

TRACING EVOLUTION OF THE PHILIPPINE
CONCEPT OF EXTRA-CONTRACTUAL
RESPONSIBILITY IN THE CONTEXT OF STATE
IMMUNITY FROM SUIT: IS A NEW APPROACH
NECESSARY?

*Seguimiento de la evolución del concepto filipino de
responsabilidad extracontractual en el contexto de la
inmunidad estatal contra la demanda: ¿es necesario un
nuevo enfoque?*

Dan Kevin Mandocdoc Castro¹
Assistant Professor
ADMU's School of Law (Philippines)

[http://dx.doi.org/10.18543/ed-68\(1\)-2020pp163-200](http://dx.doi.org/10.18543/ed-68(1)-2020pp163-200)

Recibido: 05.11.2019
Aceptado: 20.12.2019

Abstract

The Philippines and Spain, at one point in history, shared the same civil code. In the realm of extra-contractual responsibility (torts in common law, quasi-delicts in Philippine law) in relation to public services, however, the two legal systems currently have a vastly different approach. On the one hand, the Philippines adheres to the common law concept of state immunity from suit — making it almost impossible for individuals to sue the government or its agencies in cases where the act or

¹ '20, Ph.D (cand.), University of Malaga (UMA); '20, LL.M (cand.), Ateneo de Manila University (ADMU); '13, J.D., ADMU (with honors). The Author is currently a doctoral student at UMA under the Erasmus K107 Program. He is also an assistant professor of ADMU's School of Law.

omission that caused the damage is intertwined in the government's exercise of governmental functions. Spain, on the other hand, applies strict or objective liability with respect to the Public Administration's rendering of public services. This makes negligence immaterial on the question of whether an individual may claim against the government for damages related to public services.

In this paper, the author traces the continental law origins and evolution of the Philippine concept of quasi-delict (the term used in the Philippines to refer to torts or extra-contractual obligations), subjects these legal regimes to different legal philosophies, and uses the lens of economic analysis of law in order to determine whether the Philippines needs to reconsider the doctrine of state immunity in the context of extra-contractual responsibility for damages relating to public services.

Keywords

continental law; common law; tort or extra-contractual responsibility; state immunity; public services.

Resumen

Filipinas y España, en un momento de la historia, compartieron el mismo código civil. Sin embargo, en el ámbito de la responsabilidad extracontractual (agravios en el derecho consuetudinario, cuasi-delitos en el derecho filipino) en relación con los servicios públicos, los dos sistemas jurídicos tienen actualmente un enfoque muy diferente. Por un lado, Filipinas se adhiere al concepto del derecho consuetudinario de inmunidad estatal contra demandas, lo que hace que sea casi imposible para las personas demandar al gobierno o sus agencias en los casos en que el acto u omisión que causó el daño se entrelaza en el ejercicio del gobierno de funciones gubernamentales. España, por otro lado, aplica una responsabilidad estricta u objetiva con respecto a la prestación de servicios públicos por parte de la Administración Pública. Esto hace que la negligencia sea irrelevante en la cuestión de si un individuo puede reclamar contra el gobierno por daños relacionados con los servicios públicos.

En este artículo, el autor rastrea los orígenes y la evolución de la ley continental del concepto filipino de cuasi-delito (el término utilizado en Filipinas para referirse a los agravios u obligaciones extracontractuales), somete estos regímenes legales a diferentes filosofías legales y usos. la lente del análisis económico de la ley para determinar si Filipinas necesita reconsiderar la doctrina de la inmunidad estatal en el contexto de la responsabilidad extracontractual por daños relacionados con los servicios públicos.

Palabras clave

Derecho continental; common law; responsabilidad extracontractual; inmunidad estatal; servicios públicos.

SUMMARY: I. INTRODUCTION. II. HISTORICAL PERSPECTIVE. 1. *Ancient Lineage: Roman Law*. 2. *The Twelve Tables*. 3. *Lex Aquilia*. 4. *Corpus Iuris Civilis*. II. STATE RESPONSIBILITY IN ROMAN LAW. III. DEVELOPMENT IN THE MIDDLE AGES. IV. DEVELOPMENTS IN THE MODERN PERIOD. V. THE SPANISH CIVIL CODE OF 1889. VI. GENERAL PROVISION FOR EXTRACONTRACTUAL RESPONSIBILITY. VII. VICARIOUS LIABILITY. VIII. SPANISH CIVIL CODE IN THE PHILIPPINES. IX. CONCEPT OF STATE IMMUNITY FROM SUIT IN THE PHILIPPINES. X. DEVELOPMENTS IN SPAIN AFTER SEVERANCE OF TIES. XI. STATE IMMUNITY XII. STRICT LIABILITY. 1. *Utilitarianism*. 2. *Libertarianism*. 3. *Kantian ethics*. 4. *Justice as fairness*. 5. *Analysis*. XIII. ECONOMIC ANALYSIS TOWARDS A FEASIBLE RECOMMENDATION. XIV. CONCLUSION. BIBLIOGRAPHY.

I. INTRODUCTION

The municipality cannot be held liable for the torts committed by its regular employee, who was then engaged in the discharge of governmental functions. Hence, the death of the passenger — tragic and deplorable though it may be imposed on the municipality no duty to pay monetary compensation.

*Municipality of San Fernando, La Union v. Firme*²

The conclusion reached by the Philippine Supreme Court in the case above, which involved the death of a passenger of a public utility vehicle that collided with a dump truck of a municipality that was on its way to obtain sand and gravel for the repair of streets, may seem unusual to the eyes of a contemporary Spanish legal scholar. The legal regime in the Philippines that makes the government immune from suits arising from its discharge of government functions, in fact, may even appear unjust.³ After all, no less than the Spanish Constitution provides that “[p]rivate individuals shall, under the terms established by law, be entitled to compensation for any loss that they may suffer to their property or rights, except in cases of force majeure, whenever such loss is the result of the operation of public services.”⁴

While the ruling in *Municipality of San Fernando* has been modified by the enactment of the Local Government Code, which vests municipal corporations the power to sue and be sued,⁵ the concept of state immunity still

² G.R. No. 52179, April 8, 1991.

³ Article XIV, Section 3 of the Philippine Constitution provides: “The State may not be sued without its consent.”

⁴ Spanish Constitution, art. 106.2

⁵ Republic Act No. 7160, Local Government Code, Sec. 22 (1991).

exists in the Philippines. For one, the general rule of state immunity applies to the national government. Secondly, Philippine courts distinguish between consent to sue and consent to be liable – “where the suability of the state is conceded and by which liability is ascertained judicially, the state is at liberty to determine for itself whether to satisfy the judgment or not. ... Thus, where consent to be sued is given by general or special law, the implication thereof is limited only to the resultant verdict on the action before execution of the judgment.”⁶

The divergence in the legal regimes for the liability of the government for a quasi-delict (the term used in the Philippine Civil Code to refer to the Spanish concept of extra-contractual liability or torts by negligence) is amusing considering that the Philippines and Spain, at one point in their histories, shared a Civil Code. The disparity between the two legal regimes is further highlighted by the fact that the potential extra-contractual responsibility of the Spanish government is assessed on a strict or objective liability basis. On the other hand, Philippine laws provide only limited instances (mostly inherited from Spain as well) where the strict liability may apply — these instances include animal possession, objects being thrown, death of an employee, vehicle accidents, and product liability.

On the surface, this difference in the two legal systems can be attributed to the history. More than a century ago, the Philippines’s link to Spain’s civil law tradition was severed and common law doctrines — including the American concept of State immunity from suit (a product of the maxim that the King can do no wrong) — became embedded in the former’s legal system. In addition to this, however, one cannot deny the reality that Spain’s economy is significantly more developed than the national economy of the Philippines. Finally, the Philippines, unlike Spain, is not a welfare state.

This article explores the reason behind the difference in the approach of Spain and the Philippines in the matter of extra-contractual responsibility vis-à-vis the doctrine of State immunity from suit. Primarily, it will trace the continental law origins and evolution of the Philippine concept of quasi-delicts and determine how vastly common law has affected the said concept, particularly with respect to those related to public services. Together with this, the evolution of the concept of legal personality will also be touched upon. The administration or State, after all, is an entity that has a legal personality distinct from the natural persons who discharge public services. Thereafter, the status quo in the Philippines — that is, the applicability of state immunity from suit in cases involving the government’s discharge of public functions — will be analyzed using different legal philosophies.

⁶ Municipality of Hagonoy, Bulacan v. Dumdum, Jr., G.R. No. 168289, March 22, 2010.

Finally, the result of this analysis will be further examined using an economic lens with the aim of formulating a realistic recommendation.

II. HISTORICAL PERSPECTIVE

As mentioned above, the Philippines and Spain once shared a Civil Code until the late 19th Century. As a preliminary approach in determining the reason behind the difference in the two jurisdictions' approach on quasi-delicts relating to public services, this portion of the article will trace the history of extra-contractual responsibility and determine at what point in history did the concept of governmental responsibility become different in the two countries.

1. *Ancient Lineage: Roman Law*

Any attempt to trace the evolution of the Philippine concept of quasi-delict must begin with its ancient origins — Roman Law. Similar to the Spanish concept of extra-contractual liability,⁷ the Philippine concept of quasi-delicts has its roots on Roman Law. In *Barredo v. Garcia*,⁸ the Philippine Supreme Court noted that the Philippine concept of quasi-delict “is of ancient lineage, one of its early ancestors being the *Lex Aquilia* in the Roman Law.” The *Lex Aquilia* has been described as “a statute quite comprehensive in scope, repealing provisions of many earlier laws and rendering obsolete some portions of the Twelve Tables regarding liability for damage to another’s property.”⁹

⁷ For one author, “there is little dispute about the main outlines of the history of the core of delictual liability from Roman law to the continental European law codes of the 18th and 19th centuries.” D. Ibbetson, *How the Romans Did for Us: Ancient Roots of the Tort of Negligence*, 26 UNSW L.J. 475, 477 (2003). Another author also notes that “Roman law is the foundation of the European systems of law, at least west of the Cistula, and of their offshoots outside Europe, ... and those parts of the continental codes which have been adopted by countries like Japan.” J. Bray, *A Plea for Roman Law*, 9 Adelaide L. Rev. 50, 53 (1983).

⁸ G.R. No. 48006, July 8, 1942.

⁹ R. Balane, *Jottings and Jurisprudence in Civil Law (Obligations and Contracts)* 13, fn. 7 (2018 ed.) [hereinafter R. Balane, *Obligations and Contracts*]. It has been noted that “[i]n the area of private law, legislation was rare in the republic after the enactment of the Twelve Tables (the main exception to this being the *lex Aquilia* ...).” P. Stein, *Interpretation and Legal Reasoning in Roman Law*, 70 Chicago-Kent L. Rev. 1539, 1540 (1995).

2. *The Twelve Tables*

The enactment of the Twelve Tables happened during the Republican Period¹⁰ when “the Romans codified centuries-old legal customs and traditions into a formal written expression[.]”¹¹

There is nothing in the Twelve Tables that would govern the liability of the State for damage caused by its act or omission to a third-party. In fact, the Twelve Tables also did not define nor provide general principles on what amounts to quasi-delicts. Instead, the provisions merely enumerated certain wrongs and provided the applicable penalty.¹² In the realm of torts or delicts, the Twelve Tables provided “retaliation in kind (*talio* in Latin — or the ‘eye for an eye’ philosophy typical of most ancient legal codes), or an option of monetary compensation for damage caused.”¹³ It was silent, however, as to how the matter should be handled if the entity that caused the harm was the State or a person acting on behalf of the State.

3. *Lex Aquilia*

The *Lex Aquilia* is believed to have been passed sometime in 286 B.C.¹⁴ Like the Twelve Tables, *Lex Aquilia* did not introduce a general principle in relation to liability — much less how to handle cases involving the State or its agent as the entity causing the damage. Ibbetson notes that “the modern consensus is probably that the *lex* was not concerned with the creation of

¹⁰ M. Monahan, *The Problem of “The Judge Who Makes the Case His Own”: Notions of Judicial Immunity and Judicial Liability in Ancient Rome*, 49 *Catholic Univ. L. Rev.* 429, 441 (2000).

¹¹ M. Monahan, *supra* note 10, at 441.

¹² Some of the wrongs enumerated in Table VIII (Torts or Delicts) include (1) the composition of a song that insults another person, which merits clubbing to death of the composer; (2) breaking of another person’s limb, which justifies retaliation unless the other agrees to pay compensation; (3) breaking or bruising of bone with a hand club, which imposes the payment of penalty of 150 or 300 copper coins depending if the victim is a freeman or a slave; (4) pasturing on or for cutting secretly by night another’s crops acquired by tillage, which results to hanging and death by sacrifice to Ceres if the offender is an adult; and (5) burning of a building or a stack of corn set alongside a house, which has the penalty of being bound, scourged, burned to death if done intentionally. P. R. Coleman-Norton (trans.), *The Twelve Tables*, available at https://www.ksassessments.org/sites/default/files/HGSS_Preview_Texts/Grade_6/The%20Twelve%20Tables%20of%20Roman%20Law.pdf (last accessed Apr. 23, 2019).

¹³ J C Zietsman, *Medical Negligence in Ancient Legal Codes*, 52 *Akroterion* 87, 87 (2007) (citing R.O.L. III: Tabula 8:2-4; Warmington 1967:476-77).

¹⁴ R. Balane, *Obligations and Contracts*, *supra* note 7, at 13, fn 3. See also J C ZIETSMAN, *supra* note 13, at 87 (citing Dannenbring 1968: 213-14). He dates *Lex Aquilia* to 287 BC.

legal liability where none had existed before, but rather with the alteration of the criteria by which damages for certain specific forms of wrongs were assessed.”¹⁵ If at all, *Lex Aquilia* reveals that “while the ancient Romans ‘were under no general obligation’ to ensure that others did not experience material loss, they were required ‘to act with care’ in circumstances where their actions risked causing such loss to another.”¹⁶

Although copies of the original *Lex Aquilia* have not been found, quotations by later lawyers enabled researchers to understand its relevant portions, particularly chapters one and three.¹⁷ Particularly, “they were quoted by Gaius in his commentary on the *edictum provincial* (first chapter) and by Ulpian in his commentary on the Edict (third chapter), and these quotations have been incorporated into the *Corpus Juris Civilis*.”¹⁸

The first chapter of *Lex Aquilia* provided “punishment for the killing of another’s slaves and animals that were of importance for an agricultural community — animals that were collectively referred to by the *Lex* as ‘four-footed beasts of the class of cattle’, that is, not quadrupeds as such but those

¹⁵ See, e.g., A.M. Honoré, ‘Linguistic and Social Context of the *Lex Aquilia*’ (1972) 7 *Irish Jurist* (New Series) 138, 147; B. Winiger, *La Responsabilité Aquilienne Romaine: Dammum Iniuria Datum* (1997) 35.

¹⁶ Z. Sarkady, *The Lex Aquilia and the Standards of Care*, in *Acta Universitatis Szegediensis : acta juridica et politica : publicationes doctorandorum juridicorum* 205 (2003).

¹⁷ D. Ibbetson, *supra* note 5, at 481. As to the second chapter of *Lex Aquilia*, only the paraphrase of Gaius is available. It provides: “*Capite secundo <adversus> adstipulatorem qui pecuniam in fraudem stipulatoris acceptam fecerit, quanti ea res est, anti actio contuitur.*” R. Westbrook, *The Coherence of the Lex Aquilia*, in *Revue Internationale des droits de l’ antiquité* 437, 442 (1995). One author interprets this as giving “a right of action against an *adstipulator* who has given *acceptilatio* in fraud of his *stipulator* for the value of the subject-matter.” D. Nasmith, *Outline of Roman History from Romulus to Justinian* 324 (2006). This second chapter, however, became obsolete in Justinian’s time. G. Campbell, *A Compendium of Roman Law* 133 (1878).

Modern scholars in Roman Law have grappled in deciphering the organization of the *Lex Aquilia* — with some believing that the order of the three chapters resulted from a historical accident. R. Westbrook, *supra* note 19, at 438. Another opines that *Lex Aquilia*’s structure is based on two things: (1) logic — “Three examples are given of different circumstances which give rise to a different point in time for assessment of damages: prior to the wrong, at the same time as the wrong, and subsequent to the wrong”; and (2) its academic character — it was “the culmination of a two-fold process of transformation. ... [I]t acquired the status of normative legislation, through insertion into a known legislative form and by juristic interpretation within that conceptual framework.” R. Westbrook, *supra* note 19, at 450 & 471.

¹⁸ R. Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* 953 (1996) (citing Gai. D. 9, 2, 2 pr & Ulp. D. 9, 2, 27, 5).

grazing animals that forage in groups.”¹⁹ The penalty imposed upon the defendant was payment of “an amount equal to the highest value that the object had had during the year before it was killed.”²⁰ On the other hand, unlike the first chapter that dealt precisely with forcible killing or *occiderit*,²¹ “[t]he third chapter was phrased in more general terms and covered all cases of loss caused to another by burning, breaking or destroying property (*usserit, frangerit, ruperit*).”²² For these instances, the penalty slapped on the defendant is the payment of the compensation based on the value of the object “probably within the last thirty days before the damage took place”²³ — *in diebus triginta proximis*.

The imposition of penalties based on the value of the damaged object is an improvement from the fixed schedule provided by the Twelve Tables. In *Lex Aquilia*, the amount to be paid is based on the loss suffered by the owner,²⁴ and not merely as a penalty for a wrongdoing. Thus, in effect, *Lex Aquilia* also served as a compensatory mechanism for damage inflicted by one to another.²⁵ This improvement could have happened because the punitive vengeance regime under the Twelve Tables had already been considered to be “harsh and inflexible antique rules in cosmopolitan Rome.”²⁶

Eventually, *Lex Aquilia* became the sole governing law on the subject matter. Despite this, however, silence still remained as to whether the State could be held responsible for quasi-delicts inflicted on private third-parties.

4. *Corpus Iuris Civilis*

In 527 A.D., Justinian became Emperor in Constantinople.²⁷ Sometime a year after, “Justinian issued instructions for the compilation of a new code,

¹⁹ J.C. Zietsman, *supra* note 13, at 87.

²⁰ J.C. Zietsman, *supra* note 13, at 88 (citing Gaius 3.210; Digest 9.2.2 pr.).

²¹ D. Ibbetson, *supra* note 5, at 482.

²² J.C. Zietsman, *supra* note 13, at 88.

²³ J.C. Zietsman, *supra* note 13, at 88. Citing Van Warmelo, he also notes that while the first chapter clearly qualified the compensation to the highest value by using the word “*plurimi*”, the third chapter did not do so. Nevertheless, “both Gaius and Justinian refer to an interpretation by the first century AD jurist Sabinus who held that the law should be interpreted as if it had been inserted, ‘the legislator having thought it sufficient to have used the word in the first chapter.

²⁴ D. Nasmith, *supra* note 19, at 324.

²⁵ F. De Zulueta, *The Institutes of Gaius. Part II: Commentary* (1967).

²⁶ Z. Sarkady, *The Lex Aquilia and the Standards of Care*, in *Acta Universitatis Szegediensis : acta juridica et politica : publicationes doctorandorum iuridicorum* 205 (2003).

²⁷ P. Birks & G. McLeod (trans.), *Justinian’s Institutes* 8 (1987).

which ... should embrace the imperial constitutions down to the date of its promulgation.”²⁸ The ultimate result of this compilation was a three volume collection of Roman Law “called the *Corpus Iuris Civilis*, literally the ‘Body of the Civil Law’”²⁹ — comprised of four works: the *Institutes*, the *Digest*, the *Codex*, and the *Novels*.³⁰ Of these four works, the Digest is relevant in understanding the origins of quasi-delicts.

Ad Legem Aquiliam is the subject matter discussed in Book 9 of the Digest.³¹ Book 9 of the Digest also maintained the first and third chapters of *Lex Aquilia*. In particular, Digest 9.2.2. contains what is believed to be Gaius’s direct quotation of the first chapter of *Lex Aquilia*, which provides: “[*Si quis*] *servamve alienamve quadrupedem vel pecudem iniuria occiderit, quanti id in eo anno plurimi fuit, tantum aes dare domino damnas esto.*”³² On the other hand, Digest 9.2.27.5 appears to be Ulpian’s

²⁸ T. Sandars, *The Institutes of Justinian; with English Introduction, Translation, and Notes* 23 (2nd ed. 1859).

²⁹ P. Birks & G. McLeod, *supra* note 35, at 8. The use of the word civil in this literal translation should be read as a synonym for “Roman.”

³⁰ These four works can be generally described as follows:

1. Digest: Also referred as the Pandects, it “is the largest of the works. It preserves the writings of the classical jurists.” Birks & McLeod, *supra* note 35, at 9. It is comprehensive in character, being divided into 50 books. Sandars, *supra* note 36, at 24. “There are thirty-nine jurists from whose writings the Digest contains literal extracts, those from Ulpian and Paul constituting about one-half of the whole work.” *Id.* Ultimately, “Justinian ... commanded that this Digest have the force of law. Any texts not contained in the Digest could not be offered in argument in court.” D. Bogen, *Ignoring History: The Liability of Ships’ Masters, Innkeepers and Stablekeepers Under Roman Law*, 36 *Am. J. Leg. Hist.* 326, 329 (1992).

2. Institutes: Due to the vastness of the Digest, and because it “also required for its comprehension too great a previous knowledge of law to admit its being made the opening of a course of legal study”, Justinian determined that the composition of an elementary work was necessary. One can consider the Institutes as “a book for beginners, only one twentieth the size of the Digest.” Birks & McLeod, *supra* note 35, at 12.

3. Novels: The Novels were, in fact, not originally planned as part of the Justinian’s plan to compile the law. In essence, included in the Novels “are the new pronouncements of the Emperor, those which he made after the work of his commissions was complete.” Birks & McLeod, *supra* note 35, at 9.

4. Codex: “Before computers and before printing, the *codex*, the book with a spine and pages, was the first great revolution in information storage and retrieval.” Birks & McLeod, *supra* note 35, at 9.

³¹ J.C. Zietsman, *supra* note 13, at 87.

³² R. Westbrook, *supra* note 19, at 441-42. It translates to: “If anyone shall have unlawfully killed a male or female slave belonging to another or a four-footed animal, whatever may be the highest value of that in that year, so much money is he to be condemned to give to the owner.” D. Ibbetson, *supra* note 5, at 481.

direct quotation of the third chapter — “[*Ceterarum rerum praeter hominem et pecudem occisos*] si quis alteri damnum faxit quod usserit fregerit ruperit iniuria, quanti ea res erit in diebus triginta proximis, tantum aes domino dare damnas esto.”³³

III. STATE RESPONSIBILITY IN ROMAN LAW

As noted above, the responsibility of State for quasi-contracts has not been established in the Twelve Tables, in *Lex Aquila*, and in *Corpus Iuris Civilis*. The question now is whether State responsibility for quasi-delicts, or at least its basis can be found in other aspects of Roman Law.

Edwin M. Borchard, in his series of articles published in the Yale Law Journal in the early 20th Century, finds that one can easily justify that there was no concept of State responsibility for quasi-delicts in Roman Law considering that it provided “but imperfect prototypes for the modern conceptions of the State, of sovereignty, of officers exercising State power, or of private individuals possessing privileges and immunities which the State may not constitutionally impair.”³⁴ He also notes in the same work that “[t] here is some authority for the view, strongly disputed, that the *populus Romanus*, the nearest earlier Roman conception to the State, could hardly be subject to the rules of private law, for it would thus be bound by its own laws.”³⁵

He further states that Roman Law generally limited subjects of legal relations to natural persons and not to corporations — the reason which for centuries was the basis for the non-responsibility of corporations in torts or quasi-delicts. In this regard, Henry O. Taylor observes that Gaius’s discussions on persons, which the Digest of Justinian followed, did not give any indication about the notion of corporation. He adds that while corporations

³³ R. Westbrook, *supra* note 19, at 442. It translates to “If anyone may cause loss to another, insofar as he shall have burnt, smashed or maimed unlawfully, whatever may be the value of that matter in the thirty days next ... so much money.” D. Ibbetson, *supra* note 5, at 481. In Westbrook’s article, he omits the opening clause (*i.e.*, “*ceterarum rerum praeter hominem et pecudem occisos*”) and reasons that “[t]he phrase *praeter himine et pecudem occisos* has long been regarded as suspect, not least because it is ungrammatical. Lenel rejected *ceterarum rerum* on the grounds that ‘other things’ could not refer back to [the second chapter of *Lex Aquilia*], since it concerned a debt, not a thing. Honoré, however, regards these words as genuine, referring not to things other than slaves and animals but to “matters other than those comprised under the first two chapters of the statute”.

³⁴ E. Borchard, *Governmental Responsibility in Tort*, VI, 36 Yale L.J. 1, 3 (1926)

³⁵ E. Borchard, *supra* note 50, at 5 (citing I Mommsen, *Romisches Staatsrecht* (Leipzig 1876) 162 & 227, and as cited by Loening, *Die Haftung Des Staates Aus Rechtswidrigen Handlungen Seine Beamten* 12 (1879).

may be treated as persons for limited instances, “in no place in the Pandects are corporations said to be persons[.]”³⁶ In addition, there is literature stating that “[f]or Roman jurists, ‘persons’ essentially meant human beings, but there were instances in the Empire where non-human entities were recognized as acquiring rights and duties. In some respects, these entities were treated as legal persons, although they were not described as such.”³⁷ In Roman Law, a person is “an individual, a human being capable of possessing and exercising legal rights. It is one who has legal capacity to acquire and possess property; who may sue and be sued, and in other ways may exercise legal privileges. When a *universitas*, a corporation, was recognized as having rights as collected whole, a unit, apart and separate from the individual members that composed it, it surely, for legal purposes had a sort of personality, or, at least must have been treated as a sort of person.”³⁸ The idea “[t]hat a corporation is an artificial person, a juristic person, a legal person, a legal fiction, or that it is intangible, or invisible, are the products of philosophic reflection. Such views were not expressed by the Roman lawyers.”³⁹

Jose Manuel de Torres Perea also takes the same view. He states that ancient Rome did not have sufficient capacity for abstraction to elaborate a concept comparable to that of legal entity — much less viewing the State as a subject of rights and obligations. Citing Joan Miquel Gonzales, de Torres Perea notes that the *populus romanus* never came to be considered as a true abstract body against the citizen; the State was not assimilated to a private individual. If at all, there was merely a relative personification of an organization in the public sphere in the form of municipalities and colonies, and in the private sphere in the form of *universitates personarum* that were given some form of economic independence. While the concept of a corporation has been considered in the course of evolution of Roman Law (for example, the *collegia* distinguished between the *universitas* and its members and the debts of these two were separated), there was no recognition that an organization had a distinct legal personality from its members.⁴⁰

³⁶ H. O. Taylor, *The Notion of a Corporation in the Roman Law*, in 1 A Treatise on the Law of Private Corporations (4th ed. 1898). He nevertheless notes in the same work that “[t]he right of a corporation to make by-laws for the regulation of its affairs appears to be as old as the Twelve Tables; and, not unlikely, the right to sue and be sued is equally ancient.”

³⁷ P. du Plessis, Borkowski’s Textbook on Roman Law 87 (2015 5th ed.).

³⁸ W. Burdick, *The Principles of Roman Law and Their Relation to Modern Law* 276 (2004).

³⁹ Burdick, *supra* note 54, at 276.

⁴⁰ J.M. de Torres Perea, *Alcance de la Personalidad Jurídica de la Sociedad Civil Externa* 13-14 (2003) (citing J. Miquel Gonzales, *Curso de Derecho Romano* 87 & 89 (1987)).

As for the extra-contractual responsibility of the organization for its agent's willful wrong or excess in authority, Borchard observes that Roman Law generally renders the agent solely liable for the same, except the portion in which the corporation was justly enriched. Further, for torts done in relation to official functions, only the officer at fault was personally liable and this liability did not extend to the corporation. For Borchard, at most, this principle of fault (1) served as a guidance for the distinction between liability for unlawful and lawful acts in the context of State responsibility and (2) aided in making the private law principles applicable in solving problems relating to governmental responsibility.

Given these, it can be concluded that Roman Law did not have a clear rule as to whether the State can be held accountable for quasi-delicts suffered by private third-parties. To begin with, Roman Law was not evolved enough to grant a complete legal personality to all corporate bodies as far as Romans lacked the necessary capacity of legal abstraction to do so. Therefore, the Roman state was not deemed to have legal personality. Indeed, "[t]here is reason to doubt ... if a contemporary interpretation of Roman [L]aw would have justified the conclusion that even in legal theory the head of the state was exempt from legal responsibility[.]"⁴¹

IV. DEVELOPMENT IN THE MIDDLE AGES

Upon the decline of the Roman Empire, the popularity of Roman Law also decreased. Studies relating to it only re-emerged in the late 11th Century with the work of the glossators. Given that the glossators were scholars who focused on interpreting, and not on enacting, Roman Law, their work did not overhaul the concepts discussed above.

One important development happened during the Middle Ages with respect to the concept of legal personality. Otto von Gierke, a famous German scholar, ascribes the origin of the fiction giving a corporation a separate juridical personality to the writings of Sinibaldus Fieschi, an Italian jurist who later became Pope Innocent IV in the year 1243.⁴² Pope Innocent IV, in his commentary on the five decretal books of Pope Gregory IX, provided two passages that would make some scholars consider him the father of corporate fiction.⁴³ Maximilian Koesler summarizes these two passages as follows. First, when a *collegium* (a type of an ecclesiastical corporation) was needed to deliver an oath, it was possible to execute the same through an oath by a

⁴¹ Watkins, *The State as a Party Litigant* 1 (1927).

⁴² M. Koessler, *The Person in Imagination or Persona Ficta of the Corporation*, 9 La. L. Rev 435, 437 (1949).

⁴³ M. Koessler, *supra* note 59, at 437.

representative of the *collegium* instead of using several oaths executed by the members of the ecclesiastical group. Pope Innocent IV explained that this was possible because the *collegium* figured as a person for corporate matters. Second, a *universitas* (considered to be the closest Roman Law Term to today's corporation) could not be excommunicated — Pope Innocent IV reasoned that excommunication was not possible because a *universitas* is a legal term rather than a name of a person. While Pope Innocent IV's writings only focused on ecclesiastical groups, scholars believe that "we may be sure that what applied to religious organizations applied *a fortiori* to civil."⁴⁴ These contributions of Pope Innocent IV led Gierke to consider him as "the father of the dogma of the purely fictitious and intellectual character of juridical persons which still rules."⁴⁵

As for quasi-delicts, general principles relating to it started to emerge in Spain in the 13th Century.⁴⁶ While maintaining the texts in *Lex Aquilia* as the primary basis,⁴⁷ general principles were already being made in the *Siete Partidas*⁴⁸ — a seven-book collection, with each book bearing a letter of Spain's King Alfonso. The first *Partida* provided the laws of God while the remaining six provided the laws of man.⁴⁹ Each *Partida* contains several titles, and under each title are several provisions of laws.

The link of the *Siete Partidas* to Roman Law cannot be undermined. It has been considered as a milestone that served as one of the best tools to recover Roman Law in Europe in the Middle Ages — a law whose influence

⁴⁴ J. Dewey, *The Historic Background of Corporate Legal Personality*, 35 Yale L.J. 655, 665 (1926).

⁴⁵ J. Dewey, *supra* note 61, at 655 fn. 13 (citing Gierke, 3 *Das deutsches Genossenschaftsrecht*, 279-285).

⁴⁶ It goes without saying that the Spanish legal tradition did not only commence with the *Siete Partidas*. A summary of the development of the Spanish legal system up to the enactment of the Philippine Civil Code has already been written by Prof. Ruben F. Balane. See Balane, *Spanish Antecedents*, *supra* note 59.

⁴⁷ See Balane, *Spanish Antecedents*, *supra* note 59. Prof. Balane notes that "[t]he *Partidas* are, to a certain extent, influenced by the local laws and customs of Castile, but the preponderant influence upon them comes from canon law and the Roman law of Justinian. In fact, the style and structure are in conscious imitation of the Pandects and numerous sections contain literal translations of portions of Justinian's codes, with liberal infusions from the works of the Italian glossators."

⁴⁸ D. Ibbetson, *supra* note 5, at 484. The Philippine Supreme Court observes that "[t]he exact date when the preparation of the *Siete Partidas* was commenced and completed is not expressly stated by any of the authors. It is certain, however, that El Rey Don Alfonso El Sabio, ordered their preparation in the early part of the thirteenth century (1251) and that they were probably completed in the early part of the fourteenth century (perhaps 1330). *Sy Joc Lieng v. Encarnacion*, G.R. No. 4718, March 19, 1910.

⁴⁹ M. Nichols, *Las Siete Partidas*, 20 Calif. L. Rev. 260, 262 (1932).

significantly decreased and has almost disappeared. Andres Bello, a Venezuelan-Chilean philosopher, even considers the *Siete Partidas* as a copy of the Roman Pandects.⁵⁰ It has also been described as “the most perfect system of Spanish laws, and may be advantageously compared with any code published in the most enlightened ages of the world.”⁵¹

With respect to quasi-delicts, the applicable portion of the *Siete Partidas* are the laws in Partida 7, Title XV. Some of these laws provided in general strokes guiding principles for what eventually be the Philippine concept of quasi-delict. Even the Philippine Supreme Court has recognized the role of the *Siete Partidas* in the development of the Philippine concept of quasi-delicts. In *Barredo v. Garcia*,⁵² the Philippine Supreme Court noted that the *Siete Partidas* “contributed to the genealogy of the present fault or negligence under the Civil Code, for instance, Law 6, Title 15, of Partida 7, says: ‘*Tenudo es de fazer emienda, porque, como quier que el non fizo a sabiendas el daño al otro, pero acaescio por su culpa.*’”⁵³|||

In terms of the responsibility of State,⁵⁴ the *Siete Partidas* started to provide exemption from liability for damage caused in the exercise of official functions. For instance, Law 2, Title XV, Partida VII provided that when some judge has rightfully given judgment against another, if in enforcing it, the judge or people under his command cause harm to the guilty party or his assets, they would not be liable for it. Nevertheless, if the judge harmed or caused harm to another person tortuously, he will be liable. It also provided that judges, those who have power to complete justice, and the ones in charge of the royal contributions who should take beasts or cattle because of their charge must not keep the animals stacked in such a way that they cannot eat or drink. If any of them would do otherwise, he must pay compensation to the owner of the cattle for the damages or lost resulted from this encirclement.

What can be noted is that while Law 2, Title XV, Partida VII exempted the judge or those in charge of royal contributions from liability in the absence of torts, the responsibility arising from damages resulting from

⁵⁰ I. Jaksic, Selected Writings of Andres Bello (F. M. Lopez-Morillas, trans.) (1997).

⁵¹ 1 L. M. Lislet & H. Carleton (trans.), *The Laws of Las Siete Partidas, Which are Still in Force in the State of Louisiana* vii (1820).

⁵² G.R. No. 48006, July 8, 1942.

⁵³ G.R. No. 48006, July 8, 1942. The portion of the *Siete Partidas* cited by the Philippine Supreme Court translates to: “[he] will be liable to compensate, because while he did not intentionally caused the damage, it happened because of his fault.”

⁵⁴ See also J. F. O’Callaghan, Alfonso X, *The Justinian of his Age* 156 (2019). He notes that “[i]n addition to natural persons or human beings, the law recognized juristic persons, that is, institutions or corporations that enabled a group of individuals to act as one person. The *pesonero* who occupied ‘the place of the person of another, whether an individual or a corporation, reflected that idea (SP3, 5, 1).”

abuse of power falls solely within the person of the official involved and does not extend to the State. This is not surprising inasmuch as the prevailing school of thought that time was that fault was personal and, generally, could not be attributed to a corporation.⁵⁵ Borchard notes that the idea of not extending to the corporation the personal liability of a corporate officer who acted outside the range of his functions was an idea underlying the legal development in several continental Europe countries during this time.

V. DEVELOPMENTS IN THE MODERN PERIOD

In the realm of corporate personality, de Torres Perea notes that great advance happened during this period due to the formation of large groups of capital contributors to finance large companies.⁵⁶ He explains that the development related to the creation in Great Britain and the Netherlands of large companies that obtained the privilege of limiting liability, making the risk to subscribers acceptable. While there was initial hesitation to extend separate personalities to these large companies, the attribution of separate juridical personalities eventually happened — starting from the personification of the corporations, continuing with the foundations, and leading to the associations and societies themselves.

This development resulted in doctrinal advances on the subject matter. De Torres Perea notes that for Hugo Grotius, for instance, corporations had their own personality recognized and protected by natural law, which could not be left to the discretion of the authority. He advances that in the view of Grotius, the *universitas* has been endowed with a certain permanent *spiritus* and it maintained its real personality despite changes in the composition of its members. Thus, a city could be considered as a moral person.

In continental Europe, the concept of legal entity happened first in Germany through the efforts of its pandectists given that the French Civil Code did not have the concept of a moral person⁵⁷ — a name that Friedrich Carl von Savigny considered as misleading and suggested to be replaced by the term juristic person.⁵⁸ While Pope Innocent IV still viewed the term “person” as referring to natural individuals, Savigny viewed it as referring to one of two things: either a human individual or, in a larger sense, any rights and duties bearing unit that could encompass any other kind of juridical entity.⁵⁹ Maximilian Koessler, in summarizing Savigny’s work, states that in case

⁵⁵ E. Borchard, *supra* note 50, at 11.

⁵⁶ J.M. de Torres Perea, *supra* note 56, at 16-17.

⁵⁷ J.M. de Torres Perea, *supra* note 56, at 17.

⁵⁸ 2 F. C. Savigny, *System des Heutigen Roemischen Rechts* 240, 241 (1840).

⁵⁹ M. Koessler, *supra* note 59, at 442 (citing Plucknett, *Words* (1928) 14 *Corn. L.Q.* 263, 266; Neckam, *The Personality Conception of the Legal Entity* (1938) 49).

positive law develops to allow the capacity of a separate entity that is not human, an artificial creation of a juristic person — a rights and duties bearing unit — would take place.⁶⁰

De Torres Perea continues the development of the concept of corporate personality as follows in this paragraph. In the realm of codification, he *Bürgerliches Gesetzbuch* or the German Civil Code was initially interpreted as not granting separate legal personality to a civic society — a notion that was based on the reason that only capitalist companies had independent and separate assets. This idea, however, was eventually widened to include other forms or corporations. In France on the other hand, the concept started first with the concept of moral person: the idea that both corporations and other mercantile entities covered by the Commercial Code were moral persons. Later on, the French Civil Code voluntarily ignored this concept. Civil societies would also be included in the category of corporations and mercantile entities under the justification that it was necessary to understand the preference granted to the creditors of the company to collect from the social assets ahead of the creditors of the partners.⁶¹

VI. THE SPANISH CIVIL CODE OF 1889

In Spain, the Constitution of Cadiz of 1812 recognized the need for the country to have a unified civil code.⁶² Nevertheless, it took more than eight decades before Spain, in the form of the *Codigo Civil de España* (Spanish Civil Code), had its own civil code. It took effect on 24 July 1889.

The enactment of the Spanish Civil Code was not an easy feat. In the span of eight decades, several civil code projects were drafted. The projects include (a) the incomplete first civil code project of 1821; (b) the civil code project by Pablo Gorosábel in 1823; (c) the civil code project of Manuel Cambronero that was completed by Tapia, Vizmanos, and Ayuso in 1836; (d) Project of the Spanish Civil Code of 1851 (the “1851 Civil Code Project”); and (e) the Anteproyecto del Codigo Civil Español (the “1882-88 Preliminary Bill”).⁶³

⁶⁰ M. Koessler, *supra* note 59, at 443 (citing 2 F. C. Savigny, *supra* note 76, at 2 & 236).

⁶¹ J.M. de Torres Perea, *supra* note 56, at 18-19.

⁶² Various developments happened in the Spanish legal system in between the *Siete Partidas* and the enactment of the Spanish Civil Code. Inasmuch as work on these development has already been written and considering that these developments do not have significant effect on quasi-delicts, these are no longer examined in this article. .

⁶³ A. Parise, *The Place of the Louisiana Civil Code in the Hispanic Civil Codifications: The Comments to the Spanish Civil Code Project of 1851*, 68 Louisiana Law Review 823 (2008) & I M. Bernaldo de Quiros, *El Anteproyecto del Codigo Civil Español (1882-1888)* 726 (new ed. 1965).

The 1851 Civil Code Project was mainly written by Florencio García Goyena in a serious attempt to publish a Civil Code for the whole Spanish Kingdom. Unfortunately, this project could not be adopted by the Spanish Parliament, due to the strong opposition from the Catholic Church (the proposal tried to establish a civil marriage) and from some historical Spanish territories that did not want to lose their respective civil laws. However, this project, that was called the “Codigo Isabelino” in honor of Queen Isabel II, inspired the lawmakers of different Latin American countries, especially the Civil Code of Mexico, and the own legislators of Spain, when drafting the Spanish Civil Code of 1889.

In terms of the responsibility of State for damages caused to private third-parties, the Constitution of Cadiz of 1812 granted immunity in favor of the King. Chapter IV, Article 168 provided that the King’s person was sacred and inviolable and he could not be held responsible for anything.

VII. GENERAL PROVISION FOR EXTRA-CONTRACTUAL RESPONSIBILITY

Article 1902 of the Spanish Civil Code provides: “*El que por acción u omisión causa daño a otro, interviniendo culpa o negligencia, está obligado a reparar el daño causado.*”⁶⁴ Prof. Rodríguez de las Heras Ballell explains that the regime of civil liability on Article 1902 of the Civil Code has four elements: (1) harming conduct (whether an act or an omission), (2) bases of liability or criteria to allocate liability (risk or negligence), (3) injury to a right deserving of protection, and (4) causation.⁶⁵ For Manresa, “The obligation imposed by said article comprises the two items or the two terms that are present in every indemnity, in accordance with Article 1106 of said Code, that is, the amount of the loss which may have been suffered, and that of the profit which a person may have failed to realize.”⁶⁶

The 1882-88 Preliminary Bill indicates that Article 1902 (marked in the 1882-88 Preliminary Bill as Article 13, Chapter II, Title XVI) was based on Article 1900 of the earlier 1851 Civil Code Project.⁶⁷ Both provide the same

⁶⁴ “The person who, as a result of an action or omission, causes damage to another by his fault or negligence shall be obliged to repair the damaged caused.” Ministerio de Justicia, Spanish Civil Code, available at <http://derechocivil-ugr.es/attachments/article/45/spanish-civil-code.pdf> (last accessed on 15 October 2018).

⁶⁵ T.R. Heras Ballell, Introduction to Spanish Private Law: Facing the Social and Economic Challenges 273 (2010 ed.).

⁶⁶ E. Garcia, *Torts under the Spanish Law*, 2 Phil. L.J. 27, 41 (1915) (citing XII Manresa at 12 & Rakes case).

⁶⁷ I.M. Peña, *supra* note 62, at 726. See F. Garcia Goyena, *Concordancias, Motivos y Comentarios del Codigo Civil España 968* (1974).

thing: anyone who causes damage to a third person through an act involving fault or negligence is obliged to repair the damage caused.

Ultimately, this provision is based on the universal maxim: *alterum non laedere*.⁶⁸ The fault should harm no one but its author. For Garcia Goyena, while Article 1900 of the 1851 Civil Code Project does not elevate the act or omission to the level of a crime or to one punished by the Penal Code, it obliges one to repair the damage that he cause to another. He also opines that it is a recognition that the scale of fault or negligence can be vast and no matter how thorough the specific provisions of laws are crafted, these cannot anticipate each possibility of fault or negligence -- thus, each case must be decided on the basis of the particular circumstances of the facts and the persons involved.

VIII. VICARIOUS LIABILITY

Liability for the acts of another (*responsabilidad por hecho ajerno*) is commonly referred to as indirect liability in civil law jurisdictions or vicarious liability for those under common law. Citing Francisco Jordano Fraga, Prof. Rodríguez de las Heras Ballell explains that it “entails dissociating between the person causing damages and the person subject to compensation for damages aiming at ensuring fair reparation to the victim.”⁶⁹ The governing provision for this type of liability is Article 1903 of the Spanish Civil Code.

As to the diligence of a good father of a family mentioned in the last paragraph of Article 1903, the concepts of *culpa in vigilando*, *culpa in eligendo*, and *culpa in educando* must be taken into account. Article 1903 of the Spanish Civil Code is based on Article 1384 of the French Civil Code. In the preparatory works for the text of Article 1384 of the French Civil Code, its drafters stated that one of the foundations or bases of the reasons for the responsibility arising from this provision is the presumption that there had been guilt in monitoring (*culpa in vigilando*) or in choosing (*culpa in eligendo*) — that is, negligence in the control of the behavior of children or dependents, or in the election of the latter.⁷⁰

⁶⁸ *Id.* “*Juris praecepta sunt haec: honeste vivere, alterum non laedere, suum cuique tribuere.*” (“The maxims of law are these: to live honestly, to hurt no one, to give every one his due.”) Sandars, *supra* note 36, at 78.

⁶⁹ Rodríguez de las Heras Ballell, *supra* note 14, at 288.

⁷⁰ R. de Angel Yaguez, *Lecciones Sobre Responsabilidad Civil* 58 (1978). The other reason given for the liability arising from this article is social order — the convenience of assuring the victims that they will be compensated for the damages suffered considering that the presumed insolvency of the tortfeasors (children, apprentices, employees or servants).

With respect to the potential responsibility of State for damages caused to private third-parties, the Spanish Civil Code recognized this. Paragraph 5 of Article 1903 expressly recognized that the State is subject to the same liability when it acts through a special agent, but not if the damage shall have been caused by the official upon whom properly devolved the duty of doing the act performed.

IX.SPANISH CIVIL CODE IN THE PHILIPPINES

The Spanish Civil Code of 1889 was extended to the Philippines in the late 19th Century. One week after the publication of the Spanish Civil Code on 24 July 1889, a royal decree was dated 31 July 1889 was issued by Queen Regent Maria Cristina in the name of King Alfonso XIII, her son.⁷¹ The royal decree extended the Spanish Civil Code “to the Islands of Cuba, Puerto Rico, and the Philippines, to take effect twenty days after its publication in the official newspapers of the same⁷² — “*a los veinte dias siguientes á su publicación en los periódicos oficiales de las Islas.*” It is in this context that the concept of quasi-delicts became embedded in the Philippine legal system.

By virtue of this royal decree, the provisions of the Spanish Civil Code were extended to the Philippines. The abovementioned provision of the Spanish Civil Code on quasi-delicts, therefore, also became part of the Philippine legal system.

As history would have it, however, the ties between the Philippines and Spain did not last long after 1889. Before the end of the 19th Century, Philippines was ceded by Spain to the United States of America — a country that primarily adopts the common law regime. One question that aroused during this time was whether the private laws of the Philippines (which was then governed by the Spanish laws) should be patterned after the common law model of the United States of America.

Initially, the consensus was to maintain civil law in the realm of private law. For example, then law student Jose P. Laurel, who would later on become an Associate Justice of the Philippine Supreme Court and a President of the Philippines, explained that “[l]egally and socially, the civil-law system has become so interwoven with the life and proprietary interests of the inhabitants of these Islands that to introduce an entirely new legal system would be destructive of an institution under which the Filipino people have been bred and to which they have been accustomed for a period of more than three

⁷¹ Balane, Spanish Antecedents, *supra* note 59.

⁷² R. Balane, The Spanish Antecedents of the Philippine Civil Code (1989) (citing 1 Sherman, *op. cit.* pp. 278-279) [hereinafter R. Balane, Spanish Antecedents].

hundred years.”⁷³ This position was consistent with other scholars in the Philippines that time. For instance, the opinion of Justice Carson in *U.S. v. Cuna*⁷⁴ indicates that neither English or American Common Law was in force in the Philippines at the start of the twentieth century.⁷⁵

About five years after the publication of Mr. Laurel’s work, however, the Philippine legal system took a different turn. In the case of *In Re: Application of Max Shoop for Admission to Practice Law*,⁷⁶ the Philippine Supreme Court through Justice Malcolm noted that while several Spanish laws⁷⁷ were made effective in the Philippines, the “prolific use of Anglo-American authorities ... in the decisions of th[e] court, combined with the fact that the available sources for study and reference on legal theories are mostly Anglo-American”,⁷⁸ supports the conclusion that “there has been developed, and will continue, a common law in the jurisprudence of this jurisdiction (which for purposes of distinction may properly be termed a Philippine Common Law), based upon the English Common Law in its present day form of an Anglo-American Common Law[.]”⁷⁹

Former Chief Justice of the Supreme Court of Puerto Rico José Trías Monge describes the creation of this hybrid system as a tension between the legal cultures of the politically dominant and the subservient states. For the Philippines in particular, Trías Monge ascribes the infusion of common law principles in matters involving civil law to the appointment of non-Speaking magistrates in the Supreme Court, the change of official language (from Spanish to English), the adoption of the American style of opinions, and the fluctuation of American lawyers to the Philippine bar.⁸⁰ Yet, the civil law tradition remained in the Philippines. The reform of its Civil Code — which was the Spanish Civil Code — in the middle of the 20th Century resulted in the production of a “code of civil extraction, where principles derived from Philippine jurisprudence join others established in the civil codes of Germany, France, Italy, Switzerland, Argentina, and Mexico.”⁸¹

⁷³ J.P. Laurel, *What Lessons May Be Derived by the Philippine Islands from the Legal History of Louisiana — Part Two*, 2 Phil. L.J. 63, 93 (1915).

⁷⁴ 12 Phil. 241 (1908).

⁷⁵ 12 Phil. 241, 244 (1908).

⁷⁶ Nov. 29, 1920.

⁷⁷ These include the Penal Code of 1887, the Code of Commerce of 1888, Ley Provisional, Code of Criminal Procedure, and Code of Civil Procedure of 1888, Civil Code of 1889.

⁷⁸ *In Re: Application of Max Shoop for Admission to Practice Law*, Nov. 29, 1920.

⁷⁹ *In Re: Application of Max Shoop for Admission to Practice Law*, Nov. 29, 1920.

⁸⁰ J. Trías Monge, *Legal Methodology in Some Mixed Jurisdictions*, 78 Tul. L. Rev. 333, 335-36 (2003).

⁸¹ J. Trías Monge, *supra* note 110, at 345.

With respect to the revision of Articles 1902 to 1910 of the Spanish Civil Code on extracontractual liability, the Philippine Civil Code Commission was very careful in choosing the word that would encompass “*actos y omisiones ilícitos o en que intervengan cualquier género de culpa o negligencia*”.⁸² These provision of quasi-delicts were eventually placed in Book IV, Title XVII, Chapter 2 of the new Philippine Civil Code — specifically Articles 2176 to 2194.

X. CONCEPT OF STATE IMMUNITY FROM SUIT IN THE PHILIPPINES

A review of the prior organic laws of the Philippines, from the Instructions of President William McKinley to the Second Philippine Commission to the 1935 Constitution, reveals the absence of any express provision granting the State immunity from suit.⁸³ Yet, as early as 1922, the concept of state immunity from suit has already been recognized by the Philippine jurisdiction relying on the treatise of Floyd R. Mechem — an American commentator. This concept of State immunity from suit continued to grow with jurisprudence and was later inscribed in Article XV, Section 16 of the 1973 Philippine Constitution. The same concept was carried to the 1987 Philippine Constitution as its Article XVI, Section 3. It provides that “[t]he State may not be sued without its consent.”

But where did this concept arise from? In the United States of America, its incorporation has been justified on one of two legal theories: “the first, that the king — erroneously transformed into the State — can do wrong, a doctrine evidently deemed to have an immutable historical foundation; and the second, espoused primarily by Mr. Justice Holmes for the Supreme Court that the State, the authority that makes the law, cannot be subject to law, and hence, it is argued, cannot be chargeable with or sued in tort.”⁸⁴

For historians, the axiom “the king can do no wrong” originated during the time of Edward I of England in light of the petition of right that he developed.⁸⁵ During this time, Push notes that the king of course could not be made answerable for his own court but the immunity from suit was only limited to the person of the king — something that was practical considering that it was the king who would rule on the petitions, and definitely not based on any notion that the king was above the law. This immunity is identical with the

⁸² Balane, *Obligations and Contracts*, *supra* note 7, at 13.

⁸³ J.D. Jimenez, *State Immunity from Suit*, 35 *Ateneo L.J.* 27, 27 (1991).

⁸⁴ E. Borchard, *supra* note 50, at 17.

⁸⁵ G. Push, *Historical Approach to the Doctrine of Sovereign Immunity*, 13 *Louisiana Law Review* 476, 477 (1953)

one present in the Constitution of Cadiz in Spain, which provided in Chapter IV, Article 168 that the King's person was sacred and inviolable and he could not be held responsible for anything.

How this doctrine transformed exactly into the immunity of the entire State remains unclear. Some historians trace this transformation of the nation state: "what was once the mere personal immunity of an individual was finally merged with the whole concept of sovereignty; and the theory of the divine right of kings lent support to the proposition that the king was above the law-that he was in fact the law-giver appointed by God[.]"⁸⁶

As to how this English concept became applicable in the non-monarch United States of America, its first mention with reference to the United States happened in *Colins v. Virginia*.⁸⁷ In that case, United States of America Supreme Court Chief Justice John Marshall held that "[T]he universally received opinion is that no suit can be commenced or prosecuted against the United States; and the Judiciary Act does not authorize such suits."⁸⁸

This concept became so embedded in the Philippine jurisdiction that it was even adopted in the 1973 and 1987 Philippine Constitution. Recent jurisprudence also maintains its application. For instance, in *Arigo v. Swift*,⁸⁹ the Philippine Supreme Court *en banc* held that the State may not be sued without its consent. Citing American cases, the Philippine Supreme Court, in *Arigo*, echoed Justice Holme's opinion that "there can be no legal right against the authority which makes the law on which the right depends."⁹⁰ The Supreme Court added that "[w]hile the doctrine appears to prohibit only suits against the state without its consent, it is also applicable to complaints filed against officials of the state for acts allegedly performed by them in the discharge of their duties. The rule is that if the judgment against such officials will require the state itself to perform an affirmative act to satisfy the same, such as the appropriation of the amount needed to pay the damages awarded against them, the suit must be regarded as against the state itself although it has not been formally impleaded."⁹¹ The Philippine Supreme Court also justified the applicability of the concept using practicality. In *City of Bacolod v. Phuture Visions Co., Inc.*,⁹² the Supreme Court explained that "[t]he purpose behind this principle is to prevent the loss of governmental efficiency as a result of the time and energy it would require to defend itself against lawsuits."

⁸⁶ Push, *supra* note 139, at 479.

⁸⁷ 6 Wheat 264.

⁸⁸ 6 Wheat 264 (406).

⁸⁹ G.R. No. 206510, September 16, 2014.

⁹⁰ *Kawanakoa v. Polybank*, 205 U.S. 349.

⁹¹ G.R. No. 206510, September 16, 2014.

⁹² G.R. No. 190289, January 17, 2018.

Applied in the context of quasi-delicts, Cesar Sangco observes that “[c]ertain functions and activities, which can be performed only by the government, are more or less generally agreed to be ‘governmental’ in character, and so the State is immune from tort liability. On the other hand, a service which might as well be provided by a private corporation, and particularly when it collects revenues from it, the function is considered a ‘proprietary’ one, as to which there may be liability for the torts of agents within the scope of their employment.”⁹³ He explains, however, that victims of quasi-delicts are not without a remedy because the officer or employee committing the tort is personally liable and may be sued as any other citizen and held answerable for the damage caused by his tortious act. In effect, Sangco was referring to paragraph 6 of Article 2180 of the new Philippine Civil Code, which provides that the general provision on quasi-delicts in Article 2176 shall be applicable when the damage has been caused by an official to whom the task done properly pertains.

Does this mean that the Philippine government cannot be sued at all in cases involving quasi-delicts? The answer is in the negative. For instance, in *Commissioner of Customs v. Agfha Incorporated*,⁹⁴ the Philippine Supreme Court denied the claim immunity from suit claim of the government and ordered it to pay the value of the shipment that was lost while in the custody of the Bureau of Customs. This is consistent with the earlier case of *Republic v. UNIMEX Micro-Electronics*,⁹⁵ which involved the Bureau of Customs’s ineptitude and gross negligence in keeping of a private entity’s goods. The Philippine Supreme Court held that while the judgment may result to the obligation ultimately falling upon the government and the doctrine of state immunity from suit exempts the government from being held liable for governmental acts, the Bureau of Customs should not be exonerated from liability as the circumstances involved warrant the non-application of the state immunity doctrine. The Philippine Supreme Court explained that it could not turn a blind eye to the gross negligence of the Bureau of Customs and its lackadaisical attitude in failing to provide a cogent explanation on the goods’ disappearance that was in its custody. The Supreme Court explained that justice and equity required the shredding of the State’s cloak of invincibility against suit.

Indeed, justice demanded the non-application of the doctrine of state immunity in the abovesited case. In doing so, however, did the Philippine Supreme Court engage in judicial legislation by ruling against the clear wording of the Philippine Constitution? Are these actions by the Philippine

⁹³ C. Sangco, 2 Philippine Law on Torts and Damages 612 (1994).

⁹⁴ G.R. No. 187425, March 28, 2011.

⁹⁵ GR No. 166309-10, Mar 09, 2007.

Supreme Court not indications that the doctrine of state immunity as currently worded in the Philippine Constitution requires a modification?

XI. DEVELOPMENTS IN SPAIN AFTER SEVERANCE OF TIES

On the other side of the world, the concept of extra-contractual obligations in Spain developed differently than the Philippines. For example, initially, the Spanish extra-contractual responsibility regime was primarily fault based — except Article 1905 for damage caused by animals and under Article 1910 for those caused by things from a house. Under the fault liability regime, the negligence is measured by ability of a person's conduct and capacity to assess the probability that the accident would happen and its consequences (*test de previsibilidad*) and the possibility of preventing them by adopting adequate precautionary measures (*test de evitabilidad*).⁹⁶ This predictability test is irrelevant to the other liability regime under the Spanish legal system, which is liability without fault (*responsabilidad sin culpa* or strict liability).

With respect to liability relating to public administration, Article 106.2 of the 1978 Spanish Constitution provides that the Public Administration is civilly liable for damages caused to individuals' rights or goods in the exercise of public services. The governing rule for this is Articles 139 to 149 of the Law of 30/1992 of 26 November, as partially modified by the Fourth Law of 1999 and by Royal Decree 429 of 26 March.

Based on the Spanish Supreme Court's Judgment of 15 December 1997,⁹⁷ this system of civil responsibility of the Public Administration first appeared in Article 121 of the 1954 with the Law of Compulsory Expropriation⁹⁸ and was followed by Articles 40 and 41 of the Law of the Legal System of the Administration of the State of 1957. The subsequent adoption of the regime in Articles 9 and 106.2 of the Spanish Constitution made it a fundamental guarantee of legal security. The same judgment notes that the Public Administration's patrimonial responsibility, as contemplated in Articles 106.2 of the Constitution, 40 of the Law on the Legal Regime of the State Administration of 1957, and 121 and 122 of the Law of Compulsory Expropriation, is configured as an objective liability. This means that to obtain relief, it is irrelevant that the administrative action has been normal or abnormal and it suffices to there has been an effective, economically evaluable, and individualized damage as a result of the Public Administration's rendering of public service. Having an objective character, it not necessary to prove that the

⁹⁶ Rodríguez de las Heras Ballell, *supra* note 14, at 281.

⁹⁷ RJ 1997\9357.

⁹⁸ RCL 1954\1848 and NDL 12531.

responsibility of the owners or managers of the administrative activity that has caused damage has acted with intent or fault. In fact, it is not even necessary to prove that the public service has developed in an anomalous way, because the constitutional and legal precepts that make up the applicable legal regime extend the obligation to compensate the cases of normal operation of public services. Thus, it is sufficient that the risk inherent in its use has exceeded the limits imposed by the security standards required according to social conscience. There will then be no duty of the injured party to withstand the impairment and, consequently, the obligation to compensate for the damage or injury caused by the administrative activity will be attributable to the Public Administration.

This legal regime has been described as a departure from the general fault-based rule provided in the Spanish Civil Code. Pilar Vanegas Roa notes that this concept of patrimonial responsibility adopted by Spain abandoned the concept of fault under Articles 1902 and 1903 of the Spanish Civil Code and is based on the concept of compensable injury provided that the damage was a consequence of normal or abnormal functioning of public services.⁹⁹ Unlike the Philippines, the Spain has adopted a legal regime that renders the public administration objectively liable for damage arising from its discharge of public services — regardless whether the public administration acted with fault or negligence.

XII. STATE IMMUNITY VS. STRICT LIABILITY

After tracing the historical developments on quasi-delicts and corporate juridical personality, the prevailing legal regimes in Spain and the Philippines can be stated in the following broad concepts. In Spain, the responsibility of the public administration with respect to damage arising from extracontractual matters is strict liability — that is, the public administration becomes liable to pay damages to the citizen whether the damage arose with or without fault. On the other hand, the liability regime in the Philippines for quasi-delicts is restricted by State immunity from suit. Because of this, two matters must first be taken into account before a citizen can recover damages from the State: (1) the State's consent to be sued and (2) the State's consent to pay or become liable. In this part of the article, the existing legal regime in the Philippines will be tested against different legal philosophies with the hope of answering whether it is still beneficial to the Filipino people.

⁹⁹ P. Vanegas Roa, *Los conflictos de la Responsabilidad Patrimonial de la Administración Pública por el funcionamiento del servicio público deportivo*, 8 *Revisita de Paz y Conflictos* 267, 270 (1988).

1. *Utilitarianism*

Founded by Jeremy Bentham, this legal philosophy is based on the notion that the highest form of morality maximizes utility — the difference between pleasure or pain. In the words of Bentham, “[n]ature has placed mankind under the governance of two sovereign masters, *pain* and *pleasure*. ... By utility is meant that property in any object, whereby it tends to produce benefit, advantage, pleasure, good, or happiness (all this in the present case comes to the same thing) or (what comes again to the same thing) to prevent the happening of mischief, pain, evil, or unhappiness to the party whose interest is considered: if that party be the community in general, then the happiness of the community: if a particular individual, then the happiness of that individual.”¹⁰⁰ Michael Sandel summarizes Bentham’s utilitarianist approach as follows: given that people are governed by pain and pleasure, government’s legislation must maximize the happiness of its citizenry as a whole.¹⁰¹ Stated otherwise, Bentham’s utilitarianism sees the maximization of happiness, the difference between pleasure and pain, as the ultimate goal.¹⁰²

The legal regime in the can be justified using the legal philosophy of utilitarianism. On the one hand, the Philippine Supreme Court has explained that State immunity from suit goes on to the very essence of sovereignty — “a continued adherence to the doctrine of non-suability cannot be deplored, for the loss of governmental efficiency and the obstacle to the performance of its multifarious functions would be far greater in severity than the inconvenience that may be caused private parties, if such fundamental principle is to be abandoned[.]”¹⁰³ In effect, the Philippine Supreme Court was saying that to allow each aggrieved party to sue after the State would also force the State to spend its resources on defending the suit and, if found responsible, paying damages. This would, in effect, negatively affect the State’s ability to perform its governmental functions. Thus, the aggrieved party should suffer the damage instead of affecting the entire citizenry. This line of thinking has resulted to the Philippine Supreme Court recognizing the damage caused to a private individual but still maintaining the applicability of State immunity from suit. In *Municipality of San Fernando v. Hon. Firme*, the Supreme Court held that “the death of the passenger — tragic and deplorable though it may be — imposed on the municipality no duty to pay monetary

¹⁰⁰ J. Bentham, *Utilitarianism* 5-6 (1890).

¹⁰¹ M. Sandel, *Justice What’s the Right Thing to do?* 34 (2009)

¹⁰² N. Sigot, *Wealth and Happiness in Bentham’s Utilitarianism*, in 3 *The Political Economy* 27-29 (2016).

¹⁰³ *Department of Agriculture v. National Labor Relations Commission, et al.*, G.R. No. 104269, Nov. 11, 1993.

compensation.”¹⁰⁴ This reasoning clearly falls within utilitarianism. A greater number of people would be more satisfied if the resources that the government would allocate to respond to a suit against it is used to ensure that that the government is able to focus on its primary functions.

On the other hand, the legal regime in Spain may appear to contradict the utilitarian model. Making the public administration liable for damage suffered by a private individual does not maximize the happiness of all its people because it would require the government to allocate funds to the victim instead of using it for matters that would benefit the entire population. Yet, it must be noted that Spain is a welfare state and a fundamental feature of a welfare state is social insurance.¹⁰⁵ This social insurance “is usually financed by compulsory contributions and is intended to provide benefits to persons and families during periods of greatest need.”¹⁰⁶ When the unexpected damage arising from the performance of public services is considered as a risk that the people should be protected against, one can argue that the population would be happier when they have the assurance that part of their contribution or taxes protects them against unexpected damages arising from public functions. The pain caused by having to pay an additional amount for the protection against this type of risk is balanced by the pleasure obtained from having the assurance that in case anything happens to any of them, that person would receive damages that would make him as whole as he was prior to the unexpected event. In short, the minor inconvenience suffered by the people who pay taxes (a portion of which is used to pay extra-contractual responsibilities of the public administration) is outweighed by the happiness felt by the populace in general by being assured that they would receive compensation for potential injuries connected with the administration of public service.

Indeed, both legal regimes satisfy the utilitarianist approach. Nevertheless, one of the objections often ascribed to utilitarianism also applies to both the legal systems. As noted by Sandel, one main criticism of utilitarianism is its failure to consider that each individual matter should be treated beyond his preferences being counted to obtain the preferences of the entire population.¹⁰⁷ With respect to the Philippines, by making the State immune from suit so that its discharge of governmental functions will remain unhampered, the legal regime is unjust because it allows a person who has suffered damage to bear it despite not having any hand as to its cause. On the other hand,

¹⁰⁴ G.R. No. L-52179, April 8, 1991.

¹⁰⁵ Welfare State, available at <https://www.britannica.com/topic/welfare-state> (last accessed May 30, 2019).

¹⁰⁶ Welfare State, available at <https://www.britannica.com/topic/welfare-state> (last accessed May 30, 2019).

¹⁰⁷ M. Sandel, *supra* note 175, at 37.

for Spain, one can argue that its legal system deprives individuals their personal freedom to choose whether they would like to be insured against the risk of damage relating to public services. In effect, both legal regimes ignores the right of each member of the population in order to ensure that the entire group is happy.

2. *Libertarianism*

Whereas one of utilitarianism's primary objection is its disregard of an individual's rights, the legal philosophy of libertarianism, which is arguably an American concept, is anchored on each individual's fundamental right to liberty. In this regard, some have observed that utilitarianism "seems at odds with a theory of substantive rights, such as liberty-based ones."¹⁰⁸ For a libertarian, each person has the right to do whatever he pleases on everything that he owns subject to the condition that he respects the right of other people to do the same. Sandel submits that "[o]nly a minimal state — one that enforces contracts, protects private property from theft, and keeps the peace — is compatible with the libertarian theory of rights. Any state that does more than this is morally unjustified."¹⁰⁹ He also observes that libertarianism does not agree on paternalism (laws intended to prevent people from causing harm to themselves), morals legislation (laws that seek to advance ideas of virtue), and redistribution of income (laws that ensures that wealth is redistributed to help everyone).

In a case involving the installation of police checkpoints, the Philippine Supreme Court recognized that the Philippine legal system adopts the libertarian model: "[n]o one can be compelled, under our libertarian system, to share with the present government its ideological beliefs and practices, or commend its political, social and economic policies or performance."¹¹⁰ It is submitted that this libertarian system is also consistent with the current State immunity from suit. The government gives an individual great freedom to exercise his rights. When damage arises in relation to the government's exercise of governmental functions, the individual is left on his own to seek redress. Thus, in one case, the Supreme Court maintained that the family members of a child who died after being runover by a municipal car could only go after the driver in his personal capacity and not after the municipality that employs him. The Supreme Court held that "[j]ustice cannot sway in favor of petitioners simply to assuage their pain and loss. The law on the

¹⁰⁸ D. Jackson, *Bentham and Payday Lenders*, in H. Stacy & W. Lee (eds.), *Economic Justice Philosophical and Legal Perspectives* 31 (2013).

¹⁰⁹ M. Sandel, *supra* note 175, at 60.

¹¹⁰ *Valmonte v. de Villa*, G.R. No. 83988, May 24, 1990.

matter is clear: only the negligent driver, the driver's employer, and the registered owner of the vehicle are liable for the death of a third person resulting from the negligent operation of the vehicle."¹¹¹

As for the Spanish legal regime, it does not go in line with the reasoning of libertarianism. While James P. Sterba has works claiming that libertarianism can be compatible with the right of the poor to a welfare minimum that the government should guarantee, other philosophers like Tibor Machan and Jan Naverson have already critiqued Sterba's argument.¹¹² The author agrees that Spain's being a welfare state is inconsistent with libertarianism. For one, allowing the public administration to answer for responsibilities arising from the discharge of governmental functions implies the intrusion of the State to matters that are beyond the scope of functions of a minimalist state. Further, if the legal regime of strict liability for damage arising in the discharge of public services is viewed as part of Spain's being a welfare state, one can argue that it is a form of morals legislation — an imposition of the sovereign's belief that no person should bear the consequences of an event where the public administrator was the service provider. The legal regime's concept of making everyone pay so that the aggrieved citizen does not suffer the damage, to a certain extent, can also be considered as a form of legislation of wealth distribution. It makes everyone pay through their taxes so that the aggrieved party can be restored to his original position before the damage happened.

3. *Kantian Ethics*

Immanuel Kant does not adhere to either utilitarianism or libertarianism. "Kant's ethical theory holds that every human being has equal dignity as an end in itself, but his theory of human nature and history is based on the idea that civilized human beings tend to assert their self-worth antagonistically in relation to others, seeking superiority over them. ... He therefore thinks we need to guard against our corrupt tendency to quibble with the strictness of the moral law and make exceptions to moral rules in our own favor."¹¹³ In what Sandel considers to be "one of the most powerful and influential accounts any philosopher has produced",¹¹⁴ the concept that the human person, as a rational being, deserves dignity and respect is advanced by Kant. In Kant's perspective, the categorical imperative requires that every human be respected as ends in themselves and not a mere objects to obtain general welfare.

¹¹¹ Spouses Buenaventura v. Apostol, *et. Al*, G.R. No. 163609, Nov. 27, 2008.

¹¹² See J.R. Edwards, *Is There a 'Libertarian' Justification of the Welfare State? A Critique of James P. Sterba*, 4 *Libertarian Papers* 97 (2012).

¹¹³ A. Wood, *Kantian Ethics* 6 (2008).

¹¹⁴ M. Sandel, *supra* note 175, at 104.

The Philippine legal regime is inconsistent with Kant's point of view. The current regime denies the aggrieved individual of the right to go after the government even if the act or omission causing damage to that person was due to the negligence of the government or its officer. As jurisprudence would show, the primary basis for the denial of this right is the notion that inconveniencing the government with all potential law suit that would arise from respecting this right would make it less effective in delivering its governmental functions. This line of reasoning shows that the aggrieved individual is not seen as one worthy of respect but a mere subject that the State should govern — if the State causes damage to this person, he or she must bear the consequences and allow the State to carry on in governing other members of the population. The overarching principle here is that the government exists to govern and the each individual member of the population only exists to be governed. Instead of viewing the individual as the very reason why the government is existing, the individual is seen nothing more than a mere subject of governance.

On the contrary, the legal regime in Spain is consistent with Kantian ethics. Instead of seeing the public administration as a mighty being that should not be held accountable for damage suffered by individuals, the Spanish legal regime makes the individual the very reason why the government exists in the first place. The public administration must deliver public services to the individual and if damage is caused to him in the government's course of delivering these services, the individual should be made whole again regardless of whether there is negligence on the part of the government. The overarching principle in this legal regime is that the dignity of each individual should be respected simply because this dignity is worthy of respect.

4. *Justice as Fairness*

American philosopher, John Rawls, offers a different approach on legal philosophy. For Rawls, the direction of administration that is in line with justice involves a hypothetical contract — one that is formulated by individuals who are placed in a position of equality. That is, if each individual is placed in an equal footing, what kind of government would they want to govern them. Sandel points out that Rawls obtains two principles of justice that result from this hypothetical contract. First, basic liberties would be given to each individual and this would be given more importance than general welfare. Second, distribution of wealth to make everyone absolutely equal would not happen. Rather, distribution would only focus to benefit those who are the least members of society.

The philosophy of Rawls is inconsistent with the Philippine legal regime. If the Filipinos are given placed in an equal position, one that places everyone as the aggrieved party in a quasi-delict involving the government, the

people would choose to ensure that whoever among them becomes the victim would be able to be placed back in their position before the quasi-delict. Further, in terms of wealth distribution, it would be a consensus that everyone should contribute such that none of them would suffer the effects of a quasi-delict. These would lead to a contract among the people that would give them the assurance that they have a way to go after the persons liable for an act or omission that caused damaged to them — regardless whether the cause is a private individual or the government. This social contract is clearly inconsistent with the current legal regime that grants the government immunity if it or its officer causes damage to a private individual.

As for the Spanish legal regime, it is submitted that the strict liability on public administration is consistent with the philosophy of Rawls. A system that guarantees to each individual that they would be given damages to recover what they lost because of faulty public service is one that persons of equal footing would adhere to. Instead of risking the possibility that he could be an aggrieved party without any right to recover, individual members of the population would be willing to shell out a small amount.

5. *Analysis*

Based on the foregoing, it becomes clear that the system of utilitarianism and libertarianism could be used to justify the legal regime in the Philippines that grants the state an immunity against suit. On the other hand, utilitarianism, Kantian ethics, and John Rawl's principle of equality support the current legal regime in Spain that makes the public administration objectively liable for damage arising in relation to its discharge of public services.

It is unfortunate that the current legal regime in the Philippines is inconsistent with Kantian ethics and the principle of equality. In the Preamble of the Philippine constitution, the following are stated as the goals for its enactment: to embody the Filipinos ideals and aspirations, promote common good, promote and develop the Filipino patrimony, and secure the blessings of independence and democracy under the rule of law and regime of truth, justice, freedom, love, equality, and peace. While the current legal regime can be argued to promote common good (utilitarianism) and to maintain the rule of freedom (libertarianism), it fails to consider that the government exists because of the Filipino people — the very people who had the power to enact the Constitution. By failing to take into account that the Filipino people should be the ends why the government exists in the first place (Kantian ethics) and that these people would want to have themselves protected against the risk of possibly being the victims of quasi-delicts involving the government (principle of equality), the current system on State immunity from suit, unfortunately, pales in comparison to the Spanish system that not only makes

the public administration liable for quasi-delicts but even disregards whether there was fault in the discharge of public services.

While one may argue that the concept of State immunity from suit is a constitutional provision, which was ratified by the Filipinos themselves and carries with it the decision of the Filipinos to waive their ability to go after the government so that the latter could focus more in delivering its government functions, it will not do the Filipinos any harm to consider how things are done in the other parts of the world. In fact, the very doctrine of State immunity from suit is also based on the common law doctrine that the King can do no wrong. In a republican and democratic country like the Philippines, this doctrine finds no application. Thus, the author proposes that the abolition of the applicability of the doctrine of State immunity from suit with respect to quasi-delicts arising from the discharge of governmental functions be considered.

XIII. ECONOMIC ANALYSIS TOWARDS A FEASIBLE RECOMMENDATION

In reconsidering the current State immunity from suit doctrine in the Philippines, one cannot escape the fact that Spain and the Philippines have different levels of economic maturity. Spain is a developed economy while the Philippines still has a developing one. This economic difference can also be the reason why the Philippines cannot adopt the legal regime in Spain.

Economic analysis of law, a branch of research pioneered by Richard A. Posner, “is based on the insights of property rights theory and transaction cost economics.”¹¹⁵ Klaus Mathis describes it as being anchored on explaining human behavior using an economic model. Human behavior, under the economic lens, is seen as a result of decisions involving limited resources and alternative uses for these resources. In other words, economic analysis of law starts from the premise that individuals are interested in maximizing their well-being — the values that individuals assign to their costs and benefits are stable; individuals are the ones who know and determine the best value that things have for them. In economic analysis of law, this premise is used as basis in crafting laws and governmental policies, which are then contrasted with reality to determine their degree of validity.¹¹⁶ Thus, it is a recognition that “the law has an economic function and, in particular, that the common law serves as an ‘instrument for promoting economic efficiency.’”¹¹⁷

¹¹⁵ K. Mathis, *Efficiency Instead of Justice? Searching for the Philosophical Foundations of the Economic Analysis of Law* (D. Shannon, trans.) 1 (2009 ed.).

¹¹⁶ S. Pastor, *Sistema Juridico y Economia* 32 (1989).

¹¹⁷ A. Ogus, *What Legal Scholars can Learn from Law and Economics*, 79 *Chicago-Kent L. Rev.* 383, 384 (2004) (citing R. Posner, *Some Uses and Abuses of Economics*

To a certain extent, economic analysis of law flows in the same way as utilitarianism. The need of individuals to maximize their well-being is used as a guiding principle in crafting laws. Unlike utilitarianism that only considers the individual as a sample to obtain the general sentiment, the center of economic-judicial analysis is the individual, which is considered to be rational and coherent with his aims when trying to maximize the utility of his acts. Through this way, it is considered that a maximum of social welfare is achieved if the conditions of competition are perfect (social welfare is the sum of the individual statuses). Therefore, it is estimated that the law has to promote this social welfare by enabling the sum of maximizing behavior and the conditions of exchange in the market that allow greater efficiency. This is achieved by law, encouraging efficient behaviors and dissociating from distributive solutions.

In the realm of extra-contractual responsibility, “[t]he basic idea is that by exposing tortfeasors to the social costs of their activity, they will have *ex ante* incentives to take optimal preventive measures. ... Optimal care is defined as the level of care where the marginal costs of taking more care equal the marginal benefits thereof (in the sense of a reduction in the expected accident losses).”¹¹⁸ Thus, “[f]rom an economic perspective, the main goal of tort law is to provide behavioural incentives to the actors involved.”¹¹⁹

In translating this economic perspective into law, policymakers can view their decisions with a recognition that governments have limited resources. It is certainly legitimate and necessary to study the extent to which legal regulations avoid the waste of resources and increase efficiency. Eduardo Garcia de Enterría summarizes the importance of economic analysis in determining the policies of a country:¹²⁰ one believes to dream when on mountain roads in any of the states to which the Alps extend provide a warning that tries to excuse the respective government of the duty to repair damages that may have caused the status of such roads, a duty that is assumed without reservation in the normal case of opening to the public of more ordinary routes of use. He concludes that this institution of civil liability, in the reality of other countries, is not the same as the one that applies in Spain. During the late 1960s, the time when this excerpt of Garcia de Enterría was written, Spain was still a developing country and it was not viable for it to have a regulation that would diminish public treasury in street insurance measures when there

in Law, 46 U. Chi. L. Rev. 281, 289-90 (1979)).

¹¹⁸ M. Faure, *et al.*, *Liability for Unknown Risks: A Law and Economics Perspective*, 7 J. European Tort L. 198 (2016).

¹¹⁹ M. Faure, *et al.*, *supra* note 188.

¹²⁰ E. Garcia de Enterría, *Prologue*, in M. Rebollo, “Ayer y hoy de la responsabilidad patrimonial de la Administración: Un balance y tres reflexiones”.

were other more important needs. Today obviously the situation has changed, and therefore the guidelines for demanding responsibility have changed. As explained by Martin Rebollo,¹²¹ the aim is to achieve the coherence of the legal system with the economic system. To look for the balance between the system of responsibility, the possibilities of management, the dimensions of the public, the quality guidelines and the financial and tax system itself. Therefore, economic analysis of law proposes that the legislator should, as far as possible, set guidelines to determine the level of diligence required of the government in accordance with the context of what the country is in all orders. These regulations, for example, and regarding the proposed case, would establish when and how a highway should be signaled, when it should be inspected, to exonerate or at least reduce liability.

Similarly, the following example given by Claus Ott and Hans-Bernd Schafer¹²² is very illustrative. It relates to models that determine the level of diligence that must be required of those responsible for road safety in an advanced country and others in the process of development. This compares the level of diligence to be demanded of those responsible for road safety to protect the drivers of landslides in the Alps, with the same assumption in the Khyber Pass that unites Afghanistan with Pakistan. In the first case, blasting and deployment of metallic nets should be done, resources necessary to avoid serious accidents and damages. They point out that to us that it is more important to avoid those accidents than to save on the costs that such avoidance entails. Therefore, we can consider as efficient a legal regulation that originates such costs. On the other hand, with respect to Afghanistan and Pakistan, these costs could not be justified, the referred Khyber Pass passes through a dangerous mountain range and carry out the same expenses as in the Alps to prevent accidents, it would totally exhaust the budget of a poor and on-going country. Ott and Schafer point out that it would be wasteful to use all state resources to avoid these accidents and neglect the remaining tasks of the State. If a legal provision were given that would lead to it, it would be totally inefficient. Finally, they conclude that it is well known that in Germany and Afghanistan, different modules must be applied to prosecute before the courts the imprudence of those responsible for road safety; that it may be unfair to apply in one country the same resources that seem just in another and that it is clear that avoiding waste is an obligation of justice, so that effectiveness and justice can coincide in certain areas.

These examples can be applied to the Philippine legal regime on quasi-delict in relation to public services. While it is opined that Spain's regime

¹²¹ M. Rebollo, *supra* note 187.

¹²² C. Ott & H. Shafer, *Manual de analisis economico del Derecho civil* (V. Carstenn-Lichterfelde, trans.) 21 (1991).

of strict liability for damage arising in the discharge of public services is more aligned with the idea of respecting the human dignity of the Filipinos, policymakers must also consider whether adopting this system of legal regime is economically viable for the Philippines — a developing nation that has yet to make its ends meet to provide basic services like universal health-care to the Filipinos. As lofty as adopting the Spanish legal regime may sound, policymakers in the Philippines should also not forget about the other basic needs of the Filipinos. Thus, while the doctrine that the King can do no wrong finds no application in the Philippines, it is improper to simply copy the doctrine of strict liability in Spain.

XIV. CONCLUSION

Both the Spanish concept of extra-contractual liability and the Philippine concept of quasi-delicts are based on Roman Law. They evolved together, considering that the concept of quasi-delicts was transplanted in the Philippines upon the extension of the coverage of the *Codigo Civil*. The two concepts only started to grow separately when the Philippine started becoming both a civil law and common law jurisdiction in the early 20th Century.

With respect to immunity from suit, the Philippines currently has a general blanket immunity from suits by individuals against the government. This immunity from suit traces its history from the common law tradition of “the King can do no wrong”; a concept that the Philippines inherited from the United States of America, which in turn inherited it from England. While the Spanish Constitution grants immunity from suit on the person of its king, this immunity was not extended to the entire sovereign. In fact, for extra-contractual responsibility in the context of public services, the Public Administration is subjected to the strict liability test which allows recovery of damages even in the absence of negligence.

Because of the application of immunity from suit doctrine, victims of accidents involving the government are left to go after the government personnel who are responsible for the quasi-delict in their personal capacities — an ineffective remedy considering the possible non-liquidity of these personnel or the possible impossibility of knowing who exactly is the tortfeasor. Thus, the Philippine Supreme Court, in exceptional cases involving gross negligence, held the inapplicability of immunity from suit to serve the ends of justice.

This case-by-case solution, however, creates two legal infirmities. First, the Supreme Court is forced to judicially legislate — that is, to interpret the law differently than how it is expressly written. Second, the cases where the Supreme Court exercised its discretion on the subject matter involved *gross*

negligence, which is more stringent than the threshold for actions under Article 2176 of the Philippine Civil Code that only requires simple negligence.

Subjecting the two legal regimes to different legal philosophies, it is opined that the Spanish legal regime is more consistent with respecting the human dignity of the citizens. Nevertheless, on the basis of economic analysis of law, it is also not feasible for the Philippines to adopt strict liability with respect to all damages arising from the government's discharge of public services. What the author humbly suggests is a compromise — now that the amendment of the Philippine Constitution is being considered, it may serve the Filipino people well if the removal of the applicability of the doctrine of State immunity from suit with respect to quasi-delicts arising in relation to the State's discharge of its governmental functions is considered. This way, aggrieved individuals will still be able to find proper redress against the damage that they suffered and the Supreme Court will no longer be forced to create a separate legal regime that requires gross negligence.

BIBLIOGRAPHY

- R. DE ANGEL YAGUEZ, *Lecciones Sobre Responsabilidad Civil* (1978).
- R. BALANE, *Jottings and Jurisprudence in Civil Law (Obligations and Contracts)* 13, fn. 7 (2018).
- I M. BERNALDO DE QUIROS, *El Anteproyecto del Código Civil Español (1882-1888)* 726 (1965).
- J. BRAY, *A Plea for Roman Law*, 9 *Adelaide L. Rev.* 50, 53 (1983).
- D. BOGEN, *Ignoring History: The Liability of Ships' Masters, Innkeepers and Stable-keepers Under Roman Law*, 36 *Am. J. Leg. Hist.* 326, 329 (1992).
- E. BORCHARD, *Governmental Responsibility in Tort*, VI, 36 *Yale L.J.* 1, 3 (1926).
- W. BURDICK, *The Principles of Roman Law and Their Relation to Modern Law* 276 (2004).
- G. CAMPBELL, *A Compendium of Roman Law* 133 (1878).
- P. R. COLEMAN-NORTON (trans.), *The Twelve Tables*, available at https://www.ksassessments.org/sites/default/files/HGSS_Preview_Texts/Grade_6/The%20Twelve%20Tables%20of%20Roman%20Law.pdf (last accessed Apr. 23, 2019).
- J. DEWEY, *The Historic Background of Corporate Legal Personality*, 35 *Yale L.J.* 655, 665 (1926).
- J.R. EDWARDS, *Is There a 'Libertarian' Justification of the Welfare State? A Critique of James P. Sterba*, 4 *Libertarian Papers* 97 (2012).
- M. FAURE, et al., *Liability for Unknown Risks: A Law and Economics Perspective*, 7 *J. European Tort L.* 198 (2016).
- E. GARCIA, *Torts under the Spanish Law*, 2 *Phil. L.J.* 27, 41 (1915).
- F. GARCIA GOYENA, *Concordancias, Motivos y Comentarios del Código Civil Española* 968 (1974).
- T.R. HERAS BALLELL, *Introduction to Spanish Private Law: Facing the Social and Economic Challenges* 273 (2010 ed.).

- A.M. HONORÉ, 'Linguistic and Social Context of the Lex Aquilia' (1972) 7 *Irish Jurist* (New Series) 138, 147.
- D. IBBETSON, *How the Romans Did for Us: Ancient Roots of the Tort of Negligence*, 26 UNSW L.J. 475, 477 (2003).
- J.D. JIMENEZ, *State Immunity from Suit*, 35 *Ateneo L.J.* 27, 27 (1991).
- D. JACKSON, *Bentham and Payday Lenders*, in H. Stacy & W. Lee (eds.), *Economic Justice Philosophical and Legal Perspectives* 31 (2013).
- M. KOESSLER, *The Person in Imagination or Persona Ficta of the Corporation*, 9 *La. L. Rev.* 435, 437 (1949).
- J.P. LAUREL, *What Lessons May Be Derived by the Philippine Islands from the Legal History of Louisiana — Part Two*, 2 *Phil. L.J.* 63, 93 (1915).
- K. MATHIS, *Efficiency Instead of Justice? Searching for the Philosophical Foundations of the Economic Analysis of Law* (D. Shannon, trans.) 1 (2009 ed.).
- M. MONAHAN, *The Problem of "The Judge Who Makes the Case His Own": Notions of Judicial Immunity and Judicial Liability in Ancient Rome*, 49 *Catholic Univ. L. Rev.* 429, 441 (2000).
- D. NASMITH, *Outline of Roman History from Romulus to Justinian* 324 (2006).
- M. NICHOLS, *Las Siete Partidas*, 20 *Calif. L. Rev.* 260, 262 (1932).
- A. OGUS, *What Legal Scholars can Learn from Law and Economics*, 79 *Chicago-Kent L. Rev.* 383, 384 (2004).
- A. PARISE, *The Place of the Louisiana Civil Code in the Hispanic Civil Codifications: The Comments to the Spanish Civil Code Project of 1851*, 68 *Louisiana Law Review* 823 (2008).
- S. PASTOR, *Sistema Jurídico y Economía* 32 (1989).
- P. DU PLESSIS, *Borkowski's Textbook on Roman Law* 87 (2015 5th ed.).
- G. PUSH, *Historical Approach to the Doctrine of Sovereign Immunity*, 13 *Louisiana Law Review* 476, 477 (1953).
- T. SANDARS, *The Institutes of Justinian*, (1859).
- Z. SARKADY, *The Lex Aquilia and the Standards of Care*, in *Acta Universitatis Szege-diensis : acta juridica et politica : publicationes doctorandorum juridicorum* 205 (2003).
- F. C. SAVIGNY, *System des Heutigen Roemischen Rechts* 240, 241 (1840).
- P. STEIN, *Interpretation and Legal Reasoning in Roman Law*, 70 *Chicago-Kent L. Rev.* 1539, 1540 (1995).
- J.M. DE TORRES PEREA, *Alcance de la Personalidad Jurídica de la Sociedad Civil Externa* 13-14 (2003).
- J. TRÍAS MONGE, *Legal Methodology in Some Mixed Jurisdictions*, 78 *Tul. L. Rev.* 333, 335-36 (2003).
- P. VANEGAS ROA, *Los conflictos de la Responsabilidad Patrimonial de la Administración Pública por el funcionamiento del servicio público deportivo*, 8 *Revista de Paz y Conflictos* 267, 270 (1988).
- R. D. WATKINS, *The State as a Party Litigant* 1 (1927).
- B. WINIGER, *La Responsabilité Aquilienne Romaine: Damnum Iniuria Datum* (1997) 35.
- J C ZIETSMAN, *Medical Negligence in Ancient Legal Codes*, 52 *Akroterion* 87, 87 (2007).

R. ZIMMERMANN, *The Law of Obligations: Roman Foundations of the Civilian Tradition* 953 (1996).

F. DE ZULUETA, *The Institutes of Gaius. Part II: Commentary* (1967).

TRACING EVOLUTION OF THE PHILIPPINE
CONCEPT OF EXTRA-CONTRACTUAL
RESPONSIBILITY IN THE CONTEXT OF STATE
IMMUNITY FROM SUIT: IS A NEW APPROACH
NECESSARY?

*Seguimiento de la evolución del concepto filipino de
responsabilidad extracontractual en el contexto de la
inmunidad estatal contra la demanda: ¿es necesario un
nuevo enfoque?*

Dan Kevin Mandocdoc Castro
Assistant Professor
ADMU's School of Law (Philippines)

[http://dx.doi.org/10.18543/ed-68\(1\)-2020pp163-200](http://dx.doi.org/10.18543/ed-68(1)-2020pp163-200)

Copyright

Estudios de Deusto es una revista de acceso abierto, lo que significa que es de libre acceso en su integridad. Se permite su lectura, la búsqueda, descarga, distribución y reutilización legal en cualquier tipo de soporte sólo para fines no comerciales, sin la previa autorización del editor o el autor, siempre que la obra original sea debidamente citada y cualquier cambio en el original esté claramente indicado

Estudios de Deusto is an Open Access journal which means that it is free for full access, reading, search, download, distribution, and lawful reuse in any medium only for non-commercial purposes, without prior permission from the Publisher or the author; provided the original work is properly cited and any changes to the original are clearly indicated.