is argued that the alleged reason for employer’s liability, negligence in selecting or supervising employees, cannot apply to the State, for it has little or no opportunity to select or supervise. Selection is done under civil service rules or other method foreclosing complete freedom of choice. Supervision is practically impossible. In other respects, also, the courts treat the State’s responsibility for officers somewhat differently than they do the employer’s responsibility for servants, which is advanced as an additional ground disproving the applicability of private law. MARCQ, op. cit. supra note 3, 311 et seq.

69 HAURIOT, Précis (9th ed.) op. cit. supra note 57, 548, 835; VON BERNEGG, op. cit. supra note 31, 8, 12, 17. Further criticisms of the private law theory, founded largely on the arguments of LAFERRIÈRE, op. cit. supra note 27, will be found in ROGER, op. cit. supra note 41, 36 et seq.; LE ROUX, op. cit. supra note 91, 43 et seq. Cf. ROUAST, Du fondement de la responsabilité des dommages causés aux personnes par les travaux publics (Paris, 1910) cc. 2, 4.

68 DUGUET, LAW IN THE MODERN STATE (1919) 233 et seq. GARNER, op. cit. supra note 63, 621. TRARD, op. cit. supra note 27, 62. BIGNOT, op. cit. supra note 32, 87, 184. HAURIOT, op. cit. supra note 57, 528. VON BERNEGG, op. cit. supra note 31, 11. WATKINS, THE STATE AS A PARTY LITIGANT (1927) 147 et seq. and infra. Some of the earlier decisions of the Court of Cassation frankly held the State responsible by application of the civil code. DEPEYRE, (1845) Dalloz 45, 1, 261; BRUN (1854) Dalloz 55, 1, 37. Later the Council of State held that responsibility for acts of gestion publique rested on the exigencies of the administration and the necessity of reconciling public and private interests. ROTAIS, Dec. 6, 1855, Dalloz 1859, 3, 34; BIGOT, p. 25. The final denial that private law principles controlled was expressed by the Tribunal of Conflicts in the celebrated BLANCO case (1873) supra, p. 590.
GOVERNMENTAL RESPONSIBILITY IN TORT

is in a unique position, and cannot be brought within the compass of private law. Private law, it is said, contemplates relations between equals, admits of bargaining, assumes the promotion of individual interests, assumes a privilege of withdrawing from the relation, enables an unsatisfied obligation to be enforced by specific performance and judgments to be executed by forced levy, if necessary. The State's relation to the individual, it is argued, is not a relation between equals, capable of bargaining and seeking personal advantage. It is a relation imposed by law, and contemplates the promotion of the public welfare without special pecuniary advantage to the State. There is no privilege of withdrawing from the relation, suit is possible only within permitted limits and hardly ever for specific performance and the judgment cannot be executed by a levy on State property. It is further argued that when private law rules are applied to the State as a property owner, this is by way of exception only and is permitted because no harm is thereby done, but that this affords no ground for extending private law rules to the administration of the public services (gestion publique). Indeed, in the latter function, the State as a governing authority is always in evidence, and it is a denial of facts to assert that the State then, or at any time, acts like a private individual and is or should be subject to the rules governing private individuals. In fact, it is said, the distinction between gestion publique and puissance publique is theoretical only, and is impossible to apply a priori, a conclusion which finds support in the fact that the classification is not consistently applied in any decade and that the supposed line of division is continually moving. The arguments mentioned have been employed by some to deny State responsibility in tort and by others to deny that such responsibility rests on any other than public law grounds.

The so-called public law orientation of the Council of State has been attacked by adherents of theories of private law who invoke the argument that the certainty of the provisions of the civil code has been exchanged for the uncertainty of variable equitable determinations—reaching a result, however, closely analogous to that of the private law. Equity is deemed to be not a legal, but a moral, ground of responsibility, proper for the cognizance of the legislature rather than the courts; to which answer is made that no statutory text is necessary, if responsibility accords with the general spirit of the law and is founded on prin-

---

69 For a résumé of these several grounds for denying the applicability of private law, see MARCQ, op. cit. supra note 3, 296 et seq. These arguments are also employed to prove that the State is not responsible in tort under any circumstances except by express statute. For refutations of these views see WODON, op. cit. supra note 63, 181 et seq. and CAPART, Droit administratif élémentaire (2d ed. 1924) 334 et seq.
principles which are as valid as any text written into statute. Common law lawyers will have no difficulty in appreciating the force of the answer.

The theory of *faute administrative*, it is further contended, rests upon a confusion of substantive law and jurisdiction, the erroneous conclusion having been drawn that the jurisdiction of administrative courts excluded the application of private law. Possibly such intangible and difficult issues as "fault," "negligence," etc., are deemed by these writers to be more certain in application than they really are, for they are often alleged in decisions merely to reach a desirable result. Perhaps the objective test of damage, adopted by the Council of State, is both more practical and efficient, obviating the necessity of introducing what is often the fiction of personal fault or negligence. In this respect, it may be said to have advanced beyond the outlived restrictions on the theory of responsibility imposed by the words of the civil code.

Those jurists and courts who erect the premise that State responsibility in "governmental" matters is exclusively an innovation of public law, necessarily conclude that the supporting grounds or theories must find their explanation in public law. These jurists adopt the view that the relation of officer to citizen, and *a fortiori*, of State to citizen, is one of public law. Though conceding, perhaps fatally to their theory, that the State is responsible under private law rules when acting in its "corporate" capacity, they deny that this is so when acting in its "governmental" capacity. They thus divide the individual's rights into those finding their protection in private law and those resting on public law. The nature of the activity determines the classification. It is also denied that the officer exercising "public" functions represents the State as a "corporation," a subject of private law, and it is asserted that when he acts unlawfully, he ceases to represent the "will of the State"—the familiar *ultra vires* argument. Gierke's suggestion that responsibility for "governmental" acts must be discharged by the State as a "Fiscus," is regarded as an unhappy resurrection of the antiquated concept of the Fiscus and as destructive of the modern scientific achievement in classifying the activities of the State into two groups, "governmental" and "corporate." The confusion that theoretical speculation can induce

---

100 Roger, op. cit. supra note 41, 43.
101 Bailey, op. cit. supra note 58, 78 et seq.
102 Berthélemy, op. cit. supra note 41, 87 et seq.
103 The confusion was aided by the drafts and Motive (basic explanations) of the German civil code. They speak of the "public law" nature of the claim for compensation, whereas the Motive to the Introductory Law speaks of its "close relation to public law," but emphasizes that the duty to pay is one of private law. See Mügden, op. cit. supra note 89, 40.
104 Schelcher, op. cit. supra note 20, 21 et seq.; also Schelcher, Justiz u. Verwaltung (Leipzig, 1919) 176 and authorities there cited.
is illustrated by the fact that some jurists have concluded that the resulting responsibility is one of public law, justified on private law grounds or analogies\textsuperscript{104} and others that it is one of private law, but explainable only on arguments deduced from public law;\textsuperscript{105} others still that after the State assumes the responsibility it is one of private law.\textsuperscript{106} Perhaps this shows as clearly as anything else the futility of the classifications and juristic explanations advanced to justify a socially desirable result.

But to the continental lawyer, more scientifically and historically trained in general than his colleague of the Anglo-American bar, the jural classification is of great importance; and in justification, it must be said that in the development of the doctrine of responsibility, procedural and substantive, the classification has played a vital part. In the French courts, it has served largely to determine whether the judicial or administrative courts had jurisdiction, a function it still to some extent performs; in Germany, it influenced the framing of legislation. The German Civil Code of 1900 left it to the individual states to determine to what extent the State would be liable in “governmental” matters.\textsuperscript{107} Gierke’s argument that there was no justifiable basis for any distinction between “governmental” and “corporate” functions in the matter of official responsibility was designed to point out the unwisdom of having made the civil code responsibility cover only “corporate” activities, leaving responsibility for “governmental” functions to the confusion of divergent state legislation. He lived to see Prussia (1909) and the Empire (1910) adopt general statutes assuming responsibility for the torts of Prussian and Federal officers respectively, in “governmental” matters, but he died before the Constitution of 1919 adopted the general principle that Empire and states must assume responsibility for the torts of officers inflicting private injuries within the scope of their employment, regardless of the nature of the function.\textsuperscript{108} Much the same development, without the aid of legislation, has taken place in the French courts.\textsuperscript{109}

\textbf{Yale Law School}

\textbf{Edwin M. Borchard}

\textsuperscript{104} See Schelcher, op. cit. supra note 20, 21 et seq.
\textsuperscript{105} Piézoty, op. cit. supra note 25, 245 et seq.
\textsuperscript{107} Article 77 of the Introductory Law.
\textsuperscript{108} \textit{Infra}.
\textsuperscript{109} \textit{Infra}.