

## Chapter VII

### Conclusion

After conducting the study it is clear from the discussions made in the earlier chapters involving various cases it can be concluded that the common law rule of absolute immunity of the crown based on the maxim, "The king can do no wrong" has never been applied in India in toto. Even though the basic rights of the citizens of India are protected by the guaranteed rights under part III of the Constitution, the common law principle based on 'king can do no wrong' failed to give full protection of human rights. Right from the time of the East India Company, the state has been made liable for the torts of its servants but the courts have fixed liability for torts without any difficulty only to those acts committed by the servants of the state in exercise of non-sovereign powers. However in case of acts committed in exercise of sovereign powers, there is a conflict and great confusion. Here it is submitted that the courts have erringly confused sovereign powers with 'acts of state' which though done by the sovereign, is an act against another sovereign or alien outside the national territory and is not an act for which the question of compensation arises.

The liability of the state for the tortious actions of its servants and agents is governed by the provisions of the Constitution by Article 300. But it refers back to the Government of India Act 1935, 1915 and 1858. Government of India Act 1858 says that the liability of the state would be like that of the liability of the East India Company. So in order to understand the liability of the state in torts for the actions of its servants and agents, it is necessary to find out of the liability of the state prior to the Government of India Act 1858. During the reign of East India

Company in 1831, the Supreme Court of Calcutta, was bold enough to reject the plea of exemption from suit raised by the company on the ground of sovereign immunity in *Bank of Bengal v United Co*, But in *P & O Steam Navigation Company's case*, the court distinguished the functions as sovereign and non – sovereign, for determining the liability of the state. This discussion is made without any rationality but it still remain alive in the legal system of India as the basis for determining the liability of the state. In *Kasthurilal* the court supported the immunity of the state on the ground of sovereign function. Till now this principle has not been overruled. In order to determine whether an act is a sovereign function or not, the courts in India have often resorted to the test laid down by Chief Justice Peacock in *P & O Steam Navigation Co v Secretary of State for India case*. According to him sovereign powers mean 'powers which cannot be lawfully exercised except by sovereign or private individuals delegated by a sovereign to exercise them. However the judiciary has not laid down any clear or unambiguous test for determining what actually these sovereign powers are. In *Nabin Chander Dey v Secretary of state* and in *Secretary of state v Hari Banji*, the interpretation given in these case, the liability of the state can be determined on the basis of the function of the state as sovereign and non-sovereign. In the case of sovereign function, state would not be liable but in the case of non-sovereign function, state would be liable.

No legislative enactment is made to overrule this principle of state of affairs. In most of the cases the court could not fix the liability of the state on the ground of sovereign immunity because this principle of immunity is not abrogated. These imperfections continue in different cases, the courts repeatedly

expressed the fact that the remedy lies in the hands of the legislature and not in the hands of the judiciary.

Therefore the Law Commission of India recommended as early as 1956 for dispensing with the distinction between sovereign and non-sovereign powers. The Law Commission in its report recommended to modify the existing law and introduced the bill to amend the law to make the state liable like any other ordinary person. It rightly observed in its first report that there is no convincing reason as to why the government should not be placed itself in the same position like that of a private employer subject to same rights and duties imposed by the statute. The government introduced a bill entitled the Government (Liability in Tort) Bill was introduced in the Parliament in 1965 but it lapsed and it was reintroduced in 1967, again in 1969 by the joint selection committee of Parliament, but the Bill has not been enacted into law so far. The government allowed the Bills to lapse on the ground that they would bring an element of rigidity in the determination of the question of liability of the government in tort. So, the law relating to state liability in tort in India today deals with pre-constitutional laws in which it is stated that the liability of the state will be like that of the liability of the East India Company.

The Commission suggested the making of suitable law on this point. In England, the Crown Proceeding Act, 1947 made the Crown liable for the acts of its servants. This parity is maintained between the Crown and a private individual in respect of liability under torts. In the United States of America also the Federal Tort Claims Act, 1946 has been created to define the immunity of the state for

tortious acts. It is necessary to go through the similar laws existing in U.K, USA and in France.

Under a Republican Constitution particularly in a socialist state, the sovereign immunity should be confined to the bare essential functions of the state. In all other cases, the Government should be made liable for the wrongful acts of its servants. It is submitted that the legislation should come forward with a legislation clearly defining and demarcating the scope of the immunity and liability of the Government. The liability should be broad enough to cover all the illegal acts of the Government servants and the agents of the state committed in the course of their lawful employment. It is only by such a rule can justice be rendered to the helpless victims. The vague principle of 'sovereign immunity' has no place in modern society, where human and fundamental rights are given transcendental position, for instance right to equality, right to free and fair election are part of basic structure doctrine. Liberty and equality are the demands of the modern times. With these rights, there are remedies to redress their violation. The eroding principle of 'sovereign immunity' in the light of emergence of constitutional torts and compensation jurisprudence, held in a string of Supreme Court cases. Clearly show the modern social welfare approach of courts. After all, the principle of sovereign immunity not a feature of a independent, socialistic, welfare state. The Law Commission stated that 'in the context of a welfare state it is necessary to establish a just relation between the rights of the individual and the responsibilities of the state'.

But however, the need for legislation in the regard to vicarious liability cannot be ignored. The Supreme Court in the cases of Vidyawati, Kasturi Lal, N.

Nagendra Rao, Municipal Corporation of Delhi urged the legislature to come up with a law. Article 300(1) of Indian Constitution itself lays down that "The Government of India may sue or be sued by the name of the Union and the Government of a state may sue or be sued by the name of the state and may, subject to any provisions which may be made by Act of Parliament or of the Legislature of such state enacted by virtue of powers conferred by this Constitution". Thereby highlighting the scope of making legislation in this respect, In U.K. public authorities can be made liable for damages if it is found to have committed breach of human rights. Due to lack of legislation, the courts dealing with the cases of tortious claims against state and his officials are not following a uniform pattern while deciding those claims and this at times leads to undesirable consequences.

According to the present legal system, the aggrieved has to approach the civil court for getting the compensation where the principle of sovereign immunity is the rule. There is no rationale in distinguishing the function as sovereign and non-sovereign. There are no guidelines to distinguish sovereign function from non-sovereign function. Now judiciary is following the traditional method, to categorize the functions. The court also felt difficulty in deciding the case on the basis of old archaic principle. When the aggrieved approaches the court on the infringement of their guaranteed right, it is not fair on the part of judiciary to say that it is helpless to give remedy and it is still haunted by the old doctrine. The test of sovereign and non-sovereign function cannot be treated as an appropriate one to decide the liability of the government, since it lacks objectivity if a judge is biased in favour of the government he can hold the activity in question as a sovereign function and exclude liability if he wants to help

the aggrieved he can characterize the function as non-sovereign. In India there is no uniformity in judicial decision. There is no uniform test to decide whether a particular act is sovereign or non-sovereign. There is no any guideline to distinguish sovereign function from non-sovereign function. A close scrutiny of judicial decision discloses that the classification between sovereign and non-sovereign functions is not based on any clear principle. The court has to decide each case on its own facts. This problem to some extent can be rectified by enacting a comprehensive legislation governing the liability of the state for torts committed by its officials. The court repeatedly stated through the decisions that the remedy lies in the hands of legislature and that it would amount to denial of justice to the aggrieved. The law being the civilizing machinery of the people, it is necessary to make the law as a predictable working system.

In a modern welfare state, it performs several functions and so there may be chances to encroach on the rights of the citizen, when it tends with a case it is not fair to say that the state must be exempted from liability on the ground of sovereign immunity. Protection of human rights has got a wide recognition in the present day world of human revolution. The change in the administration of a state from Laissez Faire to welfare system, and inclusion of the declaration of rights in the Constitution of most of the countries after the second world war, increased the responsibility of the states in protecting the human rights of the people. But when it comes to enforcing these rights against the state for its violations the principle and procedure seems to be inadequate. The Writ Court in India recognize Constitutional torts under Article 32 and 226 of the Constitution. When the fundamental rights are violated by the state, the aggrieved can approach the writ court under Article 32 and 226 of the Constitution by filing writ

petition before the Supreme Court and High Court. Now the judiciary use Article 21 to promote compensatory jurisprudence to enforce rights guaranteed to the people and began to grant compensation in case of violation of human rights and it also clarified in a number of cases that sovereign immunity is not a defence in case of public law remedy.

It is observed that the decisions of the High Courts or the Supreme court acting under Article 226 or 32 respectively can award compensation in case of violation of fundamental right to life and personal liberty by the police in respect of those who are either under the police custody or in the process of arrest and detention, and that the doctrine of sovereign immunity in such cases does not apply for the state to avoid the liability of payment of compensation. Such a liability of the state is in addition to the rights of the victims to claim damages from the state under the civil law as in the case of Rudul Sah. Human Rights need to be respected, protected and in case of violation they are required to be compensated. To reduce violation of human rights, element of humanization must be present everywhere. The Legislature and judiciary in India have shown deep concern for promotion and protection of human rights. Considering the aforesaid judicial trend, it can be concluded that the superior courts in India, especially the Supreme Court, in appropriate cases have reduced the substantive sentence and granted the compensation to the victims. The Supreme Court has also made the state and its agencies liable for violation of human rights and required them to pay compensation to the victims of illegal detention, custodial death, rape, mass disasters. The courts are committed to protect human rights of victims by granting compensation and creating obligation on their part to consider issue of compensation at trial level only.

It can be concluded that the defence of sovereign immunity is now not available to the state whenever its employees commit tort against the citizens. Kasturilal is now overruled and the apex court has given a new dimension to the state liability principle from Rudul Sah case. A concept of paying the compensation has been evolved that whenever there is violation of fundamental right of life or liberty by any employee of the state, it is vicariously liable for such tortuous act. The remedy of getting damages can be availed both, through writ or through civil litigation. The administration of the criminal justice system should be in conformity with the rapid change in the society. Most of the countries came forward to change law according to the needs of the time. The conclusion from the present study throws light upon where change in the law and the implementation mechanism is needed. The higher courts in India started giving compensation in case of violation of human rights. But there is no rationality in fixing the compensation. Now the compensation is considered on the facts and the circumstances of each case and it is determined by taking into account the nature of the crime. It will be better if our Parliament enacts a law on this point and makes the state statutory liable, whenever there is any tort committed by its employees, whether in the exercise of sovereign or non-sovereign function.

The hypotheses thus stands proved that the notion of state liability has undergone a transition from being state centric to becoming individual centric. Various trends like the exemplary damages trend, human rights trend and checking the abuse of power by the officials can be noticed. In a welfare state, it is essential to establish a just relationship between the rights of individuals and the responsibilities of the state. No democratic system guaranteeing elected representatives to run the government can permit an executive as a sovereign.

The common law doctrine of absolute immunity of the crown was never applied in India in toto. The National Environment Tribunal Act, 1995 prescribes the 'no fault liability' or the strict liability of the state. The Law Commission has rightly observed in its First Report that there is no reason why the Government should not place itself in the same position as private employer, subject to the same rights and duties as imposed by the Statute. In fact, this is what the doctrine of Rule of Law commands and this doctrine is the part of basic feature of the Constitution. Thus, not only legally, the state becomes constitutionally liable to compensate for injuries generated by its officials. The above discussion also highlights the role of the courts as guardians of the fundamental as well as legal rights of the people. However, in the present changing conceptions of State Liability, a more vigorous approach is desirable to safeguard the civil liberties so that the employees of the state do not commit tortious actions in the grab of sovereignty. There are many cases of this genre which do not get determined, even after of considerable time. The rights of the citizens remain violated. The enforcement agencies therefore have to be strengthened besides the active interest taken by the courts in awarding effective remedies. It is only by such rule that justice can be rendered to the helpless victims against the monolithic institution of the state and its atrocities to keep pace with the growth of jurisprudence of this area, in India Constitutional tort needs for a novel outlook<sup>214</sup>.



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<sup>214</sup> Jacob P. Alex, "Constitutional Tort: Need for a Novel Outlook", AIR 2001 Journal 213.