



1958

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### Recommended Citation

Klaus Kautzor-Schroeder, *Public Tort Liability under the Treaty Constituting the European Coal and Steel Community Compared with the Federal Tort Claims Act*, 4 Vill. L. Rev. 198 (1958).

Available at: <https://digitalcommons.law.villanova.edu/vlr/vol4/iss2/2>

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PUBLIC TORT LIABILITY UNDER THE TREATY  
CONSTITUTING THE EUROPEAN COAL AND  
STEEL COMMUNITY COMPARED WITH  
THE FEDERAL TORT CLAIMS ACT

KLAUS KAUTZOR-SCHROEDER †

I.

THE EUROPEAN COAL AND STEEL COMMUNITY — ITS OBJECTIVES,  
NATURE AND ORGANS.

THE TREATY Constituting the European Coal and Steel Community, signed by France, Germany, Italy, Belgium, The Netherlands and Luxemburg in Paris on April 18, 1951, and in force since July 25, 1952, represents the first major step towards economic unity in postwar Europe.<sup>1</sup> At the same time it is also aimed against historic rivalries which in the course of centuries have brought about setbacks of an economic and other nature. The objectives of the Coal and Steel Community, according to Article 2 of the Treaty,<sup>2</sup> are "to contribute to economic expansion, the development of employment and the improvement of the standard of living in the participating countries through the institution . . . of a common market . . . ." To attain these objectives of creating a common and competitive market, the Community, through its organs, has been granted important powers over the coal and steel industries of the member states. In particular, certain restrictive practices which had been hitherto used by the different countries to protect their industries are abolished and prohibited, especially among which are the imposition of import and export duties, restriction on pro-

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1. In the meantime, taking effect on January 1, 1958, two other European institutions in the economic field have been created: the European Economic Community, designed to gradually abolish custom barriers between the six countries listed above over a period of fifteen years, and the European Atomic Energy Community, an organization for cooperation in the field of atomic research and its use for industrial purposes.

2. For the English translation of the Treaty Constituting the European Coal and Steel Community, see 46 AM. J. INT'L L. SUPP. 107 (1952). [Hereinafter Treaty.]

duction, discriminatory practices concerning prices, state subsidies, and measures which tend to divide the market or to exploit the customer.<sup>3</sup>

Insofar as the powers given to the Community reach, the Community is a true supranational agency in that its measures have a direct effect upon and immediately bind the coal and steel enterprises affected by a particular decision. The exercise of these powers is independent of the will of the member states, which, by having become partners to the Community, have given up jurisdiction in this particular field. Because of this direct effect, there is no need for a ratification by the member states of measures taken by an organ of the Community as would be the case in the realm of international law.

The different functions of the Coal and Steel Community are performed by four organs: the High Authority, the Common Assembly, the Ministers' Council and the Court of Justice.<sup>4</sup> Of these, the High Authority (HA), as the executive organ of the Community, exercises by far the most important powers over coal and steel enterprises. In order to accomplish the purposes of the Treaty, it can take direct action with respect to production and the operation of the markets whenever circumstances make this necessary. It is thus in a position to affect seriously the management of an enterprise to the extent of inflicting irreparable damage.

These extensive powers of the HA, and the great amount of discretion necessarily involved in reaching a decision in an area of fluctuating economic conditions, required the establishment of a judicial organ, the Court of Justice, to which parties allegedly injured have access. Before this Court, not only member states but also individual coal or steel enterprises, or groups thereof, as well as producers' associations (and in some instances even third parties) can appear as plaintiffs to attack decisions of the HA.<sup>5</sup> The supranational character of the Community is demonstrated again by the fact that the coal and steel enterprises, and other private parties, challenge the decisions of the HA as of their own right independently of the right of their respective states. No diplomatic protection by their government is needed, which would be necessary under the rules of international law.<sup>6</sup>

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3. Treaty art. 4.

4. Treaty art. 7.

5. See Articles 33-36, 63(2), 66(5) of the Treaty.

6. As a consequence of the existence of independent rights both of the national governments and individual enterprises to challenge decisions of the HA, there might be parallel proceedings aimed against the same decision. Thus, the decisions 1/54, 2/54 and 3/54 of the HA concerning steel prices were attacked by the Italian Government and two Italian steel enterprises in separate proceedings at the same time. See *affaires no. 2/54, /354 and 4/54 in Cour de Justice de la Communauté Européenne du Charbon et de l'Acier*, in I *Recueil de la Jurisprudence de la Cour 1954-1955*, 73, 123, 177. [Hereinafter cited as *Recueil*.]

Another feature of supranationalism in this connection is that the national courts are expressly denied the right to rule on the validity of a decision of the HA; they are under an obligation to certify the issue to the Court of Justice which shall have exclusive jurisdiction to rule thereon.<sup>7</sup>

A reason for strengthening the position of the Court is the lack of an adequate political control by the parliamentary organ of the Community, the Common Assembly, over the HA. The Assembly's authority is limited to a general discussion of the annual report submitted once a year by the HA. The only way of controlling the HA is by way of adopting a motion of censure by two-thirds of its members present and voting, representing a majority of the membership, in which case, the members of the HA must resign.<sup>8</sup> It is doubtful, however, whether, apart from cases of gross and obvious abuse of its powers by the HA, such a vote will ever be cast. In order to remedy this weakness adequate means of control on a judicial level had to be given to the Court.

## II.

### THE INFLUENCE OF NATIONAL LEGAL SYSTEMS ON THE LAW OF THE COAL AND STEEL COMMUNITY.

Although in the last fifty years there have been some international organizations which attempted to form economic units in certain areas, *e.g.*, the European Danube Commission or the International Civil Aeronautics Organization, one can nevertheless say that the Coal and Steel Community poses unprecedented questions, especially the Court of Justice which, as will be shown later, exercises jurisdiction of a varied nature, and is so unique that it does not lend itself to any traditional categorization. The interpreters of the provisions of the Treaty will find many questions which have never, not even under similar institutions, been posed and answered before.

However, one should not overlook the fact that the Community is a union of certain specific nations and that the draftsmen of the Treaty were members of these nations, being trained in their respective legal systems. It is therefore understandable that certain principles embodied in the Treaty were not invented by the framers but drawn from the laws of the member states. Consequently, one is justified in going back to the national laws in making inferences as to the meaning of a particular provision of the Treaty which has obviously been designed after it. This interrelation between the laws of the member states and

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7. Treaty art. 41.

8. Treaty art. 24.

certain Treaty provisions was clearly pointed out by one of the general counsels at the Court of Justice,<sup>9</sup> M. Lagrange, while explaining the term *détournement de pouvoir* (abuse of discretion) found in Article 33 of the Treaty.<sup>10</sup>

But the Court cannot simply apply the national law which comes closest to a Treaty provision. As some authors<sup>11</sup> have rightly asserted, the problem is not one of applying the national law of one of the member states but of applying the law of the Community.<sup>12</sup> The Court will have to create a Community law in the process of which it might very well scrutinize the national legal systems in order to come to an adequate interpretation and solution, without, however, simply adopting the legal view on this point of any member state. It is a task similar to the one which, as will be seen later, the French Conseil d'État had to perform in creating, without the aid of any legislation, French administrative law in general and the law of public tort liability in particular.

The protection of private interests under the Treaty has been strongly influenced by French administrative law. Thus, we find the basic distinction between *contentieux d'annulation* in article 33, a device for the annulment of administrative acts; and *contentieux de pleine juridiction* in article 34, the procedure to obtain indemnity for damages caused by the public administration, a distinction traditional to French administrative law. In the realm of the *contentieux de pleine juridiction*, two terms fundamental to French law of public tort liability, *faute de service* (which might be translated as service-connected fault) and *faute personnelle*, form the decisive criteria in article 40. Article 34, the other provision concerning tort liability, has adopted the notion of *faute de nature à engager la responsabilité (de la Communauté)*, which has been worked out by the Conseil d'État in a long line of cases as the basis of governmental tort liability.

This strong influence of French administrative law in the area of tort liability justifies and makes necessary an extensive analysis of the French law on this point, subject, of course, to what has been said

9. The institution of the general counsel (*avocat général*) has been taken over from the French law (there called *commissaire du gouvernement*, attached to the Conseil d'État). Although not a member of the tribunal, the general counsel publicly announces his opinion and the reasons therefor at much greater length than the court, before the latter renders its opinion.

10. In his conclusions in *affaire no. 3/54*, in *RECUEIL* 143, 149.

11. Note, 65 *YALE L.J.* 1227-28 (1956); Marsh, *Supranational Planning Authorities and Private Law*, 4 *AM. J. COMP. L.* 189, 190-91 (1955); Daig, *Die ersten vier Urteile des Gerichtshofes der Europäischen Gemeinschaft fuer Kohle und Stahl*, *JURISTENZEITUNG* 361 (1955). See also *RAPPORT DE LA DÉLÉGATION FRANÇAISE SUR LE TRAITÉ INSTITUANT LA COMMUNAUTÉ EUROPÉENNE DU CHARBON ET DE L'ACIER* 37 (1951).

12. See generally M. Lagrange in his conclusions in *affaire no. 3/54*, in *RECUEIL* 143, 148.

about the outright adoption of any national law for the interpretation of Treaty provisions.

Notions of public tort liability as developed under German law have to a much lesser degree found access into the Treaty. The reasons for this probably lie in the fact that the French example of forming a system of public tort liability completely separate from the rules of private tort law was much more suited for the Community which lacks private law rules than the German solution where governmental tort liability is essentially based on provisions of the civil code and the federal constitution. Nevertheless, the German law in this area will be analyzed to a certain extent, not so much because it presents a different approach, but primarily because some of its basic features are quite similar to the solution under the Federal Tort Claims Act.

### III.

#### THE BEGINNING OF PUBLIC TORT LIABILITY IN FRANCE AND THE ROLE OF THE CONSEIL D'ÉTAT IN THE SUBSEQUENT DEVELOPMENT.

In France, state liability in its first beginnings dates back to the Declaration of the Rights of Man in 1789. Before that time, France, as well as the rest of the European states, denied any responsibility of the state under the theory of the absolute monarchy. A combination of the Roman idea of *imperium* and feudal lordship, for which the lawyers of the king like Bodin and Loyseau worked out the theoretical foundations, was attached to the position of the king and prevented suits in tort against him, or the state which he represented. The prevailing doctrine of that time was *le roi ne peut faire mal*, a doctrine which corresponds not only in its practical but also in its theoretical aspects to the English principle that the king can do no wrong, later also to be adopted in the United States.

Not only the French state but also its public officials were originally immune from tort actions. It was only by virtue of express legislation that they could later be sued, and then, however, only with the consent of the head of the administration (by statutes of 1789 and 1790) or that of the Conseil d'État (Article 75 of the Constitution of the year VIII of the Revolution, *i.e.*, 1800). Since the Conseil d'État until 1872 was a mere administrative agency, the administration had an arbitrary power to determine whether a suit should be admitted or not. Actually, only in very few cases was consent given to bring an action against a public official.

The first inroads into the theory of sovereign immunity came as the consequence of certain ideas of the French Revolution. The Declaration of Rights of Man of 1789 established in its Article 17 the principle that private property, being an inviolable and sacred right, can be taken only when public necessity demands it and only against the payment of just compensation. The other idea was that of the equality of all citizens in regard to public charges, an idea expressly proclaimed in the same declaration. These two notions led to a system of compensation by the state in cases of eminent domain as well as in cases where a person had suffered damages by virtue of public works undertaken by the state.

From there, these principles were extended to all cases where private property had been injured by administrative action, and later to a general recognition of tort liability of the state for wrongful acts. Landmark cases in this development will be discussed later.

At this point, attention should be given to one basic difference between the French law of public tort liability and the situation in the United States. In France, the change of law from a point of absolute immunity of the state to an elaborate and far-reaching system of granting indemnity has been exclusively the work of the courts, especially the Conseil d'État and the Tribunal des Conflits.<sup>13</sup> Without the aid of any legislation, these courts have in a long line of cases created firm principles of public tort law. It is striking that in the pioneer country of codification the task of developing an increasingly important branch of the law has been, and still is, left to the two highest tribunals, which, however, have accomplished their mission in an excellent way. The protection of the private citizen against encroachments of the public power under French administrative law is outstanding and has served as an example in other countries.

In the United States, on the other hand, judges have played a rather passive and reluctant role in overcoming the outmoded concept of sovereign immunity. In spite of the early statement by President Lincoln in his first annual message to Congress in 1861 that "it is as much the duty of Government to render prompt justice against itself in favor of citizens as it is to administer the same between private individuals",<sup>14</sup> most American judges have with sparse justification applied the doctrine of sovereign immunity through the decades. Only a few opinions appear to be off the beaten track; they point at the in-

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13. The function of the Tribunal des Conflits is to decide whether the ordinary (civil) courts or the administrative courts shall have jurisdiction in a given case.

14. Quoted by Mr. Justice Frankfurter in his dissenting opinion in *Kennecott Copper Co. v. Commissioner*, 327 U.S. 573, 586 (1946).

adequacy and injustice of the old doctrine.<sup>15</sup> But certainly these few voices could not change the law. Therefore, Congress had to move in, enacting the Federal Tort Claims Act of 1946. Thus, we find the strange situation that in the United States, where judges have traditionally had a much stronger position than in France, where the law is to a large extent judge-made, and where great changes in the law have in most instances been brought about by judicial decisions rather than by legislation, the decisive step of at least partly discarding the idea of sovereign immunity had to be taken by way of legislation.<sup>16</sup> Whereas in France, the traditional country of codification, almost the entire development in the direction of estate responsibility has been achieved by the courts.

#### IV.

##### LEGAL BASIS OF PUBLIC TORT LIABILITY.

###### A. *The French System.*

Since the creation of the codes by Napoleon, private tort liability has been governed by the provisions of the civil code. Section 1 (1382) provides in broad and sweeping language that "every act that causes damage to another person obliges him by whose fault the damage has occurred to make redress," and section 1384 established liability for wrongful acts of another person on the basis of respondeat superior. It would have been quite possible, as the idea of sovereign immunity was losing more and more ground, to base the liability of the state for tortious acts on these provisions of the civil code, administered by the ordinary courts.<sup>17</sup> However, the development went in a different direction. As early as 1855, the Conseil d'État began to claim exclusive jurisdiction over this area. In the *Rotschild* case,<sup>18</sup> it announced that the responsibility of the state for wrongful acts can be adjudged only by administrative authorities since the nature of the particular branch of the administration would have to be taken into consideration, which

15. Compare Mr. Justice Frankfurter's dissenting opinion in *Great Northern Life Insurance Co. v. Read*, 322 U.S. 47, 57 (1944), with the same Justice's later dissenting opinion in *Kennecott Copper Co. v. Commissioner*, 327 U.S. 573, 580 (1946). See Justice Wolfe dissenting in *Bingham v. Board of Education*, 118 Utah 582, 593, 223 P.2d 432, 438 (1950). See also Justice Carter dissenting in *Madison v. San Francisco*, 106 Cal.2d 232, 236 P.2d 141 (1951).

16. The same is true of Great Britain, where governmental liability for torts had to be introduced by way of legislation in the Crown Proceedings Act, 1947, 10 & 11 Geo. 6, c. 44, § 2(1).

17. This was done in Belgium, where, however, the results of developing a system of public tort liability have been meagre. See Trotabas, *Liability in Damages Under French Administrative Law*, 12 J. COMP. LEG. & INT'L L. (3d ser.) 213, 214 (1930).

18. [1855] Sirey Recueil 707, cited in MUCH, *DIE AMTSHAFTUNG IM RECHT DER EUROPAEISCHEN GEMEINSCHAFT FUER KOHLE UND STAHL* 27 (1952).



the ordinary courts would be unable to do. This first comment found its confirmation in the famous *Blanco* decision, rendered by the Tribunal des Conflits in 1873.<sup>19</sup> This case is commonly considered to be the most important step in the development of freeing the law of public tort liability from the provisions of the civil code and the jurisdiction of the ordinary courts. The whole theory of administrative law as it exists to-day can be traced back to it. The facts in the case were that a child had been injured by employees of a government warehouse. The question before the Tribunal des Conflits was whether the ordinary courts applying the provisions of the civil code should have jurisdiction or whether this was a case to be decided by the administrative courts. The court decided in the latter sense, using the following words:

"The responsibility which may be incumbent upon the Government for damage caused to individuals by acts of persons employed by the Government in public service, cannot be governed by the rules which have been established in the civil code for the relations between individuals. Governmental responsibility is neither general nor absolute; it has its special rules which vary according to the needs of the service and the necessity of reconciling the rights of the Government with private rights."<sup>20</sup>

It should be noted that the original purpose of the *Blanco* decision was to free the administration from the rigorous application of the civil code provisions, especially article 1384 establishing a strict liability under the theory of *respondeat superior*. The court recognized that subjecting the government to these provisions would bring about an unsupportable burden to the public finances. It is interesting to note that in spite of these original considerations the development has gone in the opposite direction. The Conseil d'État has in the course of time imposed liability upon the state in situations where a private citizen would clearly not be liable under the civil code provisions.

Thus, starting in 1873 with the *Blanco* decision, the French law of public tort liability has gone a separate and completely different way from that of private tort law. The administrative courts were, from that time on, able to build up, unhampered by any code provisions, a system of public tort liability. It is true that in the beginning they did so by adopting the notation of fault as the basis for liability, *i.e.*, the same notion used by section 1382 of the civil code. Very soon, however, its character was fundamentally changed with the gradual intro-

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19. [1873] Sirey Recueil 153; [1873] Dalloz Jurisprudence III. 17, cited by WALINE, *TRAITÉ ÉLÉMENTAIRE DE DROIT ADMINISTRATIF* 576 (6th ed. 1951).

20. *Id.* at 158, Dalloz at 22.

duction of the term *faute de service*.<sup>21</sup> This term, as has been understood and applied in the last five decades in France, and fault as a civil code term has completely different meanings. Furthermore, the Conseil d'État has not only changed the contents of terms originally adopted from the civil code, but has, for certain groups of cases, gone further in basing the responsibility of the state on a theory of absolute liability, a form unknown to the civil law.

It can be said that to-day we find two separate bodies of tort law in France, the law of the civil code on the one hand and the public tort law, as developed by the Tribunal des Conflits and the Conseil d'État, on the other. The separation is complete; perhaps it is best demonstrated by the fact that none of the many decisions of the Conseil d'État rendered in this area has even by way of analogy referred to the provisions of the civil code.<sup>22</sup>

#### B. *The System Under the Federal Tort Claims Act.*

Very unlike the situation under the French law, the Federal Tort Claims Act of 1946 (FTCA) is based on a very close connection between private tort law and public tort liability. Governmental liability under the FTCA follows the private law rules of tort. The pertinent provisions of the FTCA establishing this are section 2674:<sup>23</sup> "The United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances . . .," and section 1346(b) which gives the district courts exclusive jurisdiction in actions against the United States, "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

Congress thus extended the application of the rules of private tort law to the area of governmental tort liability. This intent of Congress was clearly spelled out in the case of *United States v. Campbell*:

"The whole structure and content of the FTCA makes it crystal clear that in enacting it and thus subjecting the Government to suit in tort, the Congress was undertaking with the greatest precision to measure and limit the liability of the Government, under the doctrine of respondeat superior, in the same manner and to the same extent as the liability of private persons under that doctrine were measured and limited in the various states."<sup>24</sup>

21. The character of *faute de service* will be discussed in detail at a later point. For present purposes, it may be enough to say that the basis of *faute de service* is the bad functioning of the administrative service, i.e., administrative fault.

22. MUCH, *op. cit. supra* note 18, at 32, citing DUEZ, *LA RESPONSABILITÉ DE LA PUISSANCE PUBLIQUE* 18 (2d ed. 1938), and ROLLAND, *PRÉCIS DE DROIT ADMINISTRATIF* 360 (9th ed. 1947).

23. 60 STAT. 843 (1946), 28 U.S.C. § 2674 (Supp. 1952).

24. 172 F.2d 500, 503 (5th Cir. 1949), *cert. denied*, 337 U.S. 957 (1949).

Not very long after the enactment of the FTCA, the question arose as to what extent governmental tort liability is based on the rules of private law, in other words, whether the government is liable only in those cases in which private persons have traditionally been held liable. Thus, in *Feres v. United States*,<sup>25</sup> the plaintiff asked for damages arising out of injuries inflicted on him by other soldiers while he was a member of the armed forces and on active duty. The United States Supreme Court dismissed the claim, basing its decision on the fact that plaintiff had not been able to point even to a remotely analogous liability under private tort law rules. In enacting the FTCA, said the Court, Congress did not intend to create new causes of action but merely accepted government liability under circumstances which would bring private liability into existence. "We find no parallel liability before, and we think no one has been created by this Act. Its effect is to waive immunity from recognized causes of action and was not to visit the Government with novel and unprecedented liabilities."<sup>26</sup>

In *Dalehite v. United States*,<sup>27</sup> a case arising out of the Texas City explosion disaster, one of the questions was whether the federal government was liable, under the FTCA, for negligence on the part of the Coast Guard in fighting the fire on the burning ships loaded with fertilizer. Citing *Feres v. United States* and section 2676 of the FTCA, the Court confirmed its attitude taken in the *Feres* case, pointing out that the law of torts had never recognized liability arising out of fire-fighting and that hence no valid claim should be made under the FTCA.

The same result was reached in *National Manufacturing Co. v. United States*<sup>28</sup> by the Court of Appeals for the 8th Circuit, where a claim had been based on the negligence of the U.S. Weather Bureau in giving erroneous weather and flood forecasts. The court in this case introduced the criterion underlying the *Feres* and *Dalehite* cases of whether an activity is purely governmental or not. Negligence in undertaking governmental activities intended for the public at large and without any private counterpart cannot, said the court, lead to governmental liability.

Considering the holdings of these cases, it seems that the courts have strictly adhered to the letter of the FTCA by not allowing claims because of the absence of an analogous private counterpart for the respective activity. Starting in 1955, however, the Supreme Court has freed itself from this strict adherence to the letter of the FTCA, thereby

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25. 340 U.S. 135 (1950).

26. 340 U.S. 135, 142 (1950).

27. 346 U.S. 15 (1953).

28. 210 F.2d 263 (8th Cir. 1954), *cert. denied*, 347 U.S. 967 (1954).

overruling the line of cases beginning with *Feres v. United States*. The turning point in this development was the case of *Indian Towing Co. v. United States*,<sup>29</sup> where suit was brought for the loss of cargo which occurred when a tug ran aground because of the negligence of the Coast Guard in the inspection and repair of a lighthouse. The government, relying on the *Feres* and *Dalehite* cases, contended that the language of the FTCA must be read as excluding liability for negligence in the performance of activities which private persons do not undertake. This argument, hitherto firmly established, was rejected by Mr. Justice Frankfurter in the majority opinion. The criterion of purely governmental activity and the absence of an analogous private counterpart was abandoned by the Court:<sup>30</sup>

" . . . [I]f the United States were to permit the operation of private lighthouses — not at all inconceivable — the Government's basis of differentiation would be gone and the negligence charged in this case would be actionable . . . all governmental activity is inescapably 'uniquely governmental' in that it is performed by the Government . . . . On the other hand, it is hard to think of any governmental activity on the 'operational level' . . . which is uniquely governmental in the sense that its kind has not at one time or another been, or could not conceivably be, privately performed."<sup>31</sup>

The Court came to the conclusion that:

"There is nothing in the Tort Claims Act which shows that Congress intended to draw distinctions so fine-spun and capricious as to be almost incapable of being held in the mind of adequate formulation."<sup>32</sup>

The only other case to be mentioned here,<sup>33</sup> *Rayonnier v. United States*,<sup>34</sup> involved the same problem as the *Dalehite* case, namely liability of the government for negligence in firefighting. After stating that the *Dalehite* case, insofar as it had clung to private tort law concepts, had been overruled by the *Indian Towing* case, the Supreme Court continued in a rather bold and fearless way:

"It may be that it is 'novel and unprecedented' to hold the United States accountable for the negligence of its firefighters, but

29. 350 U.S. 61 (1955).

30. *Id.* at 66-68.

31. "How about the task of the executioner?" asks Davis, *Tort Liability of Governmental Units*, 40 MINN. L.R. 751, 788 (1956).

32. 350 U.S. 61, 68 (1955).

33. Several lower courts at that time discarded the *Feres-Dalehite* doctrine. See for example, *Kirk v. United States*, 232 F.2d 763 (9th Cir. 1956); *Air Transport Associates v. United States*, 221 F.2d 467 (9th Cir. 1955); *Bulloch v. United States*, 133 F.Supp. 885 (D. Utah 1955).

34. 352 U.S. 315 (1957).

the very purpose of the Tort Claims Act was to waive the Government's traditional all-encompassing immunity from tort actions and to establish novel and unprecedented governmental liability."<sup>35</sup>

With these last two decisions, the Supreme Court has to a certain extent introduced new concepts into the law of public tort liability, thus leaving the ground of private tort law. It remains to be seen in which direction the future development will go. Will the Supreme Court disregard the express command of the FTCA that public tort liability shall not go further than liability of private persons under the private tort law rules, and build up, like the Conseil d'État in France, a new and completely separate body of law for government claims cases which is not merely an extension of private tort law? The *Indian Towing* case and especially the *Rayonnier* case seem to be a first step in this direction.

### C. *The German System.*

German law concerning public tort liability follows a similar pattern as that of the FTCA. The legal basis of the responsibility of the state for torts committed by its agents is a provision of the German civil code, section 839, together with Article 34 of the federal constitution.<sup>36</sup> Section 839, at the time of its taking effect on January 1, 1900, having brought about a uniform regulation of public tort liability, provides:

"(1) If a public official intentionally or negligently violates his official obligation towards a third person, he is liable for the ensuing damages to this third person. . . ."

It should be noted that this section, though setting up special standards for the liability of public officials (especially in regard to negligence), is one of the provisions of private tort law, to be found under the chapter "Torts" of the civil code.

The direct liability of the public official has, as early as 1909 in Prussia<sup>37</sup> and in 1910 in the Reich,<sup>38</sup> been taken over by the state by way of legislative provisions. The same thing was done by Article 131 of

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35. *Id.* at 319. On the other hand, the Supreme Court still recognizes that local state law governs. *United States v. Sharpnack*, 78 Sup. Ct. 291, 297 (1958); 3 VILL. L. REV. 558 (1958).

36. For an analysis of the historical development of public tort liability in Germany, see Braband, *Liability in Tort of the Government and Its Employees*, 33 N.Y.U.L. REV. 18, 32 (1958).

37. Law of August 1, 1909, [1909] G.S. 691 (Prussia).

38. Law of May 22, 1910, [1910] REICHSGESETZBLATT 798 (Germany).

the Weimar Constitution of 1919.<sup>39</sup> Article 34 of the present federal constitution,<sup>40</sup> now the only applicable provision, states:

"If any person, in exercising the duties of a public office entrusted to him, violates his official obligation to a third party, liability shall in principle rest with the state or his employing agency. . . ."

The effect of basing governmental tort liability on this combination of legal provisions is that liability of the state can only arise if a public official would be liable under section 839 of the civil code. In this situation, the state assumes in lieu thereof the liability which originally accrued to the person of the official by virtue of article 34 of the constitution. This means that a suit can only be brought against the state and not against the official. The legal basis on which the presence or absence of the state's liability is adjudged is, however, section 839. This means that if the public official is not liable under section 839 of the civil code, the state is equally not liable under article 34 of the constitution. Article 34, in other words, presupposes that all requirements of section 839 are fulfilled. The use of the word *liability* in article 34 is generally considered to point to an already existing liability under section 839 which is then taken over by the state.

The similarities between the American and German solution are obvious by now. Disregarding for a moment the recent development in the *Indian Towing* and the *Rayonnier* cases, and taking only the provisions of the FTCA, it can be said that both systems are ultimately based on the rules of private tort law. The pertinent provisions of the FTCA as well as Article 34 of the German constitution presuppose the existence of a valid claim under those rules and merely transfer liability over to the state. It is true that German law puts great emphasis on the existence of liability of a public official, whereas the FTCA finds the decisive criterion in an analogous liability of a private person under like circumstances. This, however, is only a consequence of the fact that American law has never, for purposes of tort liability, made a distinction between private citizens and government employees, subjecting the latter, insofar as they could be sued at all, to the general rules of tort law; whereas German law in section 839 of the civil code has established a special provision for claims against public officials. This does not change the basic conclusion that the FTCA and German law stand, in

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39. Weimar Const. of 1919 art. 131 (Fisk transl. 1924).

40. Provisional Const. of the Federal Republic of West Germany of 1949 art. 34 (U.S. Dept. of State, Pub. No. 3526, transl. 1949).

their theoretical aspects and, as will be seen, also in their practical aspects, very close together, whereas French law follows completely different concepts.

V.

JURISDICTION OVER CASES INVOLVING  
PUBLIC TORT LIABILITY.

A. *France.*

The importance of the *Blanco* decision has not been limited to the substantive side of the law of public tort liability. Preceded by the *Rotschild* case in 1855,<sup>41</sup> the *Blanco* decision<sup>42</sup> clearly announced the principle that only the administrative authorities, *i.e.*, the Conseil d'État, are competent to rule on questions arising out of the separate body of public tort law. From that time on, not the ordinary courts, but only the Conseil d'État can decide tort claims against the government, as well as other claims where the government is involved. The idea behind this was not only the belief that the judges of the ordinary courts, brought up under and used to the system of the civil code, would not be able to effectively adjudge cases arising out of the new and growing area of governmental activities, but also the concept of separation of powers. This last consideration was brought out in the *Pelletier* case,<sup>43</sup> which was decided by the Tribunal des Conflits shortly after the *Blanco* case in 1873. An action for damages was brought before the ordinary courts against an army general who, acting within the scope of his authority, had confiscated certain newspapers. The general questioned the jurisdiction of the ordinary courts and brought the case before the Tribunal des Conflits. This court decided that, under the doctrine of separation of powers, ordinary courts are incompetent to decide cases where they would necessarily have to adjudge the regularity of administrative acts. This would be the case whenever a public official is sued for a fault committed in the exercise of his functions. Where, either in a suit against the state or a government employee, the question arises whether a particular administrative act is infected with fault, the Conseil d'État, being part of the administrative power, would have to take jurisdiction. Only in cases where the damage is the result of the personal fault of the employee do the ordinary courts applying the provisions of the civil code have jurisdiction.<sup>44</sup>

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41. See note 18 *supra*.

42. See note 19 *supra*.

43. [1874] Sirey Recueil 2, 28, cited in MUCH, *op. cit. supra* note 18, at 29.

44. The court here for the first time made the distinction, although not using these terms, between *faute de service* and personal fault, a distinction which has become vital in the French law of public tort liability.

This duality in the French court system necessitated the establishment of a tribunal which would decide the question whether the ordinary courts or the Conseil d'État is competent to decide a case. This function is performed by the Tribunal des Conflits, first established in 1848. Its nine members consist of three judges chosen from the Cour de Cassation, the highest ordinary court, three from the Conseil d'État and two others chosen from these six; the ex officio president is the Minister of Justice. This tribunal has not limited itself to the bare announcement that a given case belongs to the jurisdiction of one or the other branch, but has, as the *Blanco* and *Pelletier* decisions show, to an essential degree contributed to the development of French administrative law.

#### B. *United States.*

No problem of separation of powers between ordinary and administrative courts exists under the provisions of the FTCA. This is a consequence of the fact that public tort law under the FTCA is based on the general rules of private tort law and is not a separate branch of the law. Therefore, no special courts have had to be set up. Accordingly, section 1346(b) provides that the district courts, sitting without a jury, shall have jurisdiction over tort claims against the government. The query raised by Street<sup>45</sup> (referring to the institution of the equity courts and their successful history) whether the courts entrusted with the development of this new body of law should not be special tribunals untrammelled by private law concepts, can, at least under the FTCA, be answered by the Act's general attitude that public tort liability is to follow the rules of private tort law and that therefore no special courts are necessary. How desirable it would be to create a separate body of law, to be administered by a special court, similar to that for contractual liability of the government in the Court of Claims, and whether the holdings of the *Indian Towing* case and the *Rayonnier* case indicate a first step in this direction, cannot be forecast at this time.

#### C. *Germany.*

As in France, there exists in Germany the division between ordinary and administrative courts,<sup>46</sup> the latter having jurisdiction where the government in its official capacity is a party to a litigation. Nevertheless, the ordinary courts traditionally have had, and still have, juris-

45. Street, *Tort Liability of the State: The FTCA and the Crown Proceedings Act*, 47 MICH. L. REV. 341, 367-68 (1949).

46. Besides these, there are other specialized courts, such as tax courts, labor courts and a patent court.



diction over tort claims against the government. Article 34 of the federal constitution expressly provides that "with respect to the claim for damages . . . , appeal to the ordinary courts must not be excluded." This is one of the consequences of the fact that tort claims arising out of wrongful acts of public officials were originally considered to be directed against these particular officials based upon a provision of the civil code and to be brought before the ordinary courts. When at a later date the state assumed liability in lieu of the official, the jurisdictional side of the problem remained untouched, even though, especially after 1948, there have been strong voices in favor of conferring jurisdiction over cases of governmental tort liability on the administrative courts.<sup>47</sup> This, however, would require a change of the federal constitution.

#### D. *The European Coal and Steel Community.*

Leaving the analysis of the substantive aspect of public tort liability in the Coal and Steel Community for a later discussion, it seems adequate at this point to show certain similarities on the procedural side between the American system and the system under the Treaty Constituting the Coal and Steel Community.

Under the Treaty, there is only one court, the Court of Justice, which decides all litigations which may arise. A definition of the nature of the Court in traditional terms seems to be impossible and will not be attempted here.<sup>48</sup> In the area of tort liability, the Court has jurisdiction not only over suits against the Community, but also over suits against individual employees of the Community guilty of a personal fault. This is so in spite of the fact that the French law of public tort liability, which has been followed by the Treaty, confers jurisdiction in the first group of cases on the Conseil d'État whereas in the second group the ordinary courts have jurisdiction. Difficulties which arose under the French system out of the fact that ordinary courts and the Conseil d'État can both have jurisdiction over the same case, are thus avoided in the Community. It also follows that the Court will have to apply not only law of an administrative nature (in tort suits against the Community), but also rules of private tort law<sup>49</sup> (in suits against individual employees for personal fault).

47. See, for example, Heidenhain, *Die Amtshaftung in der Bundesrepublik*, in NEUE JURISTISCHE WOCHENSCHRIFT 841 (1949).

48. For example, see Ludovici, *La Jurisprudence de la Cour de Justice de la C.E.C.A.*, 60 RÉVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIQUE 111, 112 (1956): ". . . la Cour de Justice est une institution sui generis, qui ne trouve sa place dans aucune des catégories préexistantes."

49. What the contents of this private law will be is still completely open.

It can be said, therefore, that the solution of the jurisdictional problem in the Coal and Steel Community generally, and for the area of public tort liability in particular, shows much greater similarity to the American system where the same courts apply both private and public law (leaving the jurisdiction of state courts out of consideration), than to the French system where different law is applied by different courts. German law confers on the ordinary courts jurisdiction over claims arising out of governmental (as distinguished from fiscal) activities of the state only in exceptional cases, *e.g.*, in the area of public tort law. This is to that extent an exception to the general rule on the European continent that different, highly specialized courts apply different law.<sup>50</sup> This rule applies only to a limited extent to the United States where, apart from a few specialized tribunals like tax courts or the Court of Claims, the great bulk of litigation, including tort claims, is still handled by the ordinary courts. The rule does not apply at all to the Coal and Steel Community where the Court of Justice is the only judicial authority to decide litigations, whatever form they may take and whatever law has to be applied.

## VI.

### BASIC FEATURES AND DIFFERENCES IN THE SUBSTANTIVE LAWS OF PUBLIC TORT LIABILITY OF THE THREE COUNTRIES.

#### A. *Faute de Service and Faute Personnelle in France.*

The most prominent feature which arose out of the separate development of public tort law in France, beginning with the *Blanco* decision, was the introduction of the terms *faute de service* and *faute personnelle*. The first decision to be based on this distinction, although not yet using these technical terms, was the *Pelletier* case. However, as has been shown, this case and other cases following turned primarily on the jurisdictional aspect of the problem, stating that under the theory of separation of powers the ordinary courts can not have jurisdiction where a scrutiny of the functioning of the administrative service has to take place. The Conseil d'État has only gradually shifted the operation of this distinction over to the substantive side. *Faute de service* no longer served as a merely negative criterion for the purpose of excluding the jurisdiction of the ordinary courts, but it be-

50. The German Federal Constitution provides for six highest federal appellate courts: a Constitutional Court (art. 92) and courts of ordinary, administrative, finance, labor and social jurisdiction (art. 96), the court of ordinary jurisdiction being divided into permanent civil and criminal panels. Besides these, there exists a highest federal patent court.

came a concept with positive content and thus the basis of governmental tort liability. The last step in this direction was taken by the Conseil d'État in the *Tomaso Greco* case<sup>51</sup> where the court for the first time expressly used the term *faute de service* as a positive test for the liability of the government.

*Faute de service* is, as even a member of the Conseil d'État has admitted,<sup>52</sup> a term which is almost impossible to define precisely. One of the reasons is that the Conseil d'État itself has never tried to set up general criteria for the use of the term. Instead, the Court has preferred to proceed by deciding each case on its own merits, thus preserving to itself considerable freedom for different adjudications of later cases.

*Faute de service* has, as has been mentioned before, no similarity to the fault as used in the civil code. Its most important characteristic is that it does not have to have any connection with the fault of a particular, identifiable government employee. It is enough to show a generally improper operation of the administrative service to which the damage can be imputed. *Faute de service* is thus essentially anonymous in character. It is the service that is adjudged, not any of its agents. Even where there is negligence on the part of an individual, liability of the state is not the consequence of that negligence but rather the government's own fault shown by the *mauvais fonctionnement du service*. A good description of *faute de service* has been given by Teissier.<sup>53</sup>

The two cases commonly given as illustrations of the anonymous character of the *faute de service* are the *Anguet*<sup>54</sup> and the *Auxerre*<sup>55</sup> cases. In the *Anguet* case the public doors of a post office building were locked before a customer completed his business. He was asked to leave through a door reserved for letter carriers. There, he got into an argument with two letter carriers who expelled him forcibly, injuring his leg. The government disclaimed responsibility on the ground that the cause of the injury had been the personal fault of its employees. The Conseil d'État, however, decided that, irrespective of the personal liability of the letter carriers, the government was liable under the aspect of *faute de service* which consisted of the bad functioning of the public service, namely the fact that some employee had advanced the hands of the clock in the post office thus causing the premature closing of the building, which in a well-operated service

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51. [1905] Recueil 139, cited by MUCH, *op. cit. supra* note 18, at 30.

52. ODENT, *CONTENTIEUX ADMINISTRATIF* 475 (1954).

53. TEISSIER, *LA RESPONSABILITE DE LA PUISSANCE PUBLIQUE* 49 (1906), cited in MUCH, *op. cit. supra* note 18, at 33.

54. [1911] Recueil 146, cited by MUCH, *op. cit. supra* note 18, at 33-34.

55. [1905] Recueil 165, cited by MUCH, *op. cit. supra* note 18, at 34.

should not occur, and the further fact that there had been a projection at the door on which the plaintiff got injured, again a defect which should not exist in a well-managed operation. The court considered it to be completely irrelevant to inquire who had advanced the clock or who had ordered or tolerated the projection at the door-sill.

In the *Auxerre* case a soldier had been killed in a manoeuvre by the discharge of a gun, by an "enemy" soldier, which had been loaded instead of containing only a blank cartridge. It could not be determined who had fired the shot or who was responsible for mixing the loaded cartridge with the blank ones. Nevertheless, the Conseil d'État held the government liable since this accident was the consequence of a *faute de service*.

*Faute de service* is, as these examples may have shown, fault of the administration as a technical unit, regardless of whether it can be traced to the act of an individual employee or not, and regardless of whether this employee is also liable or not. This implies that a legal entity like the state, having the character of a fictitious person, can commit a fault, an implication which is generally accepted by French legal writers. Only Waline<sup>56</sup> denies such a possibility. He bases the liability of the state on a theory of guarantee by the state for its employees. This view seems to be supported, as will be seen later, by the theory of combination of liabilities developed by the Conseil d'État.

*Faute personnelle*, on the other hand, is the personal fault of a government employee for acts committed either upon the occasion or in the execution of a public function. They make him personally liable before the ordinary courts which apply the provisions of the civil code. No problems exist where the tort is a purely private act, bare of any official character, *e.g.*, where a policeman off duty injures another person with his gun. Real difficulty arises in those cases where an employee commits a tort in the execution of his official functions. This may be a *faute de service* if it reveals the defective functioning of the administrative service, but is the employee, apart from that, also personally liable? French legal writers have attempted to determine this question by setting up certain criteria. Thus, Laferriere<sup>57</sup> said that if the act is impersonal, if it shows an administrator more or less subject to error rather than a man with his weaknesses, his passions and his imprudences, the act remains administrative and cannot entail the personal liability of the employee. Jeze<sup>58</sup> stated that wilfulness, malice

56. WALINE, *TRAITÉ ÉLÉMENTAIRE DE DROIT ADMINISTRATIF* 579 (6th ed. 1951).

57. LAFERRIÈRE, *I TRAITÉ DE LA JURISDICTION ET DES RECOURS CONTENTIEUX* 648 (2d ed. 1896), cited in SCHWARTZ, *FRENCH ADMINISTRATIVE LAW AND THE COMMON-LAW WORLD* 259 (1954).

58. Cited in SCHWARTZ, *op. cit. supra* note 57, at 259.

or gross negligence on the part of the employee in inflicting damages would present personal fault. But although mentioning certain groups of cases which come under the category of *faute personnelle*, these definitions are not precise nor all-embracing.

Much,<sup>59</sup> after having analyzed the pertinent decisions of the Tribunal des Conflits, finds two criteria running through all these cases — the intent of the acting employee and the degree of fault. As to the former, Much states that where a government official has acted bona fide in performing his official functions and in the course of this action has injured someone, personal liability would have to be denied. Where, on the other hand, he injures someone, though under cover of his official functions, for purely personal reasons, *e.g.*, revenge, the official would be personally liable. This situation may be illustrated by the *Prefet de la Gironde* case<sup>60</sup> where a mayor, authorized to post a list of qualified voters on a public bulletin board, maliciously posted alongside of it the notice that a certain person, namely his political opponent in the campaign, was bankrupt and therefore disqualified as a voter. This was considered by the court to be a malicious act, bare of any official character, for which the mayor was personally responsible.

The second criterion found by Much is the degree of fault involved. Personal liability has been assumed in cases where the fault of the employee exceeded the normal degree of carelessness and error which occurs in every public administration. This includes not only criminal acts and intentional infliction of injuries, especially when motivated by malice, revengefulness, or hostility against a certain person, but also cases of gross negligence.

B. *The Requirement of a Definite Act of Particular Employee Under the FTCA.*

To the FTCA, taking a much more conservative attitude in the area of public tort liability than that of the French law, the idea that the administration itself can commit a wrongful act — that the bad functioning of the administrative machinery can provide the basis for state liability — is unknown. The approach under the FTCA is radically different from the French concept of *faute de service*. In following the rules of private tort law, the FTCA requires the existence of some definite act or omission on the part of a specific individual employee. Tort liability is, as *United States v. Campbell*<sup>61</sup> has pointed out, based

59. MUCH, *op. cit. supra* note 18, at 71-73.

60. [1899] Dalloz 3, 93, cited in MUCH, *op. cit. supra* note 18, at 71.

61. 172 F.2d 500, 503 (5th Cir. 1949), *cert. denied*, 337 U.S. 957 (1953).

on the doctrine of respondeat superior which requires proof of some specific wrongful act.

The question whether under the FTCA it is enough for a plaintiff to allege negligence on the part of the United States in general terms came up for the first time in *Sickmann v. United States*.<sup>62</sup> Plaintiff sued for damages arising out of the destruction of his crops by migratory birds protected from shooting by the Migratory Bird Treaty Act. The court dismissed the claim on the ground that plaintiff, rather than showing lack of due care by an employee of the United States, had merely in general terms charged negligence on the part of the United States acting through Congress, which under the FTCA was not sufficient.

A very clear pronouncement of this rule can be found in the *In re Texas City Disaster Litigation*.<sup>63</sup> Plaintiff had alleged negligence of the United States, describing the United States in broadest terms,<sup>64</sup> but without citing any particular employee. The court held this insufficient, saying:

"The event around which the entire statute is built, is an 'act or omission of an employee of the Government'. . . . The necessity of some definite act of commission or omission on the part of some particular employee or employees of the Government as a predicate for its liability is emphasized by the requirement of Section 1346(b) that liability be determined in accordance with the law of the place where the act or omission occurred. . . ."<sup>65</sup>

One of the reasons for dismissing the claim was that:

"Plaintiffs . . . failed to charge any specific negligence or wrongful act or omission against any particular employee or agent of the United States, simply resting on their eighty averments of negligence on the part of the United States as such."<sup>66</sup>

The *Sickmann* and especially the *Texas City Disaster Litigation* cases, followed by other decisions,<sup>67</sup> have made it clear that under the provisions of the FTCA, liability of the government for fault of the administrative service, regardless of whether the acting employee is at fault or not, does not exist. The requirement that there must be a wrongful act or omission excludes this possibility.

62. 184 F.2d 616, 619-20 (7th Cir. 1950), *cert. denied*, 341 U.S. 939 (1951).

63. 197 F.2d 771, 776 (5th Cir. 1952), *aff'd sub nom.* Dalehite v. United States, 346 U.S. 15 (1953).

64. The United States, all its agencies, executive departments, etc.

65. *In re Texas City Disaster Litigation*, 197 F.2d 771, 776 (5th Cir. 1952). Also see note 35 *supra*.

66. *Ibid.*

67. *Goodwill Industries v. United States*, 218 F.2d 270 (5th Cir. 1954); *United States v. Inmon*, 205 F.2d 681 (5th Cir. 1953).

The procedural strictness of this principle has, however, been mitigated by the application of the rule of *res ipsa loquitur* in this area. This rule is based on negligence which is inferred from all the circumstances producing the injury, plus a failure of the party who controlled the destructive force to come forward with evidence peculiarly within its knowledge rebutting the inferences of negligence.<sup>68</sup> In the case of *United States v. Hull*,<sup>69</sup> this rule was applied in a situation where a post office window had fallen on plaintiff's hand while she was sliding money across the counter. Plaintiff merely alleged negligence of the defendant, its agents, servants or employees. The court held that under the doctrine of *res ipsa loquitur* it was rational to infer from the sudden and unexplained falling of the window that the accident was attributable to some negligent or wrongful act or omission of defendant's employees. Therefore, a merely general allegation of negligence was held sufficient:

"Of course it is unnecessary . . . for the plaintiff to establish just which employee was at fault, and in what specific respect. It is enough if the trier of the facts is satisfied, on the balance of probabilities, that the injury was due to some negligent act or omission of some employee . . . ."<sup>70</sup>

The importance of the rule of *res ipsa loquitur*, as applied in the *Hull* case, is that a plaintiff in a tort suit against the government does not have to allege which particular employee has committed the wrongful act. If he has *prima facie* evidence establishing the existence of such an act about which all the information is in the hands of the government, and the government does not rebut the *prima facie* evidence, the existence of a wrongful act committed by a particular employee or employees will be presumed.<sup>71</sup> Theoretically, this solution seems to comply with the letter of the FTCA in that a definite act of a particular employee is at least presumed. In its practical consequences, however, it comes very close to a recognition of liability like the one in France under the concept of *faute de service* and defective functioning of the administrative service. It is sufficient if the claimant alleges in general terms negligence on the part of the government and its employees; the court is then under no obligation to trace the liability to

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68. See *United States v. Ure*, 225 F.2d 709 (9th Cir. 1955).

69. 195 F.2d 64 (1st Cir. 1952).

70. *Id.* at 66.

71. It should be noted, however, that the applicability of the rule of *res ipsa loquitur* in the area of public tort law is a question of state law. This means that the rule can be applied only in cases where the law of torts of the respective state recognizes its existence and applicability. This is done in most of the states. See PROSSER, TORTS §§ 42-43 (2d ed. 1955).

the act of a particular employee but merely assumes the presence of such an act. This is essentially the same thing which happens in France when a suit based on *faute de service* is brought against the government; the only difference is that no assumption as to any particular wrongful act is made. But this is merely, under the rule of *res ipsa loquitur*, a theoretical difference, easily relied upon by a court but certainly of no practical importance.

It seems therefore that if *United States v. Hull* should be followed, and the doctrine of *res ipsa loquitur* as there applied should be generally accepted by the courts,<sup>72</sup> the distinction in procedure, though not in the theoretical basis, between cases where claimants can introduce *prima facie* evidence in suits under the FTCA and suits based on *faute de service*, would vanish, leading to a great similarity between originally completely different forms of procedure in their practical consequences. It remains to be seen in what direction this development will go.

### C. *Similar Solution in Germany.*

Before going into a discussion of the situation under present German law, it is interesting to note that at the time when state liability for torts was first recognized, *i.e.*, at the beginning of this century, the prevalent theory forming the basis of this liability was that the state, as well as other legal entities (*e.g.*, corporations), is liable by virtue of its own fault and not that of its employees. This so-called *Organtheorie*, developed by Otto von Gierke, had a striking similarity to the French concept of *faute de service* in that in both cases the role of the particular wrongdoing employee is neglected and fault is imputed directly to the state.

Although this view had its merits in introducing primary rather than auxiliary state liability into German law,<sup>73</sup> it has been abandoned since. German law is, as has been pointed out, based on a system whereby the state assumes the liability originally accrued in the person of the employee. It presupposes that the employee would be liable under section 839 of the civil code. Since this provision, like the rules of private tort law generally, requires a specific wrongful act on the part of a particular person, governmental liability can equally be based only on such a specific act.

72. *United States v. Hull* was preceded by a decision of a district court in 1951, *Parcell v. United States*, 104 F.Supp. 110 (S.D. W. Va. 1951), where the court, relying on *res ipsa loquitur*, assumed negligence in the collision of two Air Force planes flying in formation, either due to negligent acts of the pilots or due to defects in the mechanical conditions of the planes. No attempt was made to find out which factor caused the collision and whose negligence was involved.

73. See MÜCH, *op. cit. supra* note 18, at 38.



However, as in the United States under the *Hull* case, German courts have created certain rules of evidence under which claimants do not necessarily have to point to a particular employee and the wrongful act committed by him. Thus, the Reichsgericht<sup>74</sup> has deemed it sufficient for the presentation of a claim if the plaintiff merely alleged facts from which the existence of a wrongful act of a particular employee could be inferred without difficulty; the allegation and proof of which particular employee was involved was held unnecessary. A justification for this practice was given in another decision of the Reichsgericht<sup>75</sup> where the court reasoned that the citizen is forced by the state to deal with public officials who are unknown to him; that it is therefore only just and fair that the government which knows or ought to know its employees furnishes, if necessary, information about the person of the particular employee to the injured, and not vice versa. If in a particular case it is impossible to ascertain the identity of an employee, the detrimental consequences arising out of this fact should not be borne by the claimant but by the administration, the defective management of which has caused such impossibility.

The Reichsgericht in this decision used a term, namely, a defective functioning of the service, very similar to the one on which *faute de service* in France is based. However, this factor does not become, as in France, the basis of governmental liability. The basis remains the wrongful act of some employee. All that the decision says is that if the state, because of the defective management of its service, can not ascertain the identity of the employee, the consequences arising out of this fact shall be borne by the state itself.

Nevertheless, this line of decisions has great practical importance. All the claimant has to do is to present the facts known to him from which the court will infer the presence of some wrongful act of an employee, regardless of whether the government is able to furnish detailed information about the person of the employee or the specific act involved. This is essentially the same solution as under the *Hull* case. The development under the FTCA and the *Hull* case on the one hand and that under German law as applied by the Reichsgericht on the other are strikingly similar in that the presence of a specific act of an identifiable employee is required by the statutory provisions in both cases, and in both cases courts have applied rules of evidence which mitigated the strict requirements for a claimant to allege and prove, and for a court to establish, the existence of such an act. What has been

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74. MUCH, *op. cit. supra* note 18, at 39.

75. *Ibid.*

said above about the decreasing difference on the practical side between tort claims under the FTCA and *faute de service* claims therefore applies equally to German law.

D. *Varying Standards for the Degree of Fault*

*Under the Decisions of the Conseil d'État.*

One of the consequences of the holding of the *Blanco* case (*i.e.*, governmental responsibility is neither general nor absolute; it has its special rules which vary according to the needs of the service) is a lack of a uniform standard for the degree of fault. This is considered to be one of the most important features of the concept of *faute de service* which distinguishes it from the notion of fault under the civil code. The Conseil d'État has stressed the fact that the element of fault in the *faute de service* cannot be brought on a common denominator, that each case has to be decided on its own merits, *i.e.*, according to the respective branch of the administration as well as the time, place and other circumstances involved in the case. All the Conseil d'État was willing to do was to recognize the existence of certain groups of cases to which an identical standard of fault can be applied. Thus, the court sometimes requires *faute simple*, sometimes *faute lourde*, the latter especially in cases where functions of the police are involved. For instance, excessive delay of the police (over two years) in assisting a sheriff in executing a judgment of eviction,<sup>76</sup> failure to enforce fire regulations for movie theatres even after the police had been advised that the performances were dangerous,<sup>77</sup> the taking of steps harmful to a company in a labor dispute in order to prevent disturbances between strikers and workers willing to work,<sup>78</sup> were cases where *faute lourde* was required. Other categories of fault set up by the Conseil d'État are *faute exceptionnelle et d'une particulière gravité*, applied during periods of national emergencies, *e.g.*, the time of the retreat of the French army in 1940,<sup>79</sup> and *faute manifeste et particulièrement grave* for suits against the government brought in the colonies.

Very often, the Conseil d'État has refused to bring a case under any of these categories at all by simply stating that there was a *faute de service de nature à engager la responsabilité de l'État*. This clause, which has been taken over by the Treaty Constituting the

76. *Sieur Braut*, [1943] Recueil 19, cited in Jacoby, *Federal Tort Claims Act and French Law of Governmental Liability*, 7 VAND. L. REV. 246, 264 (1954).

77. *Ville de Perpignan v. Dame Dalbiez*, [1943] Recueil 218, cited in Jacoby, *supra* note 76, at 246, 265.

78. *Compagnie nouvelle des sucreries réunies*, [1944] Recueil 32, cited by Jacoby, *supra* note 76, at 265.

79. See for example, *Finidori*, [1944] Recueil 254 (loss of personal belongings of employee of army store), cited in Jacoby, *supra* note 76, at 264, note 120.

European Coal and Steel Community, allows the court, not being bound by any strict rule, the utmost of discretion in deciding whether, on the merits of a given case, the state should pay reparation or not. This discretion has, as Street observes,<sup>80</sup> been wisely exercised by the Conseil d'État in order that justice be done.

E. *Combination of Liabilities Under French Law.*

A wrongful act of a government employee inflicting damages on a private person may be based on personal fault of this employee and also on *faute de service* at the same time. For instance, if an automobile accident is caused by both the drunkenness of the driver of a government vehicle and the poor condition of the brakes, the driver as well as the state would be liable. This, as will be shown at a later point, has not always been the law. Until the beginning of this century, the Conseil d'État had held that *faute de service* and *faute personnelle* were mutually exclusive. From 1909 on,<sup>81</sup> however, this old theory was not applied. Under present law, the possibility of a coexistence of liability of the employee for personal fault and of the state for *faute de service* in some cases, or under a theory of guarantee in other cases, is now generally accepted. Two different groups of cases must be distinguished:

The first group involves situations where both *faute de service* and personal fault are present. Reference can be made to the *Anguet* case discussed above, where the premature closing of the post office and the existence of a projection at the door sill had been the bases for assuming *faute de service* by the Conseil d'État. Besides that, the letter carriers who had expelled the claimant had also been held liable in a procedure before the ordinary courts. A combination of faults can also be based upon one and the same act, for instance in a case where a non-commissioned officer had not only failed to prevent excessive acts of his soldiers but even participated in them.<sup>82</sup>

Liability of the state in these cases is based on the mere existence of a *faute de service*, regardless of whether the employee has acted within or outside the scope of his authority.

In the second group of cases, only a personal fault is present which, however, flows from an act committed by the employee in the course of performing his official functions. In the absence of a *faute de service*, that act forms the basis of the state's liability.

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80. STREET, *GOVERNMENTAL LIABILITY: A COMPARATIVE STUDY* 60 (1953).

81. Starting with the decision of the Conseil d'État in *Compagnie Commerciale de Colonisation du Congo*, [1909] Sirey Recueil 153, cited in MUCH, *op. cit. supra* note 18, at 75-76.

82. Todjman, [1948] Recueil 82, cited by MUCH, *op. cit. supra* note 18, at 75.

Two cases may serve to illustrate this. In *Compagnie Commerciale de Colonisation du Congo*,<sup>83</sup> an administrative official had without any justification interfered with the recruitment of native labor, thus inflicting severe damage upon the company. The Conseil d'État held the government liable for these acts, stating that even though they constituted a personal fault of the official, they were nevertheless done by an agent of the government in the exercise of his official functions and thus of a character to involve state liability.

A famous case in this connection is the *Lemonnier* case,<sup>84</sup> decided by the Conseil d'État in 1918, which arose out of a local carnival in a French community. Its main attraction was a shooting contest, with the target floating on the river. Plaintiff, while walking in the vicinity, was struck by a bullet. The contest had continued even after other persons had informed the mayor that they had almost been hit while walking in the area. The Conseil d'État, holding the state liable, gave the following reasons:

"The fact that the accident was the result of a fault of an administrative official . . . of such a character as to involve the personal liability of the official . . . and even the fact that the official has already been found liable, cannot deprive the victim of the accident of the right to bring a direct action against the public authority concerned for the reparation of the injuries suffered."

Even more information can be gathered from the conclusions of the commissaire du gouvernement,<sup>85</sup> M. Blum, in this case:

"If it [*i.e.*, the official's personal fault] has been committed in the administrative service, if the means and instruments to commit the fault have been put at the disposition of the official by the service, if the victim has only by virtue of the administrative service been brought into contact with the official, if, in a word, the service has provided the conditions for the commission of the fault and its injurious consequences to a given individual . . . , the injured . . . can bring an action against the administrative service."

Liability of the state in the cases so far discussed were based on the fact that the personal fault had been committed within the scope of the official's authority. With three decisions rendered in 1949,<sup>86</sup> the Conseil d'État has gone one step further—and probably the last step—by holding the state liable for personal faults committed by agents acting *outside* the scope of their authority. In two of the

83. See note 76 *supra*.

84. [1918] Sirey Recueil 761, cited by МУХН, *op. cit. supra* note 18, at 76.

85. See the extensive statement by M. Blum, *ibid.* at 761-71. See also note 9 *supra*.

86. Dem. Mimeur, Defaux, Besthelsemer, published in *REVUE DE DROIT PUBLICQUE* 189 (France 1950).

three cases, drivers of government vehicles, while on their way back from their respective official missions, had, for personal reasons and against orders, made detours during which they caused accidents. In the third case, the driver, instead of waiting for his superior as he was supposed to do, had taken a ride for his own pleasure causing an accident. The Conseil d'État rendered judgment against the government, although previous cases had come to an opposite result, saying that the accident "*ne saurait, dans les circonstances de l'affaire, être regardé comme depourvu de tout lien avec le service,*" because it happened "*à l'occasion du service et du fait d'un véhicule qui avait été confié à son conducteur pour l'exécution d'un service public.*" It seems that the principle underlying these cases has its roots in the pronouncement of M. Blum just quoted that if the means and instruments to commit the fault have been put at the disposition of the official by the service, state liability will be incurred.

The second group of cases just discussed indicates a highly important development in the over-all picture of the French law of public tort liability. It should be remembered that the basic concept of liability of the state, *faute de service*, was anonymous in character and thus completely disregarded the particular wrongful act of the government agent. Here, however, a novel kind of liability appears, namely liability of the state for the personal faults of its agents. The most convincing explanation of the nature of this liability seems to be given by Waline<sup>87</sup> who puts the state into the position of a guarantor for damages arising out of personal faults of its agents committed either within or outside the scope of their authority and irrespective of the presence of *faute de service*. From there Waline goes on to say that not only in these cases but also where the government is responsible for a *faute de service*, liability of the state is based on a guarantee given by the state to its citizens. Faults can, according to Waline, be committed only by human beings. Thus, the state as a fictitious person cannot commit a wrong, but necessarily has to act through its agents. Therefore, whenever the state has been held liable, either for a *faute de service* or for the personal fault of its agents, it has been held so in its capacity as a guarantor.

Without going into any discussion of this thesis of one of the leading French writers on administrative law, it should be emphasized that the cases which held the state responsible for personal fault of employees have led the development of public tort liability close to its original starting point, namely the provisions of the civil code, especially section 1384. In the same way that the *Blanco* case had originally moved

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87. WALINE, *op. cit. supra* note 56, at 589.

public tort liability away from private tort law, later cases, especially the *Lemonnier* case, in situations where no *faute de service* could be established, have gone in the opposite direction to subjecting the state to one of the private tort law rules, namely, the rule of respondeat superior.

The French law, insofar as it imposes liability on the state for personal faults of its employees, takes the same position as the FTCA and German law. There as we have seen, liability of the state for its own fault is an unknown concept. It is the personal fault of a particular employee for which the state is responsible after it has taken over this liability. However, French law admits the possibility of suing both the state and the employee,<sup>88</sup> which under American and German law is impossible. This has been clearly established by section 2676 of the FTCA, reading:

"The judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim."

The same rule applies under German law, although in an exceptional case, where the official had intentionally and contra bonos mores inflicted damages on private persons, the Bundesgerichtshof<sup>89</sup> has held that under the doctrine of abuse of rights the official cannot escape personal liability by pointing to the liability of the state.<sup>90</sup>

A separate question, not to be discussed here at any length, is whether a state can in turn recover from the employee who had originally caused the damage once it has been held liable and paid damages to the injured citizen. Under Article 34 of the German Federal Constitution, the state can, in cases where the employee has acted intentionally or with gross negligence, seek indemnity from him for the amount paid to the injured person. In France, the Conseil d'État<sup>91</sup> in 1951 overruled previous decisions by establishing the doctrine followed since then<sup>92</sup> that the state can require restitution from the official if the latter has committed a personal fault; where both *faute de service* and personal fault are present, an apportionment of the damages takes place.<sup>93</sup> In the United States, the Supreme Court in *United States v. Gilman*<sup>94</sup> has answered the same question in the negative holding that in the

88. This does not mean that the injured person can recover twice. See WALINE, *op. cit. supra* note 56, at 590.

89. BGHZ 3/94, 104 (1951).

90. An additional reason for the decision was that the state, namely the former Reich, had ceased to exist and thus could not be sued any longer.

91. Laurelle, Delville, 1951, cited by SCHWARTZ, *op. cit. supra* note 57, at 285.

92. Carion, 1953, cited by SCHWARTZ, *op. cit. supra* note 57, at 287.

93. Delville, 1951, cited in SCHWARTZ, *op. cit. supra* note 57, at 285.

94. 347 U.S. 507 (1954).

absence of a statutory authorization the government has no right of indemnity against an employee whose negligence has made it liable for damages.

Since injured individuals in almost all cases prefer to sue the state, and since by this rule the fear of personal liability is taken away, it would seem that the French and German solution in making the employee subject to restitution to the state and thus creating a check on his activities is more adequate than the solution under the *Gilman* case. This is true even though section 2680(h) of the FTCA exempts claims arising out of a number of wilful torts (*e.g.*, assault, battery and false imprisonment). It seems that the employee should be made liable in some form or other not only in these cases, but also where negligence, or at least where gross negligence is involved. Thus, under the FTCA and the holding of the *Gilman* case, an effective check on the employee of a pecuniary nature is, at least for the area of negligence, lacking.

F. *Two Important Exceptions to Public Tort Liability Under the FTCA.*

(1) *The discretionary-function exception.* The most important and also the most controversial exception to the operation of the FTCA is the discretionary-function exception of section 2680(a):

"The provisions of this chapter . . . shall not apply to a) any claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty, on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."

The leading case in this area, *Dalehite v. United States*,<sup>95</sup> arose out of the Texas City disaster in 1947. A ship loaded with fertilizer which had been produced and was about to be shipped overseas as part of the government foreign aid program, exploded in the harbor of Texas City, killing 560 persons, injuring 3000 and causing property damages of about 200 million dollars. Suit was brought under the FTCA and the district court found negligence in manufacture in four respects — the bagging temperature of the fertilizer, the type of bagging (paper), the labeling (no warning of explosive nature) and in coating the grains. On appeal, the government contended that the discretionary-function exception applied, whereas plaintiffs argued that even though discretion might have been involved in the adoption of the fertilizer program, no

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95. 346 U.S. 15 (1953).

such discretion was present in its execution. The Supreme Court accepted the contention of the government with the following words:

"It is unnecessary to define . . . precisely where discretion ends. It is enough to hold . . . that the discretionary function or duty that cannot form a basis for suit under the Tort Claims Act includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion. It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable."<sup>96</sup>

". . . .

"The acts found to have been negligent (i.e. by the district court) were thus performed under the direction of a plan developed at a high level under a direct delegation of plan-making authority from the apex of the Executive Department."<sup>97</sup>

The court then introduced a distinction which in later cases has been held to be the decisive criterion for the application of the discretionary-function exception:

"In short, the alleged 'negligence' does not subject the Government to liability. The decisions held culpable were all responsibly made at a planning rather than operational level and involved considerations more or less important to the practicability of the Government's fertilizer program."<sup>98</sup>

The court in its opinion also pointed to the legislative history of section 2680(a) which indicates that the FTCA was not designed to subject the government to liability arising out of authorized activities like flood control or irrigation projects but that its main objective was to make the government responsible for ordinary common-law torts, especially negligence in the operation of vehicles. This statement provoked the remark by the dissenters that accepting this position would mean that the FTCA merely amended the old and discredited rule that the king can do no wrong, now to be read, the king can do only little wrongs.<sup>99</sup>

However, neither the dissenters in the *Dalehite* case nor later cases attacked the statement of the majority that decisions made at the plan-

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96. *Id.* at 35-36.

97. *Id.* at 39-40.

98. *Id.* at 42.

99. Mr. Justice Jackson dissenting, joined by Mr. Justice Black and Mr. Justice Frankfurter, *Id.* at 47. 60.



ning level necessarily involve discretion and can therefore not form the basis of governmental liability. The point on which the dissent was based was that the acts found by the district court to have been performed negligently were acts not on the planning but on the operational level:

"... [A] policy adopted in the exercise of an immune discretion was carried out carelessly by those in charge of detail. We cannot agree that all the way down the line there is immunity for every balancing of care against cost, of safety against production, of warning against silence."<sup>100</sup>

The question first raised by the dissenters as to the borderline between activities on a planning and activities on an operational level, *i.e.*, the question where the discretion envisaged by section 2680(a) ends; and where governmental liability begins was taken up by later cases. The two most prominent ones in this line are the *Indian Towing* case and *Eastern Air Lines v. Union Trust Co.* In the *Indian Towing* case,<sup>101</sup> plaintiffs had alleged negligence of the Coast Guard in the operation of a light house. The court, implicitly basing its decision on the distinction between planning and operational level activities, held:

"The Coast Guard need not undertake the lighthouse service. But once it exercised its discretion to operate a light . . . and engendered reliance on the guidance afforded by the light, it was obligated to use due care to make certain that the light was kept in good working order . . . If the Coast Guard failed in its duty and damage was thereby caused to petitioners, the United States is liable under the Tort Claims Act."<sup>102</sup>

In *Eastern Air Lines v. Union Trust Co.*,<sup>103</sup> a government control tower operator had cleared two planes for the same time and the same runway which resulted in a collision of the planes. The government contended that the operator's duties in clearing planes involved the exercise of discretion and judgment, with the result that the United States could not be held liable. The court held that "the discretion was exercised when it was decided to operate the tower, but the tower personnel had no discretion to operate it negligently."<sup>104</sup> The tower operator was thus thought to be handling operational details only which are outside the area of the discretionary-function exception. Otherwise,

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100. *Id.* at 58.

101. 350 U.S. 61 (1955).

102. *Id.* at 69.

103. 221 F.2d 62 (D.C. Cir. 1954), *aff'd per curiam sub nom.* United States v. Union Trust Co., 350 U.S. 907 (1955).

104. *Id.* at 77.

reasoned the court, one could even argue that a mail truck driver who runs through a red traffic light could not create governmental liability because he is in a way exercising discretion as to how to drive.

A case decided previously by a court of appeals<sup>105</sup> may serve as another illustration: the wife of a member of the armed forces had been admitted to an army hospital. In the course of the treatment, she received a wrong injection which caused great injury to her health. The government, in the ensuing proceedings for damages, claimed that the hospital personnel was performing discretionary functions in the treatment of the plaintiff. The court rejected this argument by saying:

"Having decided that there were facilities available, and having admitted her for treatment, the hospital authorities no longer had any discretion to exercise with regard to whether she was receiving careful or negligent treatment."<sup>106</sup>

The doctrine of the *Indian Towing* and *Eastern Air Lines* cases has been followed by other decisions of the courts of appeals.<sup>107</sup> All of these read together with the *Dalehite* decision reveal the following situation which seems to be the present state of law concerning the discretionary-function exception: the government is not liable for negligence in taking decisions on a planning level. Decisions on a planning level are those which determine the initiation of governmental programs and operations and the broad principles to be followed in their execution, and these decisions are usually made by higher authorities in the executive branch of the government. The discretionary-function exception of the FTCA does not apply to negligent acts committed on an operational level even if those acts involve a certain amount of discretion. Acts performed on an operational level are those designed to execute details in the framework of the governmental program. However, it should be noted that any attempt to establish certain rules on the basis of such a limited number of cases as have been decided in this area must necessarily have its weakness. It is up to the courts, in the course of deciding cases arising in the future, to give more color to the doctrine and to create safe criteria for the inherently vague distinction between planning and operational-level activities.

In France and Germany the problem of tort liability of the state for acts in the exercise of which discretion is involved has presented

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105. *Costley v. United States*, 181 F.2d 723 (5th Cir. 1950); another case prior to *Indian Towing* and *Eastern Airlines* was *Somerset Seafood v. United States*, 193 F.2d 631 (4th Cir. 1951).

106. 181 F.2d 723, 725 (5th Cir. 1950).

107. *Dahlstrom v. United States*, 228 F.2d 819 (8th Cir. 1956); *Fair v. United States*, 234 F.2d 288 (5th Cir. 1956).

itself under different aspects. The primary question has been how far courts should go in scrutinizing whether discretion granted to the administration has been exercised in the right way. Certainly, no such sweeping exception as the one under the FTCA, that no tort claim can be brought whenever discretion is involved, is known to French or German law. Likewise unknown is the distinction between acts on a planning and on an operational level, although acts of state (*actes du gouvernement*), like for instance the declaration of war, have traditionally been exempt from judicial review.

The problem in France and Germany is essentially one of separation of powers. In both countries it is believed that the public administration should have a certain amount of freedom in order to fulfill its functions effectively. Therefore, discretion is granted to the administration for certain groups of cases, thus giving it the power to subject the decision of these cases to such considerations as it thinks to be most important and in the interest of the general public. Thus, the administration is entitled to decide a given case in one or the other way, both solutions being equally lawful as long as no transgressions beyond the limits of the granted area of discretion occurs. By granting discretion, it is understood that the administration shall to that extent have complete freedom and that courts shall not, either in annulment or in tort proceedings, encroach upon this area. In wise self-restraint the courts in both countries (*i.e.*, the Conseil d'État in France; in Germany the ordinary courts in the area of public tort liability and the administrative courts in annulment proceedings) have accepted this interpretation and refrained from substituting their own judgment as to how discretion should be exercised for that of the administration.

In the field of public tort liability, neither in France nor in Germany is there any written law on this subject. Nevertheless, the courts in both countries have held that they would not inquire whether the discretion given to the administration should have been exercised in a different way. Thus, in the *Leca* case,<sup>108</sup> the Conseil d'État dismissed a tort claim which had been based on the refusal by the administration to grant a permit, basing its decision on the fact that the issuance of this permit was a discretionary matter. The same principle has been applied in a large number of cases by the German Reichsgericht and the Bundesgerichtshof.<sup>109</sup>

Tort claims against the government have, however, been allowed both in France and in Germany where the discretion given to the administration has been abused. This seems to be the most important dis-

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108. [1942] Recueil 160, cited in Jacoby, *supra* note 76, at 266.

109. See, for example, RGZ 138/6, 14; BGHZ 4/302, 311.

inction in this field between the law of the FTCA on the one hand where not even abuse of discretion can lead to public tort liability, and the French and German law on the other. In these laws it is by now a firmly established rule that whenever there is an abuse of discretion on the part of the administration or one of its officials, state liability is incurred.

In France, this result has been reached by applying the theory of *détournement de pouvoir*, which exists whenever an administrative authority uses its discretionary powers for other than the purposes envisaged by the statute. *Détournement de pouvoir* is present if a decision involving discretion, although the reasons advanced may seem perfectly legitimate, is in reality based on personal or political considerations, for instance the personal interest of the deciding official or that of one of his friends, a feeling of revenge, the desire to inflict damages on a political opponent, or to discriminate against members of a minority group. If for instance a government employee denies a liquor license, which may or may not be granted, because the applicant is his personal enemy, basing his decision on some valid reason, a case of *détournement de pouvoir* is present. Thus, it is one of the characteristics of *détournement de pouvoir* that a decision is on its face perfectly valid and lawful but that the reasons which actually led to it are of an improper nature. In cases of this kind, the Conseil d'État has held the state liable for faulty exercise of its discretion. Thus, the Conseil d'État held<sup>110</sup> that the arrest of persons in 1944, allegedly as collaborators, but in reality in order to injure these persons in their careers, was an act of *détournement de pouvoir* for which the state was liable. The same result was reached in a case where the permission for the sale of land was refused on improper grounds although the decisions together with the reasons advanced was on its face valid.<sup>111</sup>

The German law of tort liability likewise does not exempt abuse of discretion. The former Reichsgericht as well as the present Bundesgerichtshof have in a long line of cases established the principle that where a public official has exercised discretion arbitrarily (*Emessen-smissbrauch*) or where he has acted in such a faulty way that his conduct is incompatible with standards to be applied in a well-organized public administration, the state will be made liable.<sup>112</sup> These decisions involve essentially the same kind of situations as described above under French law, *i.e.*, discriminatory denial of licenses or permissions, arbi-

110. *Epoux Larmanjat*, [1949] *Recueil* 454, cited in Jacoby, *supra* note 76, at 259.

111. *Comp. anonyme des Sablières de la Seine*, [1944] *Recueil* 189, cited in Jacoby, *supra* note 76, at 259.

112. RGZ 125/299, 307; 126/164, 269; 159/247, 251; 164/15, 31; 168/143, 164; BGHZ. 2/209, 214; 4/302, 310, 311.

trary taking of property where some taking of property may be justified, arbitrary arrests by police officers, and so on.

Thus, as we have seen, two major distinctions exist in the area of public tort liability for acts where discretion is involved. Under the letter of the FTCA, the courts are completely barred from basing governmental liability on acts in the performance of which discretion has been used. Courts in France and Germany, on the other hand, do not make any distinction as to whether discretion is involved or not, with the exception that they will not base liability on the fact that the discretion has been used in one way rather than in a different way. The second, even more important distinction is that abuse of discretion in its various manifestations cannot, under the FTCA, lead to governmental liability whereas French and German courts have consistently come to the opposite result. To what extent the line of cases based on the distinction between planning and operational level activities which exempt the latter under section 2680(a) constitutes an approach to the solution similar to the ones in France and Germany remains to be seen. It seems that at least on the basis of the existing case material the kind of discretion exercised on the operational level is not discretion in its technical meaning of having the power to make a decision one or the other way. Army doctors, to take one of the cases cited above, do not have any discretion, as the term is commonly understood, whether to give the right or the wrong injection. Thus, even insofar as the cases subject the government to liability for negligence in the exercise of discretion of this kind, their importance for a development in the direction of the French or German solution is necessarily limited.

(2) *Wilfully committed torts*. Another important exception from the operation of the FTCA is that for wilfully committed torts. Section 2680(h) provides that the FTCA shall not apply to "any claim arising out of assault, battery, false imprisonment, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights."

As Davis<sup>113</sup> and Street<sup>114</sup> have pointed out, no satisfactory reason can be given for this exception. In fact, only in committee hearings on earlier bills was any justification attempted, where it was said that such suits were difficult to defend and might easily result in the award of excessive damages.<sup>115</sup> Neither reason is convincing, the first one

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113. Davis, *supra* note 31, at 782.

114. Street, *supra* note 45, at 355.

115. Testimony of A. Holtzoff, representing the Department of Justice before *Hearings on S.2690 Before a Subcommittee of the Senate Committee on the Judiciary*, 76th Cong., 3d Sess. 39 (1940).

being untenable if one remembers that the purpose of the FTCA was to abolish the old theory of governmental immunity and at the same time to make better use of Congressional time and energy.<sup>116</sup> The second reason loses its force by virtue of the fact that no jury actions are permitted under the act.

In application of section 2680(h), the courts have held that excessive physical force used by a military police officer,<sup>117</sup> or excessive interrogation of a civilian by an army sergeant, resulting in temporary insanity,<sup>118</sup> come under the assault exception.

It should be noted that the statutory exception does not cover all wilfully committed acts. Trespass or conversion, for instance, are not included in the list, so that an illegal search and seizure by federal authorities may well come under the FTCA. Consequently, in *Hatahley v. United States*,<sup>119</sup> the government was held liable on the basis of trespass for the deliberate and wrongful act of destroying horses belonging to Indian plaintiffs by a ranger.

Apart from this exception, however, the general rule of section 2680(h) is that the government is liable for the smaller wrong when one of its employees inflict damages on a private person negligently but not for the larger wrong if the employee did the same thing deliberately — indeed a paradoxical situation.

It is interesting to note that the same situation existed in France until the beginning of this century. As has been mentioned above, *faute de service* and *faute personnelle* were originally held mutually exclusive by the Conseil d'État. This meant that in those cases where the employee had acted maliciously, intentionally, with gross negligence or for personal reasons, the state was not liable although the employee had acted in the scope of his authority, whereas in cases not involving a personal fault, the state could be sued. Thus, the soundness of the victim's claim was in inverse ratio to the gravity of the fault committed, since recovery could be had much more easily from the state than from the wrongdoing official. Gradually, it came to be felt that this could not be the right solution of the problem, that the state should not be freed from liability simply because the employee had committed an especially grave tort.

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116. The FTCA was passed as part IV of the Legislative Reorganization Act of 1946 under the topic heading "More Efficient Use of Congressional Time." See Gellhorn and Schenck, *Tort Actions Against the Federal Government*, 47 Col. L. Rev. 722, 726 (1947).

117. *Lewis v. United States*, 194 F.2d 689 (3d Cir. 1952).

118. *United States v. Hambleton*, 185 F.2d 564 (9th Cir. 1950).

119. 351 U.S. 173 (1956).

Since 1909<sup>120</sup> this old theory has not been applied. The possibility of a coexistence of liability of the employee for personal fault and of the state for *faute de service* is now firmly established.<sup>121</sup>

## VII.

### TORT LIABILITY OF THE EUROPEAN COAL AND STEEL COMMUNITY.

Great stress has been put in this Article on the basic distinctions between French and American law in the area of public tort liability, and little has been said about the law governing the Coal and Steel Community. This finds its justification in the fact that the Treaty constituting the Coal and Steel Community has, with regard to a solution of the problem of public tort liability, followed the general pattern of the French law. As has been outlined in the introductory part, basic features of the French law, for instance the distinction between *faute de service* and *faute personnelle* and the lack of a uniform standard for the degree of fault, have been taken over by the Treaty. So far, no decisions have been rendered by the Court of Justice which concern tort liability of the Community. Since we would therefore, as far as the available material goes, have been limited to the bare provisions of the Treaty and the comments of some legal writers who have dealt with this subject, it seems advisable to go to some length into an analysis of the law on which the Community law is based and to refer at this point to this analysis.

However, as the result of the peculiar nature of the Community, there do exist a number of characteristics which, both procedurally and in substance, distinguish the law of public tort liability of the Community from French law.

## VIII.

### NEW DEVELOPMENTS UNDER THE TREATY.

#### A. *Distinction Between Tortious Acts of a General Nature and Acts Performed by the High Authority.*

The most important feature under the Treaty is the separate regulation of liability for tortious acts of a general nature on the one hand, and measures taken by the High Authority (HA) which inflict dam-

120. Starting with the decision of the Conseil d'État in *Compagnie Commerciale de Colonisation du Congo*, Rec. 1909, 153, cited by MUCH, *op. cit. supra* note 18, at 75.

121. Thus, recovery has been granted in cases of assault. Sinapi, Rec. 1938, 331 (brutality of police officer), arbitrary arrest and detention, Brécard, Rec. 1949, 515, Durand-Dastes and Biziere, Rec. 1950, 191; all cases cited in Jacoby, *supra* note 76, at 252.

ages on coal and steel enterprises on the other hand. In French law, no distinction has been made as to the level in the governmental hierarchy on which a tortious act has been committed if we disregard the *actes du gouvernement*. This is quite different under the provisions of the Treaty. Reference has been made above to the important role of the HA, which is the most powerful organ in the Community. This peculiar position of the HA has led to a special treatment of its acts for purposes of public tort liability.

The general provision on which tort liability of the Community is based is Article 40(1):

"Subject to the provisions of the first paragraph of Article 34 [providing specifically for the consequences of annulment of certain acts of the HA], the Court shall have jurisdiction to assess damages against the Community, at the request of the injured party, in cases where injury results from a fault involved in an official act<sup>122</sup> of the Community in execution of the present Treaty."

This article, essentially based on French law, does not present any novel questions. It establishes tort liability of the Community for acts which arise out of the defective functioning of the Community's administrative machinery and can be invoked by everyone who has been injured.

Article 40(1) does not apply to acts of the HA. A special provision, article 34, has been inserted into the Treaty which deals with tort claims based on a decision or recommendation<sup>123</sup> issued by the HA:

"(1) If the Court should annul a decision or recommendation of the High Authority, the matter shall be remanded to the High Authority. The latter must take the necessary measures in order to give effect to the judgment of annulment. In case a decision or recommendation is adjudged by the Court to involve a fault for which the Community is liable, and causes a direct and particular injury to an enterprise or a group of enterprises, the High Authority must take such measures, within the powers granted to it by the present Treaty, as will assure an equitable redress for the injury resulting directly from the decision or recommendation which has been annulled, and, to the extent necessary, must grant a reasonable indemnity.

(2) If the High Authority fails to take within a reasonable period the measures required to give effect to a judgment of annulment, an appeal for damages may be brought before the Court."

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122. This is the translation of *faute de service*.

123. The HA, in the execution of its responsibilities, issues decisions, recommendations and opinions. Decisions are binding in all their details; recommendations are binding as to the objectives which they specify but leave the choice of appropriate means for attaining these objectives to the particular enterprise or enterprises concerned; opinions are not binding at all. See Article 14 of the Treaty.



This provision, together with Article 33 regulating the annulment procedure, forms a completely new approach to public tort liability. Neither under the French nor under the German or American system is there any requirement that the administrative act that caused the damage be annulled before a tort suit against the government can be started.<sup>124</sup> According to Article 34 of the Treaty, on the other hand, damages arising out of a wrongful act of the HA cannot be asked for unless that act has in a previous annulment procedure been set aside. This does not mean that the annulment automatically brings about liability of the Community. The procedure of article 33 is merely an immediate remedy to prevent further injurious effects of the act contested. In order to recover damages, the enterprise must establish the existence of an additional factor, namely fault on the part of the HA. Thus, the requirements for obtaining damages are more difficult to satisfy than those for obtaining the annulment.

This compulsory procedure, whose mere existence constitutes an impediment to tort suits, brings about other limitations on the liability of the Community. Thus, a suit cannot be started at all by a single enterprise or an association of enterprises against general decisions unless an abuse of the discretion by the HA affecting them can be proved. In no case can recovery be had if the suit for annulment has been dismissed or if the statute of limitations of one month provided for by article 33(3) has run out. In these two situations, no resort can later be taken to article 40(1) alleging that the mere existence of the decision constitutes a *faute de service*. This results not only from the first words of article 40, but also from the general attitude of the Treaty that acts of the HA should exclusively be adjudged by the special provisions of articles 33 and 34.<sup>125</sup>

A further limitation on Community tort liability is that under article 34 where only a single enterprise or a group of enterprises, and

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124. In Germany, legal provisions of the Laender which required a special administrative procedure designed to determine whether the administrative act was illegal before a tort action against the government could be brought, has been abolished by art. 131 of the Weimar Constitution of 1919. See Forsthoff, *Lehrbuch des Verwaltungsrecht*, in I ALLGEMEINER TEIL 249 (Band ed. 1953). It should be noted however, that both in France and Germany the individual will, as a practical matter, start a proceeding parallel to the tort action, aimed at the annulment of the administrative act, in cases where this act continues to affect him in an adverse manner, e.g., if the administration continues to withhold a license which has been illegally taken away. In these cases an ordinary court in Germany will usually stay the proceedings until the administrative court has decided over the legality or illegality of the administrative act. In France, the Conseil d'État has jurisdiction both in annulment and in tort proceedings.

125. RAPPORT DE LA DÉLÉGATION FRANÇAISE SUR LE TRAITÉ INSTITUANT LA COMMUNAUTÉ EUROPÉENNE DU CHARBON ET DE L'ACIER 40 (1951).

third parties only under certain circumstances, can bring tort actions. This excludes suits by member states.

These limitations on the liability of the Community for wrongful decisions and recommendations of the HA—necessity of previous annulment and limited number of claimants both in the annulment and in the tort procedure — find their explanation in two factors.

The first one, mentioned in the report of the French delegation participating in the creation of the Treaty,<sup>126</sup> is based on the following consideration: unlike the situation in a state where it is just that the entire community bear the pecuniary consequences of a fault committed against a particular individual, the small number of members of the Community, *i.e.*, the coal and steel enterprises of the participating countries, requires a limitation of tort suits against the Community. The expenses of granting indemnity in a great number of cases would ultimately fall upon the members of the Community in the form of increased contributions to be paid by them, whereas in a state the burden can be spread out on a much wider basis and is therefore not felt by the individual taxpayer. The consequences of fault committed by the HA would thus, assuming a broad tort liability, not be borne by the Community itself but by its members. In order to avoid this result as far as possible, the mentioned restrictions have been imposed.

The same idea can also be found in the requirement that the damage claimed under article 34 be particular to the enterprise. This means that no claim can be made which is based on a decision of a general nature affecting all or most of the enterprises of the Community in a detrimental way, regardless of whether the decision has been annulled and fault has been established. Otherwise, all injured enterprises could sue the Community. This would impose immense financial consequences on the latter and, again in view of the limited number of members, would eventually lead to their self-indemnification among themselves.<sup>127</sup>

The second, and probably even more important factor which has been stressed<sup>128</sup> for the necessity of limiting tort liability, is that the HA acts in an unprecedented field of economic cooperation and control where mistakes and false decisions are unavoidable. These might

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126. *Id.* at 38.

127. See MUCH, *op. cit. supra* note 18, at 50, 64.

128. See note 125 *supra*; MUCH, *op. cit. supra* note 18, at 53; Bebr, *The European Coal and Steel Community*, 63 YALE L.J. 1, 32 (1953); Schlochauer, *Die Gerichtsbarkeit der Europaischen Gemeinschaft fuer Kohle und Stahl*, 3 ARCHIV DES VOELKERRECHTS §§ 385, 410 (Band ed. 1952). See also Neri, *Il Ricorso dei Privati Davanti alla Corte di Giustizia della CECA*, RIVISTA DI STUDI POLITICI INTERNAZIONALI, 362, 393 (1956); Vignes, *I Ricorsi Giurisdizionali delle imprese private contro le decisioni dell'Alta Autorita del Piano Schumann*, RIVISTA DI STUDI POLITICI INTERNAZIONALI 657, 669 (1952).

easily have grave financial consequences, especially hard to be borne by an institution without substantial means, like the Coal and Steel Community. The idea therefore was not to hamper the initiative of the HA too much in striking out new paths in the common interest, by considerations of this kind. Furthermore, in an area of fluctuating economic conditions, it was believed to be very difficult to ascertain the extent of damages, based, by and large, on speculations as to what the situation might have been if the deficient act had not been undertaken.

The Treaty has thus, as we have seen, taken a new course in regulating its law of public tort liability. While following French law in principle, it has created a completely new pattern, both procedurally and substantively, for the most important group of administrative acts, namely the decisions and recommendations of the HA. The reasons for this new development can be traced back to the novel character of the Community, consisting of a limited number of members, as well as its novel functions. It is not inconceivable that the success of this solution may at some future day become important for the functioning of the whole institution.

B. *Compulsory Annulment Procedure for Acts of the High Authority and Its Consequences for the Liability of the Community.*

The procedure to annul a decision or recommendation of the HA has found its regulation in Article 33 of the Treaty which reads:

“(1) The Court shall have jurisdiction over appeals by a member state or by the Council for the annulment of decisions and recommendations of the High Authority on the grounds of lack of legal competence, substantial procedural violations, violations of the Treaty or of any rule of law relating to its application, or abuse of power. . . .

(2) The enterprise, or the associations referred to in Article 48, shall have the right to appeal on the same grounds against individual decisions and recommendations concerning them, or against general decisions and recommendations which they deem to involve an abuse of power affecting them.

(3) The appeals provided for in the first two paragraphs of the present article must be taken within one month from the date of the notification or the publication, as the case may be, of the decision or recommendation.”

Another provision which is important in this connection is article 35, according to which suit can be brought against the implicit negative

decision of the HA which is presumed to result from its failure to issue a decision or recommendation to the issuance of which it is obligated (article 35(1)), or where such failure constitutes an abuse of discretion (article 35(2)).

Without going into the details of the annulment procedure, it should be noted that suit can be brought not only by member states or the Council of the Community or enterprises or their associations (to a limited degree by the latter group against decisions of a general nature), but also by third persons. Thus, article 63(2) gives the right to bring an action to a buyer if the HA has found a violation of principles of free competition and has therefore limited the right of the enterprises of the Community to deal with this buyer to a degree which may entail temporary deprivation of access to the market. Likewise, third parties affected by a deconcentration order of the HA can according to article 66(5) invoke the annulment procedure. Insofar as these persons have a right to bring about the annulment of a decision of the HA, they must also be granted the right to recover damages since the Treaty puts them against their will into a position where they can directly be injured by illegal acts of the HA.

As a consequence of the separation-of-powers idea, the only act which the Court can take after it has annulled a decision of the HA is to remand the matter to the HA. Apart from the question of awarding damages to the injured party, the HA is then under an obligation to take the necessary steps in order to give effect to the judgment and to remove all the consequences which resulted from the annulled decision. For instance, the application for a price increase in coal or steel products, originally denied by the HA, would have to be granted, money obtained by virtue of a pecuniary sanction imposed on an enterprise for disobeying the annulled decision (article 36) would have to be reimbursed.

However, not all consequences of the wrongful decision can thus be removed. In the case just mentioned, the particular enterprise illegally denying a price increase might in the meantime have suffered considerable damages. For these situations, article 34(1) lists as one of the obligations of the HA the taking of measures which will assure an equitable redress for the damages suffered and the granting, so far as necessary, of a reasonable indemnity. An important requirement for such action on the part of the HA is that the annulled decision shall have been adjudged by the Court to involve a fault for which the

Community is liable.<sup>129</sup> The mere annulment which establishes only the illegal character of the decision does not automatically bring about tort liability of the Community.<sup>130</sup> Either in the annulment procedure or in a separate subsequent procedure, the Court must have found fault on the part of the HA. Fault in this connection is, as in French law, fault of the HA as an administrative unit and not the specific personal fault of any one of its members.

The solution of article 34(1) bears in itself another novel feature in the field of public tort liability. Whereas under the national systems discussed above a claimant can immediately seek a declaration by the courts as to the existence of tort liability of the state; article 34(1) gives the right to determine, in the first instance, whether an injury has been suffered and what the reparation shall be, to the HA.<sup>131</sup> A claimant has therefore to await this decision of the HA. Only after the latter has failed to act within a reasonable period of time or has awarded damages which the claimant deems insufficient, can he proceed before the Court of Justice.

Dispute has arisen between the legal writers as to what steps a claimant should take if the HA fails to act. Can he invoke article 34(2) directly, or does he have to attack the implicit decision of refusal under article 35 first? Valentine<sup>132</sup> has defended the latter position, whereas other writers<sup>133</sup> would allow the immediate invocation of article 34(2). This provision talks about the measures required to give effect to a judgment of annulment. Since the granting of equitable redress and reasonable indemnity is one of those required steps, the refusal to act accordingly would, contrary to the view of Valentine, make article 34(2) immediately applicable.

More complicated is the procedure if the HA has given some reparation but the enterprise maintains that it is entitled to more. Since this is not a failure to act, the way indicated by Valentine seems to be the only possible one that the enterprise has to challenge the de-

129. The French text reads: ". . . décision . . . entachée d'une faute à engager la responsabilité de la Communauté, . . ."—a formula which we found previously in French law and which gives the Court the necessary freedom to decide each case on its own merits.

130. See e.g., the conclusions of the general counsel in *affaire no. 1/55*, Recueil, vol. 2, 1955, 1956, 31, 48.

131. The possibility of reaching an agreement with the administration under the national systems is not a counterpart to the procedure under Article 34(1) of the Treaty, since the injured person is under no obligation to seek such an agreement.

132. VALENTINE, COURT OF JUSTICE OF THE EUROPEAN COAL AND STEEL COMMUNITY 89-90 (1955).

133. MUCH, *op. cit. supra* note 18, at 66; Muench, *Die Gerichtsbarkeit im Schumann-Plan*, Festschrift fuer Rudolf Laun, 123, 137 (1953); Antoine, *La Cour de Justice de la C.E.C.A. et la Cour Internationale de Justice*, 57 REVUE GENERALE DE DROIT INTERNATIONALE PUBLIQUE 210, 238 (1953).

cision granting inadequate damages in an annulment procedure, alleging that the HA has violated article 34(1) which requires equitable reparation. If, upon annulment, the HA refuses to grant further reparation, suit could be brought under article 34(2).

It seems advisable to make clear that article 34 contains two different bases for tort liability. The first one, laid down in article 34(2), applies whenever the HA has failed to take the necessary steps to give effect to an annulment judgment. The other one, article 34(1) last sentence, applies where the illegal act of the HA itself, before its annulment, has caused damage to an enterprise.

### C. *Nature of Damages.*

We have seen that Article 34(1) of the Treaty gives the HA the right to determine, in the first instance, whether and to what extent an enterprise has been damaged by an annulled decision. This makes the HA the judge over its own wrongful acts, but at the same time puts it also beyond the reach of the separation-of-powers doctrine. It allows a kind of reparation which is not limited to the granting of money damages. Under the national systems, the idea of separation of powers has led to the rule that the courts cannot issue orders directing the administration to grant a specific kind of redress, but that all they can do is award money damages.<sup>134</sup> This principle does not apply to article 34(1). Under this provision, the HA has the authority to grant equitable redress to an injured enterprise in whatever form it deems most advisable. If for instance the annulled decision of the HA had prohibited an investment program by an enterprise, as a consequence of which the latter has been denied a loan by an investment company, equitable redress would be the granting of a loan by the Community itself. The difficulty of granting equitable redress in this area would, as Much<sup>135</sup> points out, even justify a practice under which advantages are granted to the injured enterprise in one area although the injury has been inflicted in another area. All suitable measures which grant equitable redress can be used.

Only in cases where reparation of this kind is impossible may money damages be awarded by the HA. This is indicated by the words of the provision that to the extent necessary reasonable indemnity must be granted.

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134. For the United States, see U.S.C. § 1346(b) (1952), giving the District Courts exclusive jurisdiction in actions against the United States "... for money damages. . . ." For Germany, see RGZ 150/140, 143; 169/353, 356; BGHZ 4/302. For the situation in France, see *Street*, *op. cit. supra* note 80, 62.

135. MUCH, *op. cit. supra* note 18, at 66.

The principle of article 34(1) in regard to the nature of damages to be awarded does not apply to article 34(2). Since here the reparation of injuries is not entrusted to the same organ which had originally caused them, but to the Court of Justice, the doctrine of separation of powers again applies so that only money damages can be recovered. The same is true for tort claims brought against the Community under Article 40 which are also decided by the Court.

D. *The Problem of Combination of Liabilities.*

Combination of fault and thus combination of liabilities can arise only under the provision of Article 40 of the Treaty. The term *fault* as it is used by article 34 is, as has been said before, in the nature of *faute de service* of the HA. Personal faults committed by individual members of the HA are completely disregarded by this provision.

Article 40(1) makes the Community responsible in cases where *faute de service* exists together with personal fault, irrespective of whether the employee has acted within the scope of his employment or not. To this extent, the situation is exactly the same as under French law.

A novel aspect is introduced by article 40(2) for cases where only personal fault is present and this has occurred in the performance of the employee's duties.<sup>136</sup> French law, it will be remembered, assumed in cases of this kind, apart from the personal liability of the employee, liability of the state under a theory of guarantee (*Lemonnier* case). The solution of article 40(2), however, is different:

"It [*i.e.*, the Court of Justice] shall also have jurisdiction to assess damages against any official or employee of the Community, in cases where injury results from a personal fault of such official or employee in the performance of his duties. If the injured party is unable to recover such damages from such official or employee, the Court may assess an equitable indemnity against the Community."

The essential differences between this provision and the French law are threefold:

1. The Community is liable only if no recovery can be had from the wrongdoing official, for instance if he is insolvent or if he does not live any more under the jurisdiction of the Court (*i.e.*, in one of the member states).
2. The power of the Court to assess damages against the Community is a discretionary one. In other words, the Court does not have

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<sup>136</sup> If the employee has acted outside of the scope of his authority, no liability of the Community can arise. Article 40(3) of the Treaty.

to impose liability on the Community but may do so in its discretion.

3. If liability is imposed on the Community, the indemnity to be paid does not have to be full, but merely equitable indemnity. Again, it is in the discretion of the Court to what extent the Community should be required to make reparation to an injured person.

This solution certainly lags behind those which we have encountered under the national laws. There, although based on different theories, primary and full liability of the states for personal faults of their agents has in practice been established. But in spite of motions made by German delegates to the judicial committee during the creation of the Treaty to follow the French law on this point,<sup>137</sup> article 40(2) has gone a different way. The reasons for this probably lie in the general tendency of the Treaty to limit liability of the Community to an absolute minimum. It remains to be seen whether the Court will accept this tendency or whether it will, by way of judicial interpretation, for instance by widening the scope of the notion of *faute de service* in article 40(1), introduce a broader tort liability in the interest of injured persons than that which was envisaged by the Treaty.

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137. See MUCH, *op. cit. supra* note 18, at 79.