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Volume 2	Issue 2	September 2013
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Contents

Articles	Page No.
Mahatma Gandhi National Rural Employment Guarantee Act: A Critical Evaluation <i>Dr. Shiv Kumar Dogra</i>	1
Delineating the Boundaries of Plea Bargaining in India <i>Dr. Sujit Kumar Biswas</i>	11
Conceptualising Internally Displaced Person's: An Analysis of Core Issues with Respect to India <i>Dr. Biswajit Chatterjee</i>	19
Child Sexploitation and the Law: An Analysis with Special Reference to the Protection of Children from Sexual Offences Act, 2012 <i>Dr. Arun Kumar Singh</i>	31
The Right to Information Act, 2005: Its Efficacy and Fallacy <i>Ms. Sanyukta Moitra</i>	44
Changing Dimension of Divorce under Hindu Law: Present Position <i>Dr. Om Prakash Singh, Dr. Triyugi Narain Mishra</i>	57
Child and the Law of Contract: An Introspection <i>Tanmay Sen</i>	67
Right to Property as an Aspect of Right to Life under Article 21 of the Indian Constitution: An Introspection <i>Ajay Pradhan</i>	74
Live-in-Relationship Legalised: A Critical Appraisal <i>Gitu Singh</i>	92
Vicarious Liability of the State under Law of Tort: Emerging Trends <i>Sharita Sharma</i>	107
Locating Agriculture on the WTO Framework: A Study of Corporatisation <i>Anirban Bhattacharjee</i>	124

Exploring Gender Jurisprudence: The Case for Gender Recognition Act <i>Debarati Pal</i>	148
Euthanasia: Religious Traits and Taboos <i>Souradeep Rakshit</i>	155
Right to “Livelihood” Vis-À-Vis Right to “Work” in Constitution of India: An Analysis <i>Anmol Pradhan</i>	164
Note & Comments	
Suresh Kumar Koushal and another v. Naz Foundation and Others, Air 2014 sc 563 <i>Priya Roy</i>	171

Vicarious Liability of the State under Law of Tort: Emerging Trends

Sharita Sharma¹

INTRODUCTION

The problem of State liability for wrongful acts of its employees has gained tremendous importance in recent years as the State has become a major litigant in the court of law. It is becoming increasingly necessary to redefine and reallocate the responsibilities of the State in view of the fact that in present days the thinking regarding the nature and activities of the State has undergone a radical change. With the tremendous increase in the functions of the State, the extent of State liability for the acts of its employees is becoming complex day by day. The State is liable for the actions of its employees in many areas of administrative functions. It is engaging itself in numerous activities, most of which have no relation to the so-called any sovereign functions of the State. In India, the common law governed the State liability in tort during British rule. And after independence the provisions in the Constitution of India govern the State liability. When the right of the citizen is violated not by the ordinary people but by the State through its officers and agencies. Under these circumstances, the questions that arise are: (1) Can the Government be held liable for the wrongs committed by its officers? (2) Under what circumstances compensation or the monetary damages are payable by the government to an individual?² (3) Should the State be allowed to claim sovereign immunity for the lawless acts of its officers and walk away without paying any compensation to the unfortunate victims who have suffered at the hands of the erring officers.

LIABILITY OF THE STATE IN TORT IN INDIA

To what extent the state would be liable for the torts committed by its servants is a complex problem, especially in developing countries with ever widening state activities. Therefore, in order to determine the extent of liability of the Government in tort in India, one has to find out the extent of liability of the East India Company. This is certainly a strange way of determining the liability

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1. Research Scholar, Department of Law, Uuniversity of North Bengal, Darjeeling, (West Bengal).
 2. Faizan Mustafa; Liability for Government Lawlessness, AIR 1997(journal) 38.

of a state governed by a constitution. It is because of this "strange way" with resultant confusion and complexity that the law commission recommended a legislation on the subject. The liability of the Government in tort is governed by the principles of public law inherited from British common law and the provisions of the Constitution.³

In India, the only provision which deals with the liability of the state is in *Article 300* of the Constitution.⁴ This Article does not specify or provide for the liability in clear terms and this refers back to the pre-constitutional laws like *Government of India Act 1935*, and it in turn refers to the section 32 of the *Government of India Act 1915*, and section 65 of the *Government of India Act 1858*. So the law relating to state liability 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 or it imposes the same liability on the centre and the states as that of the liability of the Dominion and the provinces before the commencement of the Constitution. So the old archaic principle of sovereign immunity could be invoked. Even after the commencement of the Constitution, in order to determine the state liability in torts today we have to refer back to the state liability of the East India Company followed during the period of 1858.⁵

Liability of the state, arising out of the wrong of its agents and servants is a type of vicarious liability, in which one person can be held liable for the recognized tort committed by another.⁶ In a welfare state, the function of the state is multifarious and it enters into several activities and so it is difficult to define its duties. State may not be fully aware about the nature of the act and the state may not benefit from the act committed by the agencies of the state. Procedure followed in the private law remedy is followed in the case of human rights violation committed by the agencies of the state. If the wrong is committed by the officers of the state the aggrieved can file a suit against the wrong doer for getting compensation from him.

3. I.P Massey, *Administrative law*, Eighth Edition, 2012 at 458.

4. Article 300 deals with Suits and proceeding-(1)The Government of India may sue or be sued by the Union of India and the Government of the state may sue or be sued by the name of the state and may, subject to any provisions which may be made by the Act of Parliament or of the legislature of such state enacted by virtue of powers conferred by this Constitution, sue or be sued in relation to their respective affairs in like cases as the Dominion of India and the corresponding provinces or the corresponding Indian states might have sued or been sued if this Constitution had not been enacted.(2)If at the commencement of this Constitution-(a)any legal proceedings are pending to which the Dominion of India is a party, the Union of India shall be deemed to be substituted for the Dominion in those proceedings; and (b)any legal proceedings are pending to which a Province or an Indian state is a party, the corresponding state shall be deemed to be substituted for the province or the Indian state in those proceedings.

5. I.P Massey, *Administrative law*, Eighth Edition, 2012 at 45.

6. Salmond and Heuston, *The law of Torts*,(1998) at 444

TORTIOUS LIABILITY OF THE STATE UNDER BRITISH RULE

With the advent of the British rule, the principles of common law came to be followed in India, the applicability of the prerogative of the king also came up. The Crown was not liable in tort even though there was social necessity for a remedy against the Crown as employer. So the Crown enjoyed certain privileges. As far as personal liability is concerned the Crown's immunity in tort never extended to its servants personally. The liability of the state in India relating to tort claims is governed by public law principles inherited from British common law and the provisions of the Constitution. However during the period when the governance of India was being carried on by East India Company doubts were raised as to how far it could claim immunities enjoyed by the Crown in England.

India was ruled by the British upto 1947 in which year we achieved independence. In England the concept of State liability for the acts of its employees and officials is influenced by the Doctrine of "king can do no wrong"⁷. The East India Company began its career in India as a commercial corporation but in course of time due to historical reasons it acquired sovereign powers and it is only after gaining such power a distinction is drawn between sovereign and non-sovereign functions which it exercised. In India, in addition to the defence of 'Act of State' there are other instances where the state enjoys privilege by distinguishing its functions as sovereign and non-sovereign though there is no rationality behind it. There is no demarcating line and guidelines for treating the public function as sovereign and non-sovereign and it is determined according to the discretion of the courts⁸. In India, the principle of *Respondent superior* is not applied in case of statutory functions done by the State.

STATE LIABILITY IN ENGLAND

In England, the liability of the Crown was determined by the two ancient fundamental rules, which existed in British Constitutional law. They were substantive law based on "King can do no wrong" and procedural law "King could not be sued in his own court". These two artificial theories of feudalism do not mean the king is above the law but he must be just and lawful. Under feudalism it was unthinkable to file a suit against the King. So that the King or Lord could not be sued, in their own courts, as they were at the apex of the feudal pyramid. There was no human agency to enforce law against the King.

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7. The Crown Proceeding Act, 1947 in England brought a veritable change in the traditional concept that the King is immune from any legal consequences with the enactment of Crown Proceeding Act, 1947 section 2(1) states that the crown is subject to all those liabilities in tort to which if it were a private person of full age and capacity.
 8. M.S.V Srinivas, *Compensation under Arts. 32 and 226 for Violation of Human Rights and Fundamental Freedoms*, AIR 1997 (Journal) 167.

The King was not liable to be sued civilly or criminally for the supposed wrong doing. The maxim *qui facit per alium facit per se* and *respondent superior* had no application in case of wrong committed by the Crown servants. The result was that, where as an ordinary master was liable vicariously for wrongful acts of his servant but the Crown was not liable for the tort committed by its servants⁹.

With the growth of government function the doctrine of sovereign immunity had become more primitive in the context of modern development and the position has been entirely changed after the passing of the *Crown Proceeding Act, 1947*. This Act supported in making the Crown liable, like that of private person of full age and capacity when the Crown servant committed a tort in the course of employment. So that the ordinary legal process instituted against the Crown, through ordinary courts and the remedies, such as an action for damages, injunctions and declarations become available. If the authority acted without power, there was no justification for it and it constitute torts or contract or any other wrongful acts and is actionable like a private person. The purpose of this Act was to put the Crown in the shoes of an ordinary defendant. The Crown would be liable as if the minister or servants were acting on the instructions from the Crown¹⁰. Therefore, in United Kingdom the government's privileged position as regards the law of torts has disappeared. The immunity of the Crown was based on the old feudalistic notions of justice namely the "King was incapable of doing a wrong", but it was realized even in the United Kingdom, that principle had become outmoded and that is the reason why the British Parliament passed the *Crown Proceeding Act, 1947*. The defence of 'Act of State' was available to the Crown servant and this could be used by the Crown also. This could be applied only in limited circumstances like the course of relation with another state or with the subjects of another state, and the claim arising out of treaty rights. The liability of the Crown with respect to the failure to comply with the imposed statutory duty was dealt

9. G.P Verma, *State Liability in India*(1993) at 259.

10. Section 2 of the *Crown Proceeding Act 1947*, provides that (1)subject to the provision of this act, the Crown shall be subject to all those liabilities in tort to which, if it were a private person of full age and capacity, it would be subject:-(a)to torts committed by its servants and agents; (b)to any breach of those duties which a person owes to his servants or agents at common law by reason of being their employer; and(c)in respect of any breach of the duties attaching at common law to the ownership, occupation, possession or control of property. Provided that no proceeding shall lie against the Crown by virtue of paragraph(a)of this subsection in respect of any act or omission of a servant or agent of the Crown unless the act or omission would apart from the provisions of this Act given rise to a cause of action in tort against that servant or agent or his estate.

with in Section 2(2) of the Act¹¹. According to this provision the Crown could, be held liable for breach of statutory duty. By means of Section 2(3) of the Crown Proceeding Act, the crown would be liable under common law, for breach of duty or breach of statutory duty¹². So common law action for damages would lie against the Crown if a wrong was committed by its agencies. So that Crown would be liable like that of an ordinary person, if any wrong was committed by its servants while exercising statue.

STATE LIABILITY IN UNITED STATE OF AMERICA

In American legal system, the Rule of Law was absence in the field of government liability, as the government could not be held vicariously liable. The sovereign was exempted from suit and sovereign could not be sued in tort either for wrong actually authorized by it or committed by its servant. With the growth of government function the doctrine of sovereign immunity had become more primitive in the context of modern development and the position has been entirely changed after the passing of the *Federal Tort Claims Act, 1946*. According to the Federal Tort Claims Act 1946 the United States is liable only for torts of any employee of the government, while acting within the scope of his office or employment. The basic provision of the Act towards sovereign responsibility is as follows-

The United States shall be liable respecting the provisions of this title relating to tort claims in the same manner and to the same extent as a private individual under like circumstances but shall not be liable for interest prior to judgment or for punitive damage. The state should not be liable for all damages caused to private persons by its actions and it should be immune from liability in genuine cases. The legislatures and the judges were of the opinion that the state should not be responsible for all activities and not to fully curtail the sovereign immunity of the state. The exception in the Act is mainly divided

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11. Section 2(2) of the Crown Proceeding Act 1947 which provides that 'when the Crown is bound by a statutory duty which is binding upon persons other than the Crown and its officers, then, subject to the provisions of this Act, the Crown shall, in respect of failure to comply with the duty, be subject to all those liabilities in tort to which it would be so subject if it were a private person of full age and capacity'.
 12. Section2(3) of the Crown Proceeding Act 1947 provides that 'where any functions are conferred or imposed upon an officer of the crown as such either by any rule of the common law or by statute and that officer commits a tort while performing of purporting to perform those functions, the liabilities of the crown in respect of the tort shall be such as they would have been if those functions had been conferred or imposed solely by virtue of instructions lawfully given by the crown.

into three categories¹³. Law made the state of U.S liable for tort in the same manner and to the same extent as private individual but it provided number of exceptions in which liability can be evaded. Most of the exceptions exempt the state from liability¹⁴

METHOD OF DETERMINING THE LIABILITY OF THE STATE

The present method of determining, liability of the state in tort is by distinguishing the function of the state as sovereign and non-sovereign.

1) Liability of the state on the ground of non-sovereign function:-

In the leading case of *Bank of Bengal v United Company*¹⁵, the Supreme Court (at Calcutta) rejected the plea of sovereign immunity in a matter involving the recovery of interest by the Bank of Bengal due on the promissory notes from the East India Company for the prosecution of war. In *P. and O. Steam Navigation Company v Secretary of State*¹⁶, the court clarified that state would be liable in case of non-sovereign function.

So there was no doubt regarding the liability of the state in case of non-sovereign function. The court accepted an action against the secretary of state for the negligent act of the government workers. In this case, sir Barnes Peacock C.J, held that the liability of East India Company for the negligent act of its officers would be same as that of

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13. The exception in the Act are mainly divided into three categories they are;
 - 1) Act or omission of officers while exercising their functions or abusing the power while exercising discretionary power.
 - 2) There is no liability for intentional torts, any claim arising out of assault, battery, false imprisonment, deceit or interference with contract rights.
 - 3) The U.S government is not liable for any claims arising out of foreign countries. But no claim is allowed under this Act for the loss miscarriage or postal matters, assessment or collection of tax or customs duty or detention of goods by custom officials, claims in the Admiralty Act 1920, act or omission in administering trade in Enemy Act, upon the imposition or establishment or quarantine by the United States, Upon the injury to a vessel or to the cargo, crew or passengers of a vessel while passing through Panama Canal or in Canal Zone Waters, Upon the fiscal operation of the treasury or regulation of monetary system, activities relating to military, naval or coast guard during war, act done in the foreign country, claim arising out of the activities of the Tennessee Valley Authority and activities of the Panama Rail Road Company, Claim arising out of the Federal land bank a Federal Credit Ban or a bank of cooperatives.
 14. I.P Massey, *Dialectics of Sovereign Immunity and Dynamics of Welfare Society : Need for an Independent Public Law of Tort*, 26 JILI 1984 at 149.
 15. (1831)1 Bignell's Reports 87.
 16. (1861)5 Bom. H.C.R. APP 1 This case arose under section 25 of the

an employer for acts of its employee. In this judgment two important legal terms were used namely "sovereign" and "non-sovereign". Peacock C, J clearly mentioned that if a tortuous act has been committed by the government servant in discharge of statutory function that was the delegation of sovereign powers and in that case government would not be held liable because that was the exercise of sovereign function, and non-sovereign function is if a tortuous act has been committed by government servant in discharge of the duties assigned to him not by virtue of the delegated of any sovereign powers, in that case government would be held liable because that is the exercise of non-sovereign functions. The other interpretation of this case was that immunity is available only in respect of matters involving "acts of state". The doctrines of "acts of state" and "sovereign immunity" are not synonymous. The former flows from the nature of power exercised by the state for which no action lies in civil court and the latter was developed on the theory of the divine right of kings. Under what circumstances the East India Company is not liable for the act of its officials.

Thus in *Hari Bhanji*¹⁷, case the court compared the sovereign act with "Act of State" and the suit filed against the state for the imposition of excess duty for the transit of salt was maintainable before the court. According to the decision in *Hari Banji* the immunity of the state should be limited to the "Act of State". The same view was confirmed also in *Salaman v Secretary of State-in-Council for India*¹⁸.

In the case of *Vidhyawati*¹⁹, the court took a bold step to promote justice to the widow for the death of her husband due to negligent act of the employee of the state. According to justice Sinha C, J, in a Democratic republican form of Constitutional government, it is not justifiable to allow the defence of sovereign immunity for the negligent acts of its employees. Therefore the state was held liable for causing injury by the car which was maintained for the collector's use.

In another case *Satyavati v Union of India*²⁰, the mishap was caused by an air force vehicle used for carrying the hockey team to IAF station to play a match. The driver of the military vehicle was dazed by the glare of the heat lights suddenly put by the motor cyclist coming from the opposite direction while he was on the way to park vehicle after the match was over. In an action by the plaintiff the Union of India contended that keeping army in a proper maintenance of the force is a

17. *Secretary of State for India-in-Council v Hari Bhanji* (1882) ILR 5 Mad. 273.

sovereign function and so exempted from the liability. The court observed that in this incident the act was not of sovereign character so the government was held liable for the mishap.

In the case of *Rup Ram*²¹, a motor cyclist was seriously injured, when a truck belonging to the public works department struck him. The driver was employed by the department. When the plaintiff brought an action for compensation against the state for the rash and negligent driving, it pleaded the defence of immunity but the court refused to allow this plea supporting the decision followed in *Hari Banji* limiting immunity of the state only for the "Acts of state". The state is not immune from liability merely because the act complained of may have been done, in the exercise of governmental power. The state is liable for tortuous acts of its servants in the circumstances that make the relation between the state and that of particular servant identical with the circumstances of private employment. The mere fact that the act may be or may not have been done in the course of government activity is not conclusive.

In the case of *Rooplal v Union of India*²², the jawan found some firewood lying by the riverside it being unmarked they honestly thought that they had every right to use it as camp fire and fuel. They carried away this in a military vehicle and used it as camp fire. When the plaintiff filed a suit against the Union of India, they raised the defence of immunity and the act was done outside the course of employment. As far as the first point was concerned the jawans used this as camp fire and fuel. So it was not a sovereign function and the second point was also rejected on the ground that for twenty four hours, the jawans were under the control and direction of the Union of India so they were supposed to be in the course of employment. So the Union of India was held liable for the act. Determination of a case relating to state liability on the basis of distinction of the sovereign and non-sovereign is restricted to the cases of harmful acts done by the employee of the state. In this case, the ordinary principle of vicarious liability of the master for the torts of its servants in the course of employment was applied. The court would have imposed the liability according to the responsibility for the damage committed by each person by making the jawans also liable for the act.

Likewise, In *Shyam Sunder v State of Rajasthan*²³, Navaneet Lal was an executive engineer, working in the office of the public works Department as a store keeper. In connection with the famine relief work

21. *Rup Ram v The Punjab State* AIR 1961 Punj 336.

22. AIR 1972 J&K 22.

23. AIR 1974 SC 890.

undertaken by the department be boarded the truck owned by the department. After having traveled for four miles, when the engine of the truck caught fire the driver of the truck cautioned the occupant to jump out of the truck. While doing so Navneet Lal struck against a stone lying by the side of the road and died instantly. The plaintiff's widow alleged that it was on account of the negligence of the driver of the truck and the truck which was not road worthy was put on the road and the state was liable for negligence of its employee under the Fatal Accident Act 1855. The trial court found the driver negligent and held the state liable but the High Court reversed the decision. The Supreme Court inferred that the cause of the accident was due to the negligence of the driver because the driver had the knowledge about the condition of the vehicle and if he had taken sufficient care, he would have avoided the accident. Circumstances of the case, proved that negligence of the driver was the only cause for the accident and there was no need to prove the case with evidence. The relief work could be done by any private persons so in this case the Supreme Court by allowing the appeal set aside the decree of High Court and resorted to the decree and the judgment passed by the District Judge. The court held that the famine relief work was not a sovereign function, in this case, the court considered the negligence of the employees and fixed liability on the state.

In the case of *Thangarajan*²⁴, the driver of the lorry, defence personnel while driving the lorry for taking carbon dioxide from the factory to the ship, the accident occurred. A small boy of 10 year old was knocked down, making him permanently incapacitated. This was due to the rash and negligent driving and there was no fault on the part of the child. The court held that the accident occurred while the lorry was being driven in the exercise of sovereign function so as to exclude the liability of Union of India. But the court felt it as injustice to deny compensation for the injury caused to the boy on the ground of sovereign function. So the court strongly recommended to the government to make an ex-gratia payment of Rs. 10,000/- to the boy as it would be cruel to tell the boy suffering from grievous injuries and permanently incapacitated that he was not entitled to any relief as the vehicle was being driven in the exercise of the sovereign function of the state. The court itself began to feel that it was not justifiable to decide a case on the ground of sovereign immunity, in cases if causing damage by the employee of the state.

From these cases, it was clear that the court faced the difficulty to decide whether the particular act of the state in question is sovereign

24. *Thangarajan v Union of India* AIR 1975 Mad.32.

or non-sovereign. There were no guidelines issued by the court or legislation for demarcating these two functions. Really there is no rationale in distinguishing it, because of this perplexity. In certain cases, the court adopted the traditional custom of treating the function as sovereign and non-sovereign as the sovereign function cannot be done by private persons but in the case of non-sovereign functions, which can be done by private persons, the state was held liable.

2) Exemption on the ground of Sovereign Immunity:-

After the decision of *Peninsular and Orientation Steam Navigation*²⁵ case the divergent views followed in cases like *Nabin Chander Dey*²⁶ and *Hari Banji*²⁷; to grant immunity to the state. In the former case, the court followed the distinction between sovereign and non-sovereign and in the latter the court limited the application of the immunity only to the "Act of State". Now let us go through the cases where the court exempted the state from liability.

According to the interpretation given in *Nabin Chander Dey v Secretary of State for India*²⁸, in this case court observed that, 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, state would be liable, that the auction of Ganja license was a method of raising revenue and it is a sovereign function which no private individual could undertake, hence no action is maintainable against the East India Company in this regard.

As explained earlier in *Nabin Chander Dey*, the distinction based on sovereign and non-sovereign principle was applied to determine the maintainability of the suit against the state, in the subsequent cases. This principle helped the court to interpret the functions of the state according to their will and pleasure. If they wanted, they could give privilege to the state making the act as sovereign. There was no a rationale criterion to determine a particular act as sovereign.

In the case of *Secretary of State v Cockcraft*²⁹, when the driver of the military vehicle suffered serious injuries, due to the negligence of the P.W.D employees, suit for compensation was dismissed on the ground of sovereign immunity. There is no logic in dismissing the suit on the ground of sovereign immunity. Here the injury was caused because of

25. *Supra* note 16.

26. (1876)ILR.1 Cal.11.

27. *Supra* note 17.

28. *Supra* note 26.

29. AIR 1915 Mad.993.

negligently storing the heap of gravel, on the sides of the road and after committing negligence, the state claimed privilege.

Likewise in *Union of India v Harbans Singh*³⁰ is an appeal filed by the Union of India, the defendant against the decree dated 24/07/1953 issued by the first class subordinate judge of Delhi. The plaintiffs brought an action to recover Rs. 50,000/- as damages, on account of the death of their father resulting from the defendant Union of India's employee for knocking him down and running over him when he was riding his cycle. The plaintiff alleged this was due to the rash and negligent driving of the defendant employee in driving the military vehicle in such a manner as to cause the accident that resulted in the death of their father. The defence of the Union of India was that it was not liable to damages for any acts of its servants done in pursuance to the exercise of sovereign powers. But the trial court decreed the suit against the defendant and granted a decree of Rs. 10,000/-

In the appeal before court in this case the court had taken the view that meals being taken by the truck belonging to the military department for being distributed to the military personnel were a sovereign function and that the state was not liable for the death of a person resulting from an accident caused by the truck. After committing a negligent act and thereby killing the plaintiff's father, there is no justification to say that state is exempted from liability because they were exercising sovereign function.

In the case of *K.Krishnamurthy*³¹ a boy of five years was going by the side of the road and a road-roller belonging to the P.W.D was coming at a high speed after the work, for being placed at the place of its halt. When the road roller came nearer, the boy got up and then the edge of the truck struck him. He fell down and his right palm was crushed under the front wheel so that his hand was amputated upto wrist. The accident occurred because of the rash and negligent act of the driver. As contended by the driver the accident was not inevitable. But the court expressed its difficulty of giving favorable decision by taking into consideration the condition of the boy. In appeal it was proved beyond doubt that the accident occurred because of the negligent of the driver causing permanent injury to the boy. He was not crossing the road and he was well on the side of the road. It was concluded that the road roller was being used for the maintenance of highways. Making and maintenance of highways is a public purpose, the duty of the government and not a commercial undertaking. Now this function is largely delegated by statute and municipality. Justice

30. AIR 1959 Punj.39.

31. *K.Krishnamurthy v State of A.P* AIR 1961 AP 283.

Kamarayya of the Andhra Pradesh High Court observed that the road roller used for the maintenance of highways was for the public purpose, the government was not undertaking any commercial activity so no liability was imposed. The court expressed its helplessness in compensating this small boy. According to the present law, the court could not give any remedy because of the sovereign immunity even if the boy suffered due to the negligent act of its employee.

Article 300 of the Constitution is intended to meet the needs of the welfare state but this is equal to the Government of India Act, 1858. This shows the reluctance of the court and legislature in taking actions against the state. Here the court expressed its shock over the suffering of the boy and sympathy of taking such a decision of not providing remedy to him due to uncertainty in law. In case of urgent need, the judiciary must be bold enough to create the law so as to give justice to the parties.

In the case of *Kasturilal*³², the state was immuned from liability for the tortuous act done by its policemen who caught the plaintiff under suspicion during night and put him in lock-up. The gold and silver seized from him was kept in Malkhana. Later the plaintiff was proved innocent and he demanded his property back. But the gold was missing, perhaps taken away by the policeman in charge of Malkhana. Unfortunately the state succeeded in getting sovereign immunity as the apex court came to the conclusion that the tortuous act was done in the exercise of a sovereign function. Justice P.B Gajendragadkar C, J felt helpless and called on the government of India to enact a law in this field. The state liability bill was introduced in the Parliament in 1967, but it remained as a bill and could never be passed. Thus a chance of codifying the law of torts with regard to state acts was lost. In all the above cases the wrong or damage was caused by the employee of the state, while exercising the statutory function and the privilege was granted on that basis. But there is no justification in granting immunity to the state in case of negligence of its employees even if it was done under a statute.

In *State of MP v Chironji Lal*³³, the plaintiff claimed Rs. 600/- as damages caused by police to loud speaker amplifier, mike and other accessories which when a student's procession was being taken out and the loud speaker fitted in the Rickshaw was damaged due to the lathi charge. There was no dispute to the point that there was lathi charge and the loudspeaker was damaged because of it. The state contended that the state cannot be made liable for the damage. Quelling

32. AIR 1965 SC 1039.

33. *Kasturilal Raliaram v State of U.P* AIR 1981 MP 65.

of riot is considered as sovereign function and the state government is immune from liability. Here the court made a reference to P & O and concluded that 'where an act was done in the course of the exercise of powers which could not be lawfully exercised save by the sovereign power, no action in tort lay against the secretary of state for India in Council upto the principle of respondent superior'.

A CONSTITUTIONAL PRINCIPLE OF TORTIOUS LIABILITY

The liability of the State in India and its jurisprudential basis for the award of compensation seems to be two fold under the Constitution. Firstly, the state has a legal duty to protect the guaranteed rights, and it must compensate the victim if it acts contrary to it. Secondly, the writ powers are available to the superior courts to ensure that the state does protect these rights and these powers are not to be used in a hyper technical fashion. In order to be effectively redressed for the breach of duty by the state, the victim must be compensated by the state³⁴. It is, however, strange that the state itself has not bothered to enact a law for determining the citizens claims against it.³⁵

According to Dr Justice Anand (formerly Chief Justice of India), the Constitution is the fundamental law of the land and if the action of the state is found to be unconstitutional, the courts are empowered to eliminate those acts. The courts are the guardian of those rights and have to uphold the Constitution. So the accountability of the judges are not only towards their conscience but also to the people upon whom the sovereignty vests.³⁶

If the state were to exceed the limit so fixed and encroach upon the interest protected by fundamental rights, there is a violation of a Constitutional duty by the state. When an interest so protected by fundamental rights is thus violated, the Constitution provides for a redresses of grievance involved by approaching the High Court and Supreme Court by invoking the Writ Jurisdiction. The courts in India started giving some compensation in addition to declaring the action of the state invalid by relying on the flexible phraseology

34. Vikram Raghavan, *The Compensating Victims of Constitutional Torts*, AIR 1998 (journal) at 104.

35. Surendra Yadav, *State Liability : A New Dimension from Rudul Sah*, 43 JILI 2001 at 559.

36. Dr. Justice Anand "Protection of Human Right's – Judicial Obligation or Judicial Activism"(1997)7SCC(J)10 at 24.

used in the Constitution³⁷. From this it can be concluded that the courts are not only to protect and guard the basic rights of the people but also to declare the acts as invalid and compensate the victim for the violation of guaranteed rights.

THE HUMAN RIGHTS PERSPECTIVE

Article 21 of the Constitution stated that no person shall be deprived of his life and personal liberty except according to the procedure established by law. Traditionally, the court had only limited jurisdiction to interfere in cases of arrest and illegal detention as those function were treated as sovereign functions. The High Courts and the Supreme Court under Article 226 and 32 had only limited jurisdiction of issuing immediate relief to the victims. While interpreting the Constitution the court had followed initially a very narrow interpretation. The Indian judiciary took several steps to include the human rights norms into the scheme of the Indian Constitution through Article 21. This Article provides that 'no person shall be deprived of his life or personal liberty except according to the procedure established by law'. Since the Constitution came into force this has been interpreted in different ways.

The defence of sovereign immunity was not taken up by the state when compensation claims were founded upon violation of the fundamental right to life and personal liberty under Article 21 of the Constitution³⁸. The question was considered by the court, for the first time, involving an in human act by the police. In the case of *Khatari v State of Bihar*³⁹, popularly known as Bhagalpur Blinding cases. The question which arose was whether the state was liable to pay compensation to the blinded prisoners for violation of their fundamental right under article 21 particularly when they were blinded by members of the police force acting not in their private capacity but as police officials, who were government servants acting on behalf of government and so the court directed the state of Bihar to provide them the best treatment at state cost. It is submitted that the court should have awarded compensation to the victims.

37. Article 32 and 226 of the Constitution:

Article 32(2) The Supreme Court shall have power to issue direction or orders or writs including writs in the nature of habeas corpus, mandamus, prohibit, quo warran to and certiorari whichever may be appropriate, for the enforcement of any of the rights conferred by this part.

Article 226(1) Notwithstanding anything in Article 32 every High Court shall have power throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority including in appropriate case any Government within those territories directions, orders or writs including writs in the nature of habeas corpus, mandamus, prohibition, quo warran to and certiorari or any of them, for the enforcement of any of the rights conferred by part 111 and for any other purpose.

38. Bishnu Prasad Dwivedi, *From sah to saheli: A new dimension to Government liability*, 36 JILI 1994, at 101.

39. AIR 1981 SC 928(1st case) AIR 1981 SC 1068(2nd case), popularly known as Bhagalpur Blinding cases.

The Supreme Court has evolved a new remedy of compensating the victims in the case of *Rudul Sah v State of Bihar*⁴⁰, the petitioner had already completed his sentence and the prison officials did not take care to release him, he was kept in illegal incarceration for many years, the petitioner claimed monetary compensation for his illegal incarceration. In which the Supreme Court awarded compensation to the poor victim of tortuous acts done by government employees during sovereign function.

After the decision in *Radul Sah*⁴¹ case in series of cases the courts began to award compensation for the violation of Constitutional right guaranteed under Article 21 of the Constitution. In the case of *Sabastin M. Hongray*⁴², two Christian priests were called for interrogation in an army camp. Therefore, they could not be found and on the basis of letters of their wives, the court issued the writ of habeas corpus to produce them before it. As they could not be produced their death was presumed to be caused by army officials and for which each of the wives was awarded compensation under Article 32 in a PIL petition. Again here we see that the union government was asked to pay compensation for an act done by its employees in the exercise of sovereign function.

In the case of *Bhim Singh*⁴³, the Supreme Court felt shocked when it learnt that a member of the Legislative Assembly of Jammu and Kashmir was wrongfully arrested with the sole object of stopping him to attend the session. The court treated it as a gross violation of fundamental rights under articles 21 and 22 and following the previous two cases, awarding compensation to the detained MLA. This giving lesson to the state so that their employees do not commit tortious acts in the grab of sovereignty.

The conflict between the concept of sovereign immunity and personal liberty was considered by the Andhra Pradesh High Court in *Chilla Ramkonda Reddy v State of Andhra Pradesh*⁴⁴, the prisoner who had informed the prison officers about the risk to his life and the threats received by him. In spite of that the prison administration didn't bother to take steps to increase his security. It was found that even on the day when some outsiders attacked on the jail and this prisoner. The compensation was claimed for the death of an under trial prisoner in jail. The court held that personal liberty should be given supremacy over sovereign immunity and defence of sovereign immunity is not applicable. The High Court directing the state to pay compensation, instead of paying compensation its officers decided to make an appeal to the Supreme Court.

40. AIR 1983 SC 1086.

41. *Supra* note 40.

42. *Sabastin M. Hongray v Union of India* AIR 1984 SC 571.

43. *Bhim Singh v State of J & K* AIR 1986 SC 494.

44. AIR 1989 AP 235.

In the case of *Chilla Ramkrishna Reddy*⁴⁵, here the Supreme Court held that the fundamental rights include basic human rights. Right to life is one such right available to a prisoner, whether he be a convict or under trial or a detainee. Such rights cannot be defeated by pleading the old and archaic defence of sovereign immunity which has been rejected several times by the Supreme Court. Justice, S. Saghir Ahmad who delivered the judgment of Supreme court held, so far as fundamental right and human right or human dignity are concerned, the law has marched ahead like a Pegasus but the government attitude continues to be conservative and it tries to defend its action or the tortuous action of its officers by raising the plea of immunity for sovereign acts or acts of state, which must fail.

Another case is that of *Saheli, a women's Resources Centre v Commissioner of Police, Delhi*⁴⁶, where the illegal acts of Delhi policemen were brought to the notice of the court by a women organization. A lady tenant was harassed by a landlord in conspiracy with the police so that she vacates his house. She was attacked and molested with the help of police officials. She was implicated in false cases and called to police station where her nine years old son was slapped and beaten for intervening in between them. After a few days this boy died for which damages were claimed to compensate the poor lady by a Delhi women organization in public interest. The court rejected the defence of sovereign immunity and directed the state to pay compensation and clearly stated that the state is liable for all tortuous acts of its employees, whether done in the exercise of sovereign or non-sovereign function.

In the case of *Nilabati Behera*⁴⁷ where the deceased was caught by police and kept in police custody for a day and next day his dead body was found on the railway track with multiple injuries, since the state cannot prove its innocence, the death was presumed to be caused by the state employees. The defence of sovereign immunity was not allowed and a compensation was awarded.

In the case of *N.Nagendra Rao*⁴⁸ the appellant was carrying on business in fertilizers and food grains under the license issued by the appropriate authority. His premises were inspected and goods were seized under Essential Commodities Act. On 29.6.1976, the proceedings terminated in his favour and confiscation order was quashed. The collector directed the release of the stock, but the subordinates delayed it due to which the goods were spoiled both in quality and quantity. The appellant then asked for the value by way of compensation. His demand was rejected. Therefore, he filed suit and the state claimed sovereign immunity. The trial court did not allow this defence and

45. *State of AP v Chilla Ramkrishna Reddy* AIR 2000 SC 2083.

46. AIR 1990 SC 513.

47. *Nilabati Behera v State of Orissa* AIR 1993 SC 1960.

48. *N.Nagendra Rao & Co. v State of Andhra Pradesh* AIR 1994 SC 2663.

decreed the suit. The state appealed to the high court, which set aside the decree relying on *Kasturilal* and the appellant came in appeal to the Supreme Court. The Supreme Court held that when a citizen suffers any damage due to the negligence of the employees of the state, the state is liable to pay damages and the defence of sovereign immunity will not absolve it from this liability. The court rightly observed that the traditional concept of sovereignty has undergone a drastic change in the modern times and the distinction between sovereign and non-sovereign functions no longer exists. No legal system can place the state above law, as it is unjust and unfair for a citizen to be deprived of his property illegally by negligent acts of state's officers without remedy.

CONCLUSION

On the basis of the above study involving various cases, it can be concluded that it is not fair to say that the state must be exempted from liability on the ground of sovereign immunity. There is no rationality, no demarcation of guidelines stated by the judiciary or legislature to distinguish the function of the state as sovereign and non-sovereign. 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. The 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. The test of sovereign and non-sovereign function cannot be treated as an appropriate one to decide the liability of the government. There were several criticisms regarding the law relating to state liability in torts. Law commission asked why the government should not be placed in the same position as a private employer subject to the same rights and duties imposed by the state. The commission recommended several times to modify the existing law and introduce the Bill to amend the law in this regard to make the state liable like that of an ordinary person. Even after sixty six years of independence no sincere effort has been made to modify the law relating liability of the state in torts. Now there is no satisfactory provision to fix the liability of state in India.

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