TORTIOUS LIABILITY OF GOVERNMENT IN INDIA: EVOLUTION OF JUDICIAL DOCTRINE AND EMERGING TREND

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DECLARATION

I declare that the thesis entitled Tortious Liablility of Government in India: Evolution of Judicial Doctyrine and Emerging Trend has been prepared by me under the guidance of Prof. (Dr.) Gangatory Chakroborty, Professor of Department of Law, University of North Bengal. No part of this thesis has formed the basis for the award of any degree or fellowship previously.

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7

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ABSTRACT

It is observed that in recent years the state has become a major litigant in the court of law on the one hand government attitude continues to be conservative and it tries to defend it action or the tortious action of its officers by raising the plea of immunity for sovereign acts or acts of State on the other had till today a comprehensive enactment delineating the liability of state in case of its tortious act has not been promulgated. Tortious liability of the state is assessed through judicial Interpretation and activism alone. The important of my study in this area is given to see whether human right of the citizen are protected properly with the present legal system by providing remedy to the victim and by imposing punishment to the wrongdoer and on the other hand my study is to know whether our present law is adequate to fixing the liability of the state in case of human rights violation by the agencies.

In India we do not have any separate act to deal with liability of state in tort. In England Crown Proceeding Act, 1947 deals with the liability of Crown regarding tort committed by its servant. Liability of Crown is just like the private person. Similarly in Australia Federal Tort Claims Act, 1946 deals with the liability of the State for the wrong committed by its servant. However, Article 300 of the Indian Constitution state that Government of India and of state can be sued for their Tortious act. As this Article does not enlist the circumstances under which we can sue the state for the Tortious act of its servants. We should analyze the pre-constitutional decision in this regard. Article 300 of the Constitution does not provide for the liability in

Gangotri Chakraborty

clear terms and this Article refers back to the pre-Constitutional laws like Government of India Act 1935. The Act of 1935 refers to the Act of 1915 which in turn refers back to the Government of India Act 1858. Thus one must reach the time of East India Company in order to determine the extent of liability of Government in India today. This is certainly a strange way of determining the liability of a state governed by the constitution. It is because of this strange way with resultant confusion and complexity that the law commission recommended legislation on the subject. Accepting the recommendation the Government introduce two Bills on the "The Government Liability in Tort" was first introduce in parliament in 1965, but it could not be enacted into law.

There were several criticisms regarding the law relating to state liability in Torts. The 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. Late Dr. Rajendra Prashad, President of India took initiative for considering the law Ministry of India to amend the law similar to English Crown Proceeding Act 1947. This matter was referred by the law commission and went through similar laws existing in different countries and submitted the first Law Commission Report in the parliament on August 31st, 1965 but this lapsed due to the dissolution of third Lok Sabha. This was reintroduced in the year 1967 (The Government Liability In Tort Bill 1967) but the government allowed the bill to lapse on the ground that if it was enacted it would bring rigidity in determining state liability in Torts. It was stated that the Bill will do away with Judicial discretion to determine the sovereign and non sovereign. The court failed to produce any Jurisprudence as to the liability of the state. The better course the court would have adopted by overruling the unfortunate law which is the creation of the Judiciary so that that the remedy can be obtained from the lowest court as envisaged in the common law system, so that the error in

the judgment can be cured . A Bill was again presented in the Lok Sabha on March 25th 1969 to make uniformity of law in India in this aspect making the government liable like that of an ordinary person of full age and capacity. This bill exempted the state from liability if any acts were done in good faith. By providing exemption actually it was protecting the rights of the state then protecting the rights of the citizen. Even after sixty six year of Independence no sincere efforts has been made to modify the law relating liability of state in Torts. Modern views butter the concepts that state is the guardian of the citizen. So the dominant theme of twentieth century private law has been the replacement of tort liability by the principle of compensation. The controversy whether the state should be made liable for the wrong of its servants is in fact is the liability of the state itself and the ground on which the state claimed immunity was the doctrine that as the makers of the law must be beyond the reach of tentacles. Now there is no satisfactory provision to fix the liability of the state in India. The distinction between sovereign and non sovereign brings an unending confusion. The law being the civilizing machinery of the people, it is necessary to make the law as a predictable working system.

The law of torts had originated from common law and this branch of law continues to be uncodified. As a law of torts is basically a Judge made law and are required to study it in the light of judicial pronouncements. The law of torts forms an important division the English Jurisprudence. From the English soil it has travelled outside the countries like USA, Australia, Canada, Newzerland etc and entranced itself as the significant branch of their Jurisprudence. Generally our Courts follow the principle of English law as there is no specific enactment on the law of Torts. However it is not obligatory on the part of Indian court to follow the English law. Except it court in India are guided by the principle of justice, equity and good conscience. Tort means the violation of legal duty which the wrongdoer owned towards the victim. Thus the presence of legal right and failure to obey the legal duty to protect that right constitute Tort.

After the commencement of the constitution, a considerable change was made by the Judiciary by narrowly interpreting the sovereign Immunity to protect the right of the citizen of a democratic country as decided in Vidyawathi's Case. In an action against the negligent or arbitrary acts of the employee of the state under the statutory function like Injury due to rash and negligent driving, seizing the goods illegally and arbitrarily by the employee and refusing to return the goods even after the conclusion of trail was over. While deciding cases by the Court, it was clear that the court faced the difficulty to decide whether the particular act of the state in question is sovereign or non sovereign. There were no guidelines issued by the court or legislature for demarcating these two functions as sovereign or non sovereign. Really there is no rationale in distinguishing it, in certain cases the Court adopted the traditional method of treating the function as sovereign and non sovereign, as the sovereign function cannot be done by private person but in the case of non sovereign function which can be done by private persons, the state was held liable. While determining liability for the non sovereign functions the court in certain cases applied the theory of benefit and ratification to restrict the liability of the state for non sovereign function also.

Gangothri Chakraborty

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Sincerely,

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ABBREVIATIONS

A.I.R.	**All India Reporter**
All.	**Allahabad**
A.P.	**Andhra Pradesh**
Ass.	**Assam**
Bom.	**Bombay**
Cal.	**Calcutta**
C. J.	**Chief Justice**
Cr. L. J.	**Criminal Law Journal**
CULR.	**Cochin University Law Review**
Del.	**Delhi**
Guj.	**Gujarat**
H.P.	**Himachal Pradesh**
IBR.	**Indian Bar Review**
J.	**Justice**
JILI.	**Journal of Indian Law Institute**
JBCI.	**Journal of Bar Council of India**

J & K	**Jammu & Kashmir**
Ker.	**Kerala**
M.P.	**Madhya Pradesh**
Mad.	**Madras**
Mys.	**Mysore**
Ori.	**Orissa**
Pat.	**Patna**
Punj.	**Punjab**
Raj.	**Rajasthan**
S.C.	**Supreme Court**
S.C.C.	**Supreme Court Case**
U.K.	**United Kingdom**
U.S.A.	**United States of America**
V.	**Versus**

CONTENTS **Page No**

Chapter I

Theoretical and Conceptual Framework

Justice has been regarded as one of the greatest concerns of mankind on this planet. Edmund Burke said, that justice is itself the "great standing policy of civil society". Scholars of political science and legal theory tell us, that the administration of justice is one of the primary objects for which society was formed. Our Constitution, in its very preamble, speaks of justice as one of the great values which its makers have cherished. In any modern society, interactions between the State and the citizens are large in their number, frequent in their periodicity and important from the point of view of their effect on the lives and fortunes of citizens. Such interactions often raise legal problems, whose solution requires an application of various provisions and doctrines. A large number of the problems so arising fall within the area of the law of torts. It thus encompasses all wrongs for which a legal remedy is considered appropriate. It is the vast reservoir from which jurisprudence can still draw its nourishing streams. Given this importance of tort law, and given the vast role that the State performs in modern times, the legal principles relating to an important area of tort law, namely, liability of the State in tort, would be easily ascertainable[1].

The word tort is of French origin and has been derived from the Latin word 'tortum' which means 'to twist' and implies conduct which is tortious

[1] Sunando Mukherjee, "Legal development in liability of State in torts in India" AIR 2004, Journal 254.

Gangotri Chakraborty

or twisted[1]. Tort means the violation of legal right vested in other person or in other words it is a breach of a legal duty which the wrongdoer owed towards the victim. The law imposes a duty to respect the legal rights vested in the members of the society and the person making a breach of that duty is said to have done the wrongful act. One may commit wrongful act by breach of a duty, and that duty may be one enforceable by rule of law. Thus the presence of legal right and failure to obey the legal duty to protect that right constitute tort. In the case of breach of legal duty, generally there would be a legal remedy. The legal duties are classified into those, which are enforceable by criminal law, and those which are enforced by civil law. In the former case, the punishment of the wrongdoer is the aim of the law and in the latter case, compensation of the damage brought about by the wrong. Tort is the branch of law which is concerned with the protection of variety of interests arising in society. This branch of law consists of various 'torts' or wrongful acts whereby the wrongdoer violates some legal right vested in another person. The cardinal task and the primary object of this branch of law is therefore protection of interests by the redistribution of losses among the parties i-e by requiring the person who invades such interest to make pecuniary compensation to the person wronged[2]. The law of torts is primarily concerned with redressal of wrongful civil actions by awarding compensation. In a society where men live together, conflict of interests are bound to occur and they may from time to time cause damage to one or the

[1] S.P. Singh, "Law of Tort" Singhal publication, 1986, p. 1.
[2] S.Kuba, "Law of Torts, cases and materials", Allahabad Law Agency, 1976, p. 6.

other. In addition, with the rapid industrialization, tortious liability has come to be used against manufacturers and industrial units.

The common law of England originated through common customs of the people as interpreted, modified and unified by the Courts resulted in the collection of legal principles known as common law. The English common law of torts is a branch of the English common law based on the case law or precedents of the common law Courts and is distinguished from the statutory law. The torts committed by individuals against another were recognized in common law and the maxim *'Ubi Jus Ibi Remedium'* propelled the growth of the law or torts.

The law of torts had originated from common law and this branch of law continues to be uncodified. As the law of torts is basically a judge made law and are required to study it in the light of judicial pronouncements. Tortious liability has been codified only to a very limited extent such as workmen's compensation, motor vehicle accidents, environmental degradation, consumer protection and the like. The Law of Torts forms an important division of the English Jurisprudence. From the English soil it has travelled outside to countries like U.S.A, Australia, Canada, Newzealand etc, and entrenched itself as a significant branch of their jurisprudence. It is evident that this branch of law, by making use of the Court's power to award damages as an effective instrument for the redress of wrongs and prevention of unsocial conduct has endeared itself most to the social conscience in several countries of the world today. Consequently, the law of torts aiming as it does, at

the definition of individual's rights and duties in consonance with the standards of reasonable conduct, public good and convenience has become a subject of profound interest. Generally, our court in India follow the principle of English law, as there is no specific enactment on the law of torts. This branch of law is premature and that there is surprisingly little tort litigation in Indian Courts. Consequently, we could neither profit by experience as to the suitability or otherwise of this method of ordering social conduct nor evolve principles appropriate to Indian circumstances and conditions. Today, however, we cannot afford to neglect this branch and its bearing on the integrity and orderliness of our social and national life[3].

The question of government liability in torts has assumed great importance today. Under the Roman law, the State was not liable in torts towards its subjects because it was a sovereign. It was regarded as an attribute of sovereignty that a State could not sued in its own courts without its consent. Similarly, in England, the crown enjoyed immunity from tortious liability and the maxim *"king can do no wrong"* prevailed. Neither a wrong could be imputed to the king or the government nor could it authorize any wrong. In the post-constitutional era, the advent of welfare state philosophy led to the all pervading State intervention, reducing the distinction between public and private functions. The welfare measures and directives multiplies and the potentiality to individual injury increased. The State was for all intents and purposes a corporation aggregate thus making it a juristic person acting through its officials and agents suable under law. The courts created a new public law remedy which made the State liable for wrongs inflicted in the course of exercise of non-sovereign functions. The

[3] Din Dayal Sharma, "The lack of tort law in India", AIR 1966 Journal 75,76.

immunity was restricted to the traditional functions of the State like legislation, administration of justice, war, making of treaties and crime prevention.

The very concept of welfare state envisages that State takes care of the citizens and establishes a just relation between the rights of the individual and the responsibilities have increased, the increase in State activities has led to greater impact on the citizens. Article 12 of the Indian Constitution defines 'State'. According to this article State means the Union, the State government and the local Authorities. Thus the State is both the provider and protector. The vicarious liability of State for the acts of its employees, misuse of power by them, breach of duty by the agencies of the State or their negligence assumes significance particularly in the context of expanding scope of fundamental and legal rights. The situation requires an adequate mechanism for determination of State liability and awarding compensation to the victim in the instances of wrongs committed against them. The liberalization of the law in England through the Crown Proceeding Act, 1947 and in U.S.A concretization of liability by the Federal Tort Claims Act, 1946 could not be ignored in this regard[4].

According to Austin's theory of law, law is the command of the sovereign, who can inflict a sanction for disobedience[5]. The sovereign is unrestricted and illimitable. On Austin's theory, constitutional law, which defines the State and its activities is only positive morality as there is no sovereign above the sovereign to enforce the sovereign, to command under threat of inflection of evil. The duty of such sovereign can only be a moral duty. Here we meet one of the key problems

[4] It is however submitted that the liability of state in U.S.A is more restricted than that of United Kingdom.
[5] Austin, John: The province of jurisprudence determined, w (Rumble edi), Cambridge University Press, 1995 p.115.

of State liability. It means that State would be liable only if it willingly accepts liability.

The natural law theory had powerful influence on the development of political and legal theory. There are principles governing human life and activities which have got same validity as scientific law governing the universe. The principles of such a law of nature are discoverable by reason. Such a law of nature has a higher validity and is binding on the State. Such a theory which had its origin in the Greek philosophy was put to practical use by Rome in its *jus gentium*. The origin of State was explained in various theories of social contract during the seventeenth and eighteenth centuries. Even after the development of natural ideals, the problem of the liability of the State still remains that the sovereign State is bound by the law that it makes. So the liability of the State towards the citizens, remain as moral obligation. There is no absolute limitation against the State, which prevents it from changing the law. What is laid down even in the Constitution can be changed according to the principle of amendment[6].

According to Sir John Salmond 'Tort is a civil wrong for which the remedy is a common law action for unliquidated damages and which is not exclusively the breach of a contract or the breach of a trust or other merely equitable obligation'. while discussing General Principles of Liability said that there was no English Law of Tort, there was merely an English Law of torts. He posed the question – Does the law of torts consist of a general principle that it is wrongful to cause harm to other persons in the absence of specific ground or some justification or excuse or

[6] The basic structure theory unamendablity of those principles according to the procedure of amendment provision prescribed in the constitution propounded by the Indian Supreme Court in Kesavananda Bharati v. State of Kerala AIR 1973 SC 1461.

does it consist of a number of specific rules prohibiting certain kind of harmful activity, and leaving all the residue outside the sphere of legal responsibility[7]. He further postulate that a tort is an 'act done by the wrongdoer, whereby he has willfully or negligently caused harm to another'. Liability is based on (i) damage suffered by one from the act of the wrongdoer (ii) wrongful intent or culpable negligence on the part of the wrongdoer. Thus the fundamental principle is to hurt nobody by word or deed. But in practical life not every harmful act is deemed to be wrongful. Trade competition is an instance. It may cause damage but not injury in law. It is justified on the principle of utility to the public, though harmful to the individual. Some harms may be trivial, indefinite or difficult to prove as mental distress, etc and may be regarded as damage without injury. Thus, if all harm is not actionable, what is the general rule? Is it liability from harm subject to exceptions or is it exemption from liability that is the general rule, save those cases where law fastens liability?

Pollock in his definition says that all harm is actionable unless justified and this is consistent with the view of law that we have taken. The whole modern law of negligence enforce the duty on fellow citizen to take care to avoid causing harm to others. There is not only a positive duty of not doing harm, but there exists the negative duty for not doing willful harm. The law of torts deals with these main heads of duty, viz. (i) to desist from willful injury (ii) to respect property of others (iii) to use due diligence to avoid causing harm to others.

If all harm is actionable per se then injury which does not cause damage must be held to be actionable. There are cases which are actionable per se and

[7] B.M. Gandhi, Forwarded by J.D.A. Desai "Law of Tort", Eastern Book Point, 1987 p. 46.

cases which are actionable only on proof of damage. The reason for this distinction lies that law prohibits certain things absolutely as they are sure to result in harm. In such cases law conclusively presumes damage.

The second element requisite in a tortious liability is means rea, that is, either wrongful intention or culpable negligence. This is based on the doctrine of no liability without fault. Should this doctrine be an all-pervasive doctrine or should "fault" take its proper place in a general theory of liability providing for a wider plan of compensation for injury? The doctrine accepted so far is that the act itself creates no liability unless accompanied by a guilty mind. But so far the ultimate purpose of law consists in imposing liability on the doer of the harm, and not so much in granting relief to the person harmed. We have seen that such a conflict of views exists in contract also. The aim of the law of contract should be to give relief to the frustrated promise rather than to punish the frustrating promisor. Similarly in tort also if relief can be ensured to the injured party by a scheme of insurance etc, then that should be aimed at rather than to inflict retribution on the wrongdoer. Thus this is a part of the larger question whether wrongs are to be redressed by making the wronged person, whole as far as it may be possible, under worldly conditions, by exacting pecuniary compensation. The latter alternative seems better than the former though pecuniary compensation is not the ultimate object[8].

Holmes also supports this view when he says that the purpose of law of torts is to secure a man indemnity against certain forms of harm to person, property, reputation or estate at the hands of others not because these are

[8] M.D. Vidwans,"Basis of civil liability", AIR 1962 Journal 22,23.

wrongs but because they are harms. This view at once changes the aspect of the liability from the subjective to the objective. It emphasizes not the intent so much as the harm. It may be that in certain types of harm the act complained of may be doubly wrong both morally and legally. Fault theory may have a proper place in the general theory of liability, but it cannot claim exclusive prominence. In proper enjoyment of one's own, a man may do certain things which indirectly may result in loss to others. But it will depend on the attitude of the legal system whether it regards that loss to be capable of relief at law. Thus social considerations will come into play in deciding such matters. Things which are right from an exclusive pluralistic point of view may not be justifiable in a modern world. Thus fraud, malice intent will gradually recede to the background in the development of the theory of tortious liability in the interest of public good, while there will be an increase on the emphasis of duty to take care.

According to him liability for an action does not necessarily import wrong-doing. His thesis is that people should not be made to pay for accident which they could not have avoided. His test is that of experience, by which it should be decided whether the degree of danger attending given conduct under known circumstances is sufficient to throw the risk upon the party pursuing it. Thus his method is purely empirical "at the two extremes of the law", he says, "are rules determined by policy without reference to any kind of morality. But in the main the law started from the identical wrongs and so adopted the vocabulary and the tests of morals. But the standards developed are now external as the interests of the community are consulted in considering the wrong. To hold a man liable, the tendency of a given act to cause harm under given circumstances must be

determined by experience. To hold a man liable it must be shown that he had a fair chance of avoiding the infliction of harm.

According to Winfield "Tortious Liability arises from the breach of a duty primary fixed by the law: this duty is towards person generally and its breach is redressible by an action for unliquidated damages". 'Every injury is a tort unless justified'[9]. He claimed that law of torts consists of general principles proposed Unity Theory.

Salmond propagated that 'no injury is a tort unless it falls within a specified category of any accepted tort. He propounded the pigeon hole theory.

1.1. Salmond's Theory

According to Salmond, the liability under this branch of law arises only when the wrong committed by anyone or the other nominate torts. There is no general principle of liability and if the plaintiff can place his wrong in any one of the pigeon holes each containing it labeled tort he will succeed. This theory is also known as the Pigeon hole theory. If there is no pigeon hole in which the plaintiff case could be put in then the defendant has committed no tort[10]. Salmond had said; 'just as the criminal law consists of a body or rules establishing specific offences, so the law of torts consists of a body or rules establishing specific injuries. Neither in the one case nor in the other there is any general principle of liability. Whether I am prosecuted for an alleged tort, it is for my adversary to prove that the case falls within some specific and established rule of liability and

[9] Salmond on Jurisprudence, Sweet and Maxwell, London, 12th edition, 2002 p.4.
[10] Lubinisha Saha, "Tort v. Torts – The Indian Perspective", AIR 2002 Journal 298.

not for me to defend myself by proving that it is within some specified rule or justification or exercise[11].

1.2. Winfield's Theory

Winfield stated that every wrongful act, for which there is no justification or excuse could be treated as a tort. For him there was only law of tort. According to this theory, 'if I injure my neighbor he can sue me in tort whether the wrong happens to have a particular name like assault, battery, deceit, slander or whether it has no special title at all, and I shall be liable if I cannot prove lawful justification'[12]. This theory gives a broad outlook, it also gives a broader outlook, it also gives a wider view that the law of tort has grown for centuries and it still is growing. There is not a single case in the Reports in which an action has been refused on the sole ground that it is new, "Torts are infinitely various or confined" said Pratt, C.J. in *Chapman v. Pickersgill (1768)*[13]. In 1702, Ashby v. White[14], a man who was entitled to vote was wrongly refused to do so by returning officer. Held he was entitled to pay damages. In *Constantine v. Imperial London Hotel*[15] the court recognized the principle of *'Ubi Jus ibi remedium'* (No wrong without a remedy).

This theory is supported by the creation of new torts by the courts of law sea to widen the scope or torts. Tort of Deceit in its present form had its origin in *Pasley v. Freeman*[16]. Similarly inducement to a breach of contract was covered

[11] R.K. Bangia, "Nature of Tort", Allahabad Law Agency, 1997 p. 18.
[12] R.K. Bangia "Law of Torts", Allahabad Law Agency, 1997 p. 18.
[13] Salmond, "The Law of Torts" 7th edition, By W.T.S. Stallybrass, Sweet and Maxwell Limited, 1928 p. 64.
[14] M.G. Lloyd, "Ctacknell's Law Student" 5th edition, Buttersworth, London, 1978 p. 7.
[15] Without cause, the famous West Indian cricketer refused accommodation at a hotel, held he was entitled to receive nominal damage.
[16] (1789) 3 TR 51, Supra note 7 p. 72.

under tortious liability in *Lumley v. Gye*[17].Tort of intimidation was covered in *Rookes v. Barnard*[18].

The common law of England has not proved powerless to attach new liabilities and create new duties where experience has proved that it is desirable. An action would be elastic enough to provide remedy for an injurious action causing damages[19]. The opening of the 20th century found us with a well developed theory of tort law. According to Holmes, in his common law the law began with liability based on 'action and actual personal culpability" and tended as it grew, to formulate external standards which might subject an individual to liability though there was no fault of him. Periods of Strict liability and fault liability occurred. There is a strong and growing tendency where there is blame on either side to ask, in view of the exigencies of social justice who can but bear the loss and hence shift the loss by creating liability where there has been no fault. This principle was established in *Rylands v. Fletcher*[20]. Even, the Workmen's Compensation Act gives workmen a civil recourse even against their employers. Thus, Law of Torts is evolving with changing times.

Dr. Jenks favoured Salmond's theory and it has been said that Salmond's does not imply that the courts can create new torts but such torts cannot be created unless they are substantially similar to those which are already in existence. In the 17th edition Salmond's Editor has remarked that Salmond was rather misunderstood by his critics, since he never committed himself to the

[17] (1853) Defendant was alleged to have maliciously "enticed and procured" a singer to refuse to perform at the theatre thereby to break her contract with the plaintiff. Held plaintiff entitled to damages.
[18] (1964) Supra note 3.
[19] Salmond and Heuston, "The Law of Torts", 20th edition, Sweet and Maxwell, Universal Law Publishing and Co. 1992 p.64.
[20] (1868) L.R. 3 H.L. 330.

proposition that the categories of torts are closed or that the law of torts is closed and in expansible system. “To say that the law can mean that those pigeon may not be capacious, nor does it mean that they are capable of being added to”. However, many scholars feel that this theory is narrow, rigid and unmindful to a fault with regard to future developments in the field of tort law[21].

Professor Glanville Williams has proved an acceptable statement of the present day position: “There are some general rules creating liability (recognizing the plaintiff interest, conferring upon him a right not to be damaged) and some equally general rules exempting from liability (refusing to recognize the plaintiff’s interest or recognizing a conflicting interest in the defendant and thus conferring a privilege upon the defendant to cause damage). Between the two is a streatch of disputed territory with the courts as an unbiased boundary commission. The present heads of liability and of non liability are not fixed and immutable. The courts in performing their functions assume to themselves certain revisionist powers and it must be said that those powers are usually exercised so as to expand the area of liability. But, there is no comprehensive theory of liability: there is simply a wide and expansible theory[22].

Law’s spectacular adaptation to the requirements of ‘social solidarity’, as emphasized by the French Jurist Leon Duguit, is the most significant development\of the present age, which marked by its ever-increasing interdependence through division of labour and specialization of functions. The earlier concept that liability can be based only on fault conformed to the

[21] B.M. Gandhi, “Law of Tort” p.49.
[22] R.W.M. Dias, B.S. Makesini, “The English Law of Torts; A Comparative introduction”, c’tablissements e’mile bruylant, Brussels, Belguim, 1976. P.18.

metaphysical idea that all legal relations must be traceable to an act of will of the party. This exclusive test had to be abandoned and liability for 'risk created' introduced. Liability for risks was altogether by reference not to moral fault but to the exigencies of the general social and economic structure, an enterprise being fixed with the losses involved in the conduct of it. Liability of employers for injuries to their workmen exemplified this principle, as did the liability of the State for injuries suffered by individuals as a result of the operations of public service.

Eminent authors, like Pollock, Winfield and Stalybrass and the House of Lords too have gone a long way towards formulating general principles of tortious liability, in the process of adaptation to the branch of law of new social requirements. Practical necessities forced all the legal systems to shift emphasis in the law of torts, from moral blame to social responsibility. Hence it is not peculiar that while most of the branches of law, e.g Crime, Contracts, Property, Trusts etc, have been codified, there is yet no Code for the Law of Torts, because most of these branches developed against their respective sociological background. However, the English Common Law has been consistently trying to formulate some basic principles in the tort field, though not without an element of uncertainty. Particularly in the field of damages, there is the inherent difficulty of doing justice to both parties. Much depends upon the discretion of the judge, and as judicial discretion is aptly described by Krishna Iyer, J. as the 'hunch of the bench', there is a lurking danger in the award of damages being arbitrary in the absence of firm principles and the judicious application of those principles to the facts of the case. It is often seen that rational principles upon which damages are to b e assessed tend to be obscured by familiar phrases which lawyers use, but seldom pause to analyze. It is submitted that time is ripe for a bold scrutiny of the

principles and practice governing the compensation for losses especially the non-pecuniary ones[23].

1.3. Historical perspective of Liability

History is the record of past events, developments, trends and traditions resulting out of human activity. It gives us ample information on the gradual development of State liability in India and other countries. Ancient, Medieval and Modern history gives us tremendous materials to substantiate the development of Compensatory Jurisprudence in India. The truth is that the traditions of the past have made our legal system what it is, and still live on it. India has a known history over 5000 years and there were the Hindu and the Muslim periods before the British period, and each of these early period had a distinctive legal system of its own. One might therefore say that a comprehensive study of the Indian legal history should comprise the historical process of development of legal institutions in the Hindu and the Muslim periods also. Since law was a part of the overall historical evolution of all human institutions, the historical school is the perfect ideology to understand the present legal system related to the liability of State in torts. The law regarding the extent of liability and immunity of State for the wrongful acts of its servants under Article 300 of the Indian Constitution is in a state of uncertainty. To understand the present position with regard to the extent of State liability in India, it becomes necessary to refer back to certain cases and the legal position before the commencement of the Constitution, 1950.

[23] Dr. A. Lakshminath, "Damages in the Law of Torts: Some Reflections", AIR 1993 Journal 54.

1.3.1. The Vedic Period

During the Vedic period, the concept of vicarious liability of the State was not so developed like the present day. The king had to safeguard the life and property of the people. If any wrong happened to affect the people, the king was responsible to compensate them from king's malkhana, and if the officers failed to do it, the king was bound to protect the people against such officers[24].The duties of the king and liability arising out of the breach was dealt with in the Hindu Dharmashasthra. The people of ancient India, considered the State and the Government as basic instruments for promotion of peaceful and civilized life[25]. There are plenty of literatures that also describe the law and the legal institutions, liability and immunity of the king, ideas of the origin of the State, the nature of the society, responsibilities of the sovereign towards its individuals and equitable remedy to the affected persons through ordeal system etc. The most important amongst the various manuscripts are the vedas[26], sutras, smritis[27] epics[28]. Kautilya's Arthasashtra and the writings of foreign travelers. They also tell us the responsibilities of the State to Compensate the victims, affected by the officials of the king during ancient period. Dharma was an indispensable part and the whole machinery of the king operated by the law of Dharma.

The basic difference which immediately emerges between the English Law of Torts and the Hindu Dharmashastras is that whereas the English Law of Torts has emphasized rights and tended to make people right-conscious, its analogous provisions under the Dharmashastras emphasized duty and tended to make

[24] G.P. Verma, State Liability in India, Deep and Deep Publications, New Delhi (1993) p. 129.
[25] S.C. Raychoudhary, Social, Cultural and Economic History of India , Surjeet publications, Delhi, 1983.p.135.
[26] Rig, Yajur, Sama and Atharva Vedas.
[27] Smritis are also called as Dharmasastras. They are Manusmriti, Yajnavalkya, Vishnu and Narada Smritis.
[28] Ramayana and Mahabharatha.

people duty-conscious. That is the reason why we do not have the equivalent of the doctrine *"King can do no wrong"* in ancient India. The status of King was more of a bundle of duties than of rights. Moreover, expiation of wrong-doer, not merely reparation of the victim, was the objective of the Dharmashastras. However, there seems to be no such difference between the 'neighbour principle' of Lord Atkin which tried to give answer to the question "Duty to whom?", and answer provided in the Dharmashastras of the same question. According to manu "where common man would be fined with karshapana, the king shall be fined one thousand, which is the settled law. Thus, it is established that the servant's act is for the benefit of the master in the course of his employment, the master becomes liable[29]. Raj dharma was an essential path to be followed by the king which defined the powers and obligations of the king. However with the expansion of the Aryans and the evolution of large Empires the powers and the responsibilities of the king had enormously increased. The increase in powers of the king did not make them autocrat. His authority was restricted by various religious and legal principles. The king could not go against the sacred customs. By the time of Mauryan Empire. Ashoka considered that his only duty was to promote the welfare of all people. The State was also expected to promote 'dharma' by developing the sense of morality and righteousness among the people. Individual follows Dharma to attain Moksha, and he owes duty towards himself and towards community generally but not towards any other person so as to vest in such other person a cause of action on the event of a violation of that duty. Today we find that the same point is reached with the erosion of the fault principle, growing awareness of social responsibility and distribution of losses. It is

[29] R.L. Narsimhan,"vicarious liability of a master for the Criminal Act of his servants view of Hindu Jurists" 2 JILI 321 (1969).

evident that, the compensatory jurisprudence, has been developed from ancient India, but there was no systematic rule governing the vicarious liability of the State in India.

1.3.2. The Mughal Period

Similar jurisprudence was followed during the Mughal period also. The Remedial rights followed by them included retaliation, compensation, restitution and money compensation in case of death[30]. The responsibility of the State and the accountability of it were recorded, that when one of the grandees of India alleged that Sulthan Mohd. Bin Tuglaq, had executed his brother without just cause and cited the Sulthan before the Kazi, the Sulthan went on foot to the court without arms, and stood before the kazi who gave the decision that the sovereign was bound to satisfy the plaintiff, for the blood money of his brother and the decision was so obeyed[31]. In 1490, in *widow v. King Ghyas* the king negligently hurt the son of a widow, who made a complaint against him in the court of kazi. The king was summoned and after hearing both sides held the king guilty and asked him to pay damages and the same way in *Shiqahdar v. King* a police officer was personally held responsible for the arrest of a citizen in a wrongful manner and was asked to pay compensation to the victim[32]. It was believed that king and the State being the trustee of the people were answerable for their wrongs and this was followed during the period of Akbar[33].

[30] C.K. Rameshwara Rao, Law of Damages and Compensation, Law Publishers Pvt. Ltd. Allahabad 211001, India. 1996. P.3.
[31] Austin John: The province of Jurisprudence determined, Lecture, (1995) p. 115.
[32] S.S. Sreevastava, Vicarious Liability of the State, Eastern Law House Private Ltd. Calcutta, (1993) p. 41,42.
[33] P.L. Mehta & Neena Verma, Text of Human Rights under the Indian Constitution, (1999), p. 17.

During the period of Delhi Sultanate, even influential officials and nobles were not permitted to go unpunished for their wrongful acts. Sultans like Balban and Ala-ud-din Khalji, came forward to present themselves as criminals, if they thought they had committed some illegality. Prophet declared that he would not hesitate in awarding the same punishment to his daughter Fatima as an ordinary thief when she committed theft. Babur and Humayun, considered it their sacred duty to do justice to all. Humayun established a special drum of justice Tabal-i-adal. The people would beat this drum once, twice or thrise accordingly to the gravity of the case and the emperor promptly attended to their case and did everything possible to satisfy their complaints. Akbar used to say, 'if I am guilty of an unjust act, I must rise in judgment against myself. He also arranged a golden chain with belts to be fastened between the Shahburj in the Agra Fort and a stonepillar fixed on the bank of Jamuna. The aggrieved person could obtain redress of their grievance from the emperor by pulling the chain at anytime.

Sultan Feroz had declared the liability of the State for the claims brought and adjudged against it in the court. Balban, Tugulaq and Shahjahan were very particular in making the servants vicariously liable for the wrongs committed by them. Sometimes the officers were held liable for the failure of protection of property of the owner. It shows the 'king can do no wrong' and the 'king cannot be sued in his court' was not applicable in Islamic law.

1.3.3. The British Period

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.

As per common law, absolute immunity of the crown was accepted and the crown was not liable in tort for wrongs committed by the servants in the course of employment, even though there was social necessity for a remedy against the crown as employer. The rule was based upon the well known maxim of English law, 'king can do no wrong'. 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 emergence of the British Empire in India stands out as a unique event in the history of the world[34]. 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 of India. 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.

Almost all the legal systems in the world, including the Hindu, the Muslim and the English legal systems agree upon this basic principle of a natural right to get compensation for injuries suffered. History reveals that compensatory jurisprudence was accepted and followed by the Hindus, the Mohammedans and the British during their rule in India.

The importance of my study in this area is given to see whether human right of the citizen are protected properly with the present legal system by providing remedy to the victim and by imposing punishment to the wrongdoer and on the other hand my study is to know whether our present law is adequate to fixing the liability of the state in case of human rights violation by the agencies.

[34] M.P. Jain, outlines of Indian legal history 5(4th Edi, N.M Tripathi private Ltd. Bombay 1981).

This thesis is divided into seven chapters, chapter one as already seen as a general historical perspective of liability based on Vedic period, Mughal period and British period has been briefly discussed.

The second chapter deals with the Tortious liability of state locating in Constitution of India, broadly highlighting Article 300 of the Indian Constitution and the liability of the state under the constitutional provisions. On what basis state would be liable for the Tortious act, committed by its servants.

The next chapter is devoted to the Tortious liability of the state in Tort law, based on liability on the ground of sovereign and non sovereign function.

The fourth chapter deals with the remedies, the origin and the development of the writ in India broadly highlighting the different types of writs. The remedies available under Articles 32 and 226 of the constitution of India has been briefly discussed on the basis of case law.

The fifth chapter has been studied in the historical and comparative perspective. Tortious liability of the state in England and its remedies and the enactment of the Crown proceeding Act 1947 has been briefly discussed.

The sixth chapter also deals with historical and comparative perspective, the problem arising out of state actions and the concept of state liability in international level. The enactment of the Federal Tort claims act 1946 and the principles in the USA and France have also been referred to.

In the concluding chapter various suggestions that have emerged from the study have been collected and presented this problem to some extent can be

rectified by enacting a comprehensive legislation governing the liability of the state for Torts committed by its officers.

Chapter II

Tortious Liability of State locating in Constitution of India

State has been defined in Article 12 of the Constitution of India, which means the union government or provincial government or any other local authority. The liability of the state for wrongful acts of its employees has assumed importance in the present context. In democracy, the state performs innumerable functions for the welfare of its citizens. In the exercise of these functions, any misuse of power by the government servants may cause injury to person or property of the citizens. Sometimes even the fundamental rights are attacked. Such a situation calls for an adequate mechanism for determining the state liability and compensating the victim. It is, however, strange that the state itself has not bothered to enact a law for determining the citizens claims against it[35]. Indeed, the absence of such a mechanism has put an onerous task on the judges who have evolved in their own way some principles for meeting the aforesaid situation. These issues are certainly of great significance for a republican form of government like ours where sovereign resides in the people. However, it is submitted that the judicial perception of the problem and rationalization they have attempted for fixing liability of the state, are far from satisfactory[36]. The highest court of the land has ruled that the state is liable to pay compensation to its citizens for any harm suffered by them due to negligence of police or bureaucracy. The court observed in explicit terms that since sovereignty now vests in the people, the state can't claim any immunity[37].

[35] Surendra Yadav, State Liability : A new dimension from Rudul Sah, 43 JILI 2001 at 559.
[36] Bishnu Prasad Dwivedi, From Sah to Saheli : A new dimension to Government liability,36 JILI 1994 at 99.
[37] Faizan Mustafa, Liability for Government lawlessness, AIR 1997 Journal 38.

The law of liability of government for the tortious acts of its employees acting in the course of their employment as such is found in Article 300 of the Indian Constitution[38]. But the framers of this Article, perhaps, were uncertain about the future and thus deliberately avoided any clear cut rule for the liability in tort by governmental actions. They left the courts to search themselves from the monarchial treasure some fanciful immunity , and thereby left the litigants to gamble in each case without any specific legal principle. The government has also usually put forth the defence of sovereign immunity whenever compensation claims for injuries caused to Indian citizens[39].

In India, the only provision which deals with the liability of the State is in Article 300 of the Constitution. This Article 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 of 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.

In India there is no exclusive legislation dealing with the tortious liability of State. The First Law Commission of India recommended a legislation on the subject. The Law Commission after referring the various provisions in the legislations of other countries had also observed that the old distinction between

[38] Alice Jacob, "Vicarious Liability of Government in Torts", 7 JILI 1965 at 247.
[39] Chandra Pal, 'Compensation for Government Lawlessness' , Vol. XI 1984 IBR at 57.

sovereign and non-sovereign functions or government and non-government functions should be no longer invoked to determine the liability of the State[40]. On the lines of the recommendations of the First law Commission the Government of India introduced two bills on "The Government Liability in Tort" was first introduced in Parliament in 1965 but it could not be enacted into law. It was reintroduced in 1967[41], neither of which emerged as an Act and certain modification in the Bill was suggested in 1969 by the joint selection committee of the Parliament, but the Bill has not been enacted into law so far. Due to the fact that the Government allowed the Bills to be lapsed on the ground if it was enacted, it would bring an element of rigidity in the determination of the question of liability of the Government in tort. Because of this reason, the liability of the Government in tort at present can be stated to be that, it is based on the tortious liability of the State that existed during the East India Company rule. The Commission recommended several times to modify the existing law and introduced the Bill to amend the law in this regard to make the State liable like that of ordinary person. Late Dr. Rajendra Prasad President of India took initiative for considering the Law Ministry of India to amend the law similar to English Crown Proceedings Act 1947. Even after sixty nine years of Independence no sincere effort has been made to modify the law relating liability of the State in torts. Modern views concept is that State is the guardian of the citizens. Now there is no satisfactory provision to fix the liability of the State in India.

[40] First Report of the Law Commission of India "Liability of the State in Tort" (1956).
[41] The Government (Liability in Tort) Bill 1967.

The government's effort in 1967 in introducing the bill on Government Liability in Tort was a step in the right direction. The proposed bill made the state liable in the following cases:

(1) Tort committed by an employee while acting in the course of his business

(2) Tort committed by an employee while acting beyond the course of his employment if the act was done on behalf of the government and is ratified by it.

(3) Tort committed by an independent contractor employed by the government provided-

(a) the government assumes control of the act contracted to be done,

(b) the government has ratified the tortuous act,

(c) reasonable care is not taken under the circumstances where though the act is lawful but is of such a nature that it may cause injury.

(d) the government is under a duty to do the act itself.

(e) the government is under an absolute duty to ensure the safety of persons or property in the doing of the act contracted to be done and there has been a failure to comply with that duty.

(4) Where there is breach of common law duties attached to the ownership, possession, occupation or control of immovable property.

(5) Where the government is in possession of any dangerous thing which when escapes causes injury.

(6) Where there is breach of duty to the employees which the government owes by reason of being the employer.

However, the bill had exempted the government from liability in the following cases:

(1) Acts done by any member of the armed or police force in discharge of his duties or which are natural consequences thereof, and acts done for the purpose of training or maintaining the efficiency of the armed forces as also the acts done for the prevention of breach of peace or damage to the public property.

(2) Acts of state.

(3) Any act done by the President or the Governor in discharge of their constitutional functions.

(4) Judicial acts and acts done in execution of judicial process or claims arising from defamation, malicious prosecution or arrest.

(5) Acts done under proclamation issued under the various provisions of the Constitution.

(6) Any claim arising from the operation of any guarantee law.

(7) Any claim arising in a foreign country.

(8) Any claim arising from injury done by doing an act authorized by law where such injury is a natural consequence of the act.

(9) Any claim arising from any act for which immunity is provided under the Telegraph Act, 1885; Indian Post Office Act, 1898 and the Indian Railways Act, 1890.

It is apparent from the above provisions of the bill that the government did not fully appreciate the significance of governmental accountability in a democratic welfare state. The escape clauses are so wide that in many cases a person would find himself without remedy in case of injury to his person or property. In a democratic welfare state the government must not fight the people but must have the courtesy to settle disputes outside the court in the best interests of social justice. Today, the government of India has become the biggest litigation.

After 1950, the Supreme Court of India in different legal ramifications interpreted the liability of Government of India in tort in the light of Constitutional provisions. Hence, the Supreme Court invoked the principles of human rights jurisprudence and evolved the concepts to compensate the victims of Government lawlessness. But the principles evolved by the Supreme Court itself have not been uniformly followed and their applications have varied from case to case. Even after the commencement of Constitution, in order to determine the State liability in torts today we have to refer back to the State liability of East India Company followed during the period of 1858.

2.1. Liability of the East India Company during the British period in 1831

During the reign of the 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 sovereignty. In *Bank of Bengal v United Co*[42], the suit was filed by the Bank of Bengal to recover the interest due on the promissory notes written by the East India Company, to borrow money for the prosecution of war. Sir Charles Gray and Justice Franks of the Supreme Court of Bengal, clearly held that the East India Company had no sovereign character to prevent it from being sued for the recovery of interest on three promissory notes on the basis of which the company borrowed money for the efficient prosecution of war for defending and extending the territories of the Crown in India. In the beginning, the East India Company was engaged only in trading activities and after that by various characters, it acquired certain legislative and judicial powers.

The Charter Act 1833, vide Section 10 provided that so long as the possession and Government of the Territories were continued to the said company all persons and bodies politics would and might have take same suits, remedies and proceedings legal and equitable, against the said company in respect of such debt and liabilities as aforesaid and the property vested in the said company in trust as aforesaid would be subject to the same judgments and executions, in the same manner and form respectively as if the said property were hereby continued to the said company to their own use.

Purpose of this Act was to lay down the company's liability and it concluded that the company would be liable in an action against it.

The British government took over the administrative control of India from the East India Company in 1858[43]. This Act transferred the power to rule the country to her Majesty and also made the Secretary of State in council liable for

[42] (1831)1 Begnell's Report 87-181.
[43] The Government of India Act, 1858.

tortious acts of their servants committed in the course of employment. So this provision was first applied by Justice Peacock in Peninsular Orientation & Steam Navigation Company case. It is a land mark decision of the Calcutta High Court, in which whether the company enjoyed the immunity of the crown was considered by the judge. Actually there was no dispute regarding the maintainability of the suit of private nature against the State. The doubt was regarding the maintainability of the suit when the company appeared to have sovereign nature in British India, and there was some influence of common law over Indian legal system. This can be seen through the complicity of case laws where the judiciary applied sovereign immunity and exempted the State from liability but at the same time certain courts in India were reluctant to apply the principle of sovereign immunity.

2.1.1. The Government of India Act, 1858

When the Government of India Act 1858 passed, the company was taken over by the British Crown by providing a Secretary of State in Council for the administration. So the responsibility for administering India was vested in the Secretary of State for India. Section 65 of the Act provided as follows-

"All persons and body politic shall and may have take the same suits remedies and proceedings, legal and equitable against the secretary of State for India, no substantial change was made on the question of suability of the State".

So the liability of state came to be assimilated to that of the East India Company before the takeover. In 1861 the important case of East India Company came up in which liability of the state had to be determined by applying section 65 of the Government of India Act 1858. To determine the liability of the state,

under section 65 of the Government of India Act 1858, it was necessary to understand the liability of the East India Company. This in turn depended upon the legal position of the company at that time.

2.1.2. The Government of India Act, 1915

The provision was made in section 32(2) of the Government of India Act 1915 as follows-

"Every person shall have the same remedies against the Secretary of state in council as he might have had against the East India Company if the Government of India Act 1858 had not been passed".

2.1.3. The Government of India Act, 1935

The provision appeared in the Government of India Act 1935 in section 176(1), which is as follows-

"The Federation may sue or be sued by the name of the Federation of India and a Provincial Government may sue or be sued by the name of the province and without prejudice to the subsequent provisions of this chapter may, subject to any provisions which may or made by the Act of the Federal or a Provincial Legislature enacted by virtue of power conferred on that legislature by this Act, had not been passed".

This effort of enacting the Government of India Act 1935 was made during the pre-independence period with the intent to provide justice to the victims of state's unlawful actions.

2.2. The liability of the state under the provision of the Constitution of India

The cases that came before the court, with this prevailing confusion, i.e the provisions for governing liability of State in torts made the Constitution to include the following provision- Article 300 of the Constitution of India. Article 300 deals with suits and proceedings-(1) The Government of India may sue or be sued by the name of 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 provision 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 Province or the corresponding Indian States might have sued or been sued if this Constitution had not been enacted, 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 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.

After going through Article 300 and its reference back into Government of India Act 1858 and various cases the test was laid down for determining the liability of the State. Certain principles emerged out of it. They are

1. The Union of India and the States have the same liability for being sued in tort committed by their servants which the East India Company had.

2. The Union of India and the States are liable for damages for injuries caused by their servants if such injuries would render private employer liable.

3. The government is not liable for tort committed by its servants if the act was done in the exercise of sovereign power.

4. Sovereign powers mean powers which can be lawfully exercised only by a sovereign or by a person by virtue of delegation of sovereign powers.

5. The Government is vicariously liable for tortious acts of its servants which have not been committed in the exercise of sovereign powers.

6. The court is to find out in each case whether the impugned act was committed in the exercise of delegated sovereign power.

7. No well defined test as to the meaning of sovereign power has been attempted or can be precisely laid down. Each case must be decided on its own facts. Functions relating to trade business and commercial undertakings and to socialistic activities by a welfare State do not come within the purview of delegated sovereign authority.

8. The sovereign function of the State must necessarily include the maintenance of the army, various departments of the government for maintenance of law and order and proper administration of the country which would include ministry, police and the machinery for administration of justice.

9. Where the employment in the course of which a tortuous act is committed is of such a nature that any private individual can engage in it then such functions are not in the exercise of sovereign power.

10. In determining whether immunity should be allowed or not, the nature of the act, the transaction in the course of which it is committed, the nature of the employment of the person committing it and the occasion for it have all to be cumulatively taken into consideration.

Article 53[44] and 73[45] of the Constitution makes it clear that the sovereign executive power be exercised even in a sphere where there is no legislation. So it is therefore not correct to contend that unless a function is authorized by a statute, the government function or act cannot be done in exercise of sovereign power of the State.

After independence the Supreme Court of India considered the liability of the state in *State of Rajasthan v Vidhyawathi*[46], is the first post-Constitution case which laid down case laws on this subject. In this case the question which arose was whether the state could be held liable for the negligence of the driver of a jeep owned and maintained by the state. That was a case where the driver of a government jeep, which was being used by the collector of Udaipur, knocked down a person walking on the footpath by the side of a public road, who died

[44] Article 53 lays down that the executive power of the Union shall be vested in the President and shall be exercised by him either directly or through officers sub ordinate to him in accordance with the Constitution.
[45] Article 73 prescribes the extent of executive power of the Union, Subject to the provision of the Constitution the executive power of the Union shall extend to matters with respect to which Parliament has power to make law and to the exercise of such rights authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement . The Article itself shows that even if there is no statute in a particular field the executive power of the Union extends to such matters.
[46] AIR 1962 SC 933.

three days later. The legal representatives of the deceased sued the state of Rajasthan and the driver for damages for the tortious act committed by the driver. The state took the stand that the car was being maintained for the discharge of official duties of the collector. That is to say for the purpose of discharging the sovereign powers of the state. Though the accident occurred, while the car was returning from the workshop, the fact that it was being maintained in the discharge of sovereign function entitled the state to claim immunity from liability. The High Court would seem to have taken its stand by the old distinction developed in P & O that there is a category of cases where no liability could be fixed on the state for the acts of its servants. The High Court would seem to have held that maintaining a car for a civil servant would belong to non-sovereign category attracting liability according to the principles laid down in the P & O case. When the rule of immunity in favour of the Crown, based on Common Law in the United Kingdom, has disappeared from the land of its birth, there is no legal warrant for holding that it has any validity in this country, particularly after the Constitution and therefore it would be only recognizing the old established rule, going back to more than 100 years at least, if the vicarious liability of the state is upheld by the court. Article 300 of the Constitution itself has saved the right of Parliament or the legislature of a state to enact such law as it may think fit and proper in this behalf. But so long as the legislature has not expressed its intention to the contrary, it must be held that the law is what it has been even since the days of the East India Company.

The appeal was taken to Supreme Court the judgment of C.J Sinha accepted the judgment of the High Court and dismissed the state appeal. The appeal was heard by the constitutional Bench comprised of C.J, Sinha, J.L Kapur, M.

Hidayatullah and J.R.Madholkar JJ, the Supreme Court referred to the republican democratic Constitution of India in which there was no place for an immunity based on king can do no wrong. Our Constitution established a republican form of government and one of the objectives is to establish a socialistic state, and there is no justification in principle, or in public interest, that the state should not be held liable vicariously for the tortious act of its servant. The Supreme Court has deliberately departed from the Common Law rule that a civil servant cannot maintain a suit against the Crown. Viewing the case from the point the Supreme Court in his judgment held that under the Democratic Republican Constitution of India, there is no scope for making any claim based on sovereign immunity and therefore the state of Rajasthan must be liable for the death. State was liable vicariously for the negligence act committed by its driver on the ground that the maintaining a car for the collector's use and it causing damage while returning from the workshop is not referable to sovereign power therefore the state was liable. The decision of Supreme Court made an impression that the distinction between sovereign and non-sovereign for the purpose of liability was abolished and the government would be liable in all cases except act of state.

In *Kasturilal v State of U.P*[47], Ralia Ram the plaintiff was arrested by the police officers in U.P on suspicion of possessing stolen property and on search of such person a large quantity of gold and silver seized from him. The movable property was taken in the custody of police station until the disposal of the case. The head constable, who was in charge of the government Malkhana where the gold was deposited, misappropriated it and he fled to Pakistan. That the plaintiff whose property had been misappropriated by the state officers due to the

[47] AIR 1965 SC 1039.

negligence act, brought a suit against the state of U.P for the return of the gold and silver for the damages for the loss caused to him. It has been told that he can make no claim against the state on the ground that the power to arrest a person, to search him and to seize the property found with him was held to be sovereign function, so the state could not be held liable. The matter was taken to the Supreme Court from the decision of High Court. The appeal was heard by a Constitutional Bench comprised of P.B. Gajendragadkar, C.J, K.N Wanchoo, M.Hidayatullah, Raghubar Dayal and J.R Mudholkar, JJ. In the judgement of C.J, Gajendragadkar, in dealing with such cases the act of negligence was committed by the police officers while dealing with the property of Ralia Ram which they had seized in exercise of their statutory powers. Now, the power to arrest a person, to search him, and to seize property found with him, are powers conferred on the specified officers by statute, and in the last analysis, they are powers which can be properly characterized, as sovereign powers of the state.

Further it was held that the doctrine of immunity which has been borrowed in India in dealing with the question of the immunity of the state in regard to claims made against it for tortious acts committed by its servants, was really based on common law principle which prevailed in England, and that principle has now been substantially modified by the Crown Proceeding Act. 'In dealing with the present appeal, we have ourselves been disturbed by the thought that a citizen whose property was seized by the process of law, has to be told when he seeks a remedy in a court of law on the ground that his property has not been returned to him, that he can make no claim against the state. That we think is not a very satisfactory position in law. The remedy to cure this position, however lies in the hands of the legislature. The brief view of Kasturilal case focus on the

unsatisfactory state of law, and it has been proved by the above two decided cases after the post independence period, the present position in India relating to liability of the state is based on the old distinction between sovereign and non-sovereign functions enunciated in the days during the East India Company.

It is not fair for a man to be wrongfully deprived of his property without some means of restitution: that however we do it, "justice" insists that somehow or other such a man must be recompensed[48].

In *Nagandra Rao & Co v State of A.P*[49], the appellant was carrying business in fertilizers and food grains under the licence issued by the appropriate authorities. His premises were visited by the police Inspector and huge stocks of fertilizers, food grains and even non-essential goods were seized under the Essential Commodities Act. On 29th June 1976 proceeding was terminated in his favour and the confiscation order was quashed appellant's licence had been cancelled. When the appellant went to take delivery Collector directed the release of goods but it has been delayed so that the goods were spoiled and decayed in quality and quantity. The Appellant then asked for compensation which was denied and therefore he filed a suit for recovery of the amount and then the state claimed sovereign immunity. The trial court decreed the suit and held that the deterioration of the goods in the custody of the respondents was not in exercise of sovereign function of the state. The court held that the seizure of the goods was no doubt in pursuance of statutory obligation but once it was seized then it was the responsibility of the state government to ensure that the

[48] A. R. Blackshield, 'Tortious liability of government: a jurisprudential case note,' Vol. 8 1966 JILI p.646.

[49] AIR 1994 SC 2663.

goods were maintained in proper conditions but they failed to discharge their obligation. State filed an appeal before the High Court, the main issue was regarding the liability of the state in case of negligence of the officers of the state while discharging their statutory duties. The claim of the appellant was negative on the ground of sovereign power of the state.

In this case the court made it clarification that in modern sense sovereign immunity as a defence was never available nor it is available where its officers are guilty of interfering with the life and liberty of a citizen. In such infringements the state is vicariously liable and bound constitutionally legally and morally to compensate. But the shadow of sovereign immunity still haunts because of absence of any legislation even though this court in Kasturilal had expressed dissatisfaction on the prevailing state of affairs in which a citizen has no remedy against negligence of the officers of the state. The old and archaic concept of sovereign immunity does not survive and sovereignty now vests with the people. The distinction between sovereign and non-sovereign does not exist. It all depends on the nature of power and manner of its exercise. Legislative supremacy under the Constitution arises out of constitutional provisions. The executive is free to implement and administer the law. The defence available to the state were for raising armed forces and maintaining it, making peace or war, foreign affairs, power to acquire and retain territory are functions which are indicative of external sovereign and are political in nature. No suit under Civil Procedure Code would lie in respect of it. No legal or political system today can place the state above law as it is unjust and unfair for a citizen to be deprived of his property illegally by negligence act of officers of the state without any remedy.

The demarcating line between sovereign and non-sovereign powers for which no rational basis survives has largely disappeared. Therefore, the functions such as administration of justice, maintenance of law and order and repression of crime etc which are among the primary and inalienable functions of a constitutional government, the state cannot claim any immunity. When a citizen suffered any damage due to the negligence of the employee of the state the latter was liable to pay damages and the defence of sovereign immunity would not absolve it from this liability. Now the application of sovereign immunity is limited and sovereign and non-sovereign based on any of the rationality, is no longer allowed to exist.

The court stated that uncertainty of law results in the abuse of judicial power. The court shall be failing in its duty if it is not brought to the attention of the appropriate authority that for more than hundred years, the law of vicarious liability of the state for negligence of its officers has been swinging from one direction to other. Result of all this has been uncertainty of law, multiplication of litigation, waste of money of common man and energy and time of the court. First Law Commission in its report "Government (Liability in Tort) Bill, 1965" was introduced but it was withdrawn and reintroduced in 1967 with certain modification suggested in it by the Joint Committee of the Parliament but it lapsed. And the citizens of the independent nation who are governed by its own people and Constitution and not by the crown are still faced the problem. Necessity to enact a law in keeping with the dignity of the country and to remove the uncertainty, therefore cannot be doubted.

2.3. Article 21 and the Role of Compensatory jurisprudence

When the Constitution was drafted constitutional guarantees for protection of the human rights were incorporated in Part III of the Constitution. It was also provided that any law or any executive order which was in violation of the fundamental rights contained in Part III of the Constitution would be void and liable to be struck down by the court[50]. The courts are now empowered to proceed further and give compensatory relief under the public law jurisdiction within the constitutional scheme for the wrong done due to the breach of public duty by the state in not preserving the life and liberty of the citizen[51]. Award of compensation for the breach of Article 21 of the Constitution is therefore, not only to citizen public power but also to assure the citizens that they live under a legal system, wherein their rights and interests are protected and preserved. Further the courts have the obligation to satisfy the social aspirations of the citizens. Public law proceedings serve a different purpose than the private law proceedings. The primary source of the public law proceedings stems from the prerogative writs and the order for monetary relief is therefore to be read into the powers of the Supreme Court under Article 32 and of the High Court under Article 226 of the Constitution. Hence, the grant of compensation for the violation of Article 21 is an exercise of the courts under the public law. It is for penalizing the wrongdoer and fixing the liability for the public wrong on the state which failed in the discharge of its public duty to protect fundamental human rights of the citizens. Though there is no express constitutional provision for grant of compensation when right to life is violated, the Supreme Court has judicially

[50] H. R. Khanna, "Human Rights – Dimensions and Challenges", AIR 1998 Journal 50.
[51] Dr. A. Raghunadha Reddy, "Liability of the Government Hospitals and Breach of Right to Life," AIR 1998 Journal 153.

evolved the constitutional remedy by way of compulsion of judicial conscience. The Supreme Court and High Courts have frequently resorted to the relief of compensation in writ petitions under Articles 32/226 of the Constitution and thus developed a new area of compensatory jurisprudence in public law[52]. Hence, in all cases of violation of life, liberty, personality and dignity of any citizens by the wrongful actions of the state officials, the officials shall be liable under the law like the private individuals and the government shall be subjected to pecuniary liability. The old theory that the government can not punish itself does not stand in the modern legal environment of rule of law, supremacy of the Constitution, judicial review and human rights consciousness[53]. Let us now trace the developments in this new area.

Rudul Shah v State of Bihar[54], was the one of the cases from which this new approach started. The petitioner was detained illegally in Ranchi Jail of Bihar for 14 years after his acquittal by a competent court. In this case the petitioner brought the writ petition before the Bench consisting of Y.V. ChandraChud .C.J, Amarendra Nath Sen and Ranganath Misra, J.J, he stated that he 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, illegally detained in jail for a period of fourteen years on the ground of insanity. But the jailor could not produce evidence before the court to show that he was insane at the time of detention. After going through the injustice shown by the jail authorities the court wanted to rectify it by exercising the power under Article 32 of the Constitution. If

[52] Public Interest Litigation, Mamta Rao, Eastern Book co. Lucknow second Edition 2004.
[53] Dr. P. Koteswar Rao, 'Criminal Liability of the State for Violation of Life, Liberty and Dignity: Need for a Compensatory Legal Policy', Vol 19 (1&2) 1992 IBR.
[54] AIR 1983 SC 1086.

courts power under Article 32 was limited to passing an order of release from unconstitutional detention it would amount to denuding Article 21 of its significant content. Court further said that one of the effective ways of preventing violation of Article 21 was to make the violators to pay compensation. The Supreme Court for the first time set up an important landmark in Indian human rights jurisprudence by articulating compensatory jurisprudence for infraction of Article 21 of the Constitution, Since then apex court in a number of cases awarded monetary compensation. By the habeas corpus petition, the petitioner asked for his release on grounds of unlawful detention in jail. He also asked for ancillary relief like rehabilitation, reimbursement of expenditure for medical treatment and compensation for illegal incarceration. The Supreme Court evolved a new remedy of providing compensation to the victim of tortuous acts done by the government during sovereign functions and issued a direction to the state to pay a sum of Rs. 30,000/- as a compensation for illegal arrest in addition to the Rs. 5000/- already paid by it. The court said that its order of compensation was palliative in nature and would not preclude the petitioner from bringing a suit for recovering appropriate damaged from the state and its erring officials.

In this case court clearly expressed that even though our precious rights guaranteed under Article 21 have been violated by the instrumentalities of the state, due to their unlawful act in the name of public interest, the only method available to the court is to apply compensatory justice to the victim. While nothing in this case that a money claim was ordinarily to be agitated in and adjudicated upon, in a suit instituted in the lowest court competent to try it, the court nevertheless held that where It comes to the conclusion that the

detention was illegal then to refuse to pass an order of compensation in favour of the petitioner, the Supreme Court developing a new compensatory jurisdiction held that 'In the exercise of its jurisdiction under Article 32 the Supreme Court can pass an order for the payment of money in the nature of compensation consequential upon the deprivation of fundamental right of life and liberty of a petitioner'.

Article 21 which guarantees the right to life and liberty will be denuded of its significant content if the powers of the Supreme Court were limited to passing orders of release from illegal detention. One of the ways in which the violation of that right can be reasonably prevented and due compliance with the mandate of Article 21 secured its violators in the payment of monetary compensation. Administrative sclerosis leading to infringements of fundamental right cannot be corrected by any other method open to the judiciary to adopt. The right to compensation is some palliative for the unlawful acts of instrumentalities which act in the name of public interest and which present for their protection the powers of the state as a shield. Respect for the rights of individuals is the true bastion of democracy. Therefore, the state must repair the damage done by its officers to the petitioners rights.

Following the revolutionary norm of providing compensatory relief to the victims of violations in *Sebastian M. Hongray v Union of India*[55], the petitioner a student of political science in Jawaharlal Nehru University and a

[55] AIR 1984 SC 1026.

member of Naga community from Manipur, filed a writ petition as to know the whereabout of the two respectable persons of his village C. Daniel and C. Paul who according to him were detained by the army personnel on March 10th, 1982. It was argued that these two persons after being taken into the army camp under arrest never left the camp and was anxious to know what had happened to them. Complaints was filed a habeas corpus petition before the Supreme Court, Bench consisting of D. A. Desai and O. Chinnappa Reddy J.J, considering the seriousness of the offence, the court directed to serve notice on February 9th, 1983. When the court called for the report of the superintendent of police about the action taken against the complaint by the petitioners, the Government of Manipur claimed privilege on the ground of public interest. From the evidence it was found that these two persons were last seen in Phugrei camp on March 11th, 1982. Widows of these persons had last seen them on March 15th, 1982. The Supreme Court by a writ of habeas corpus required the Government of India to produce two persons. The Government eventually failed to produce them expressing its inability to do so. C.B.I submitted its report of not locating these two persons. They had a legal obligation to produce those persons who were taken into custody illegally. There was willful disobedience on the part of state in not responding to the writ of habeas corpus and misleading the court that they had left the camp. So it amounted to civil contempt. According to the court, the civil contempt was punishable with imprisonment as well as fine. The assertion of the government that the

persons left certain camp near, which an army regiment was stationed was alive, was untenable and incorrect. The Supreme Court held that the Government would be held guilty of civil contempt because of their willful disobedience to the writ. The court, keeping in view the torture, agony and the mental oppression through which the wives of the persons directed to be produced had to pass, instead of imposing a fine directed that as a measure of exemplary costs, as is permissible in such cases, the state pay Rs. 1 lakh to each of the aforesaid women.

Clearly visualizing the facts and circumstances of the case it was observed by the court that they might have met with unnatural death. Who is individually or collectively the perpetrator of the crime or is responsible for their disappearance will have to be determined by a proper, thorough and responsible police administration. The Union of India cannot disown the responsibility in this behalf. The appropriate mode of enforcing obedience to a writ of habeas corpus is by committal for contempt. This judgment was one of the excellent verdicts given by the court without referring to sovereign immunity. In this case after thorough enquiry was made by the investigation officers, the court expressed doubt that they might have met with an unnatural death. If we had a special court with human rights, involvement of officials in this offence could have been decided and the liability determined for each person at the trial.

Bhim Singh v State of J & k and others[56], is yet another case of judicial activism whereby the court granted monetary compensation to compensate the victim. Member of Legislative Assembly of Jammu & Kashmir was arrested and not produced before the magistrate within the requisite time and was prevented from attending the session of the Legislative Assembly. When he was on his way to attend the Assembly he was arrested and taken to an unknown destination. The writ petition by his wife was to declare his detention as illegal. His wife challenged the detention and filed a writ of habeas corpus. He filed an affidavit that he was unlawfully detained in the lock-up from 10th September to 14th September 1985. The court observed: when a person comes to the Supreme Court with the complaint that he has been arrested and imprisoned with mischievous or malicious intent and that his constitutional and legal rights were invaded, the mischief or malice and the invasion may not be washed away by his being set free. In appropriate cases, the court has jurisdiction to compensate the victim by awarding suitable monetary compensation. The court awarding a compensation of Rs. 50,000/-. The Apex court treated it as a gross violation of fundamental right under Article 21 and 22. Therefore to safeguard the civil liberties the court by giving lesson to the state so that their employees do not commit tortuous acts in the name of sovereignty.

[56] AIR 1986 SC 494.

In *Peoples Union for Democratic Rights v Police Commissioner, Delhi*[57], was another case where in exercise of its jurisdiction under Article 32 of the Constitution, compensation was awarded to victims for police atrocities again the state was held liable to pay compensation. In the instant case, police had collected some people and taken them to the police station for doing work. When the workers demanded wages they are beaten up by the police and one succumbed to his injuries. Though the case was examined for criminal prosecution of the concerned police officers, the family of the deceased was directed to be paid Rs. 75,000/- as compensation. This is a clear case of excess by the police, so it also proved that how human rights violation of the citizen can be committed by the officials indirectly. It followed that a claim in public law for compensation for contravention of human rights and fundamental freedoms, the protection of which is guaranteed in the Constitution. The court referred to the preceding cases while determining state liability and clarified that there is no need of distinguishing the function as sovereign and non-sovereign, this is because of the lack of firmness in law. The court must have power to take action against the police officials who failed to register the case, when the complainant approached them.

The Supreme Court in yet another landmark judgment in *Delhi Domestic Working Women's Forum v Union of India and others*[58], laid down broad parameter for assisting the victims of rape. In this case the six

[57] AIR 1990 SC 513.
[58] (1995)1 SCC 14.

domestic servants who were subjected to indecent sexual assault and rape by seven army personnel while they were in a moving train. A public interest litigation was brought before the constitutional bench consisting of M.N.Venkatachaliah, C.J, and S.Mohan and S.B.Majmudar, J.J. While these domestic servants were travelling in the Muri Express on 10/02/1993 from Ranchi to Delhi, some army men came there and began to tease, and later they were raped by these army men. When the train stopped at the New Delhi railway station, the army men involved in this alleged crime was caught. In this case the court expressed that the victims are humiliated by the police and they faced the traumatic experience and prolonged psychological stress during the time of trial and it would be worse than the rape. The court in its innovative judgment, stressed upon the need to set up a criminal injuries compensation board for the victims. So that the victim who had suffered substantial financial loss and those who were traumatized to continue in employment, compensation could be awarded to the victim. The Criminal Injuries Compensation Board must take into consideration the loss, pain, suffering, shock, loss from the earning due to pregnancy, and the expense of the child. At the instance of the petitioners forum, it invoked under the provisions of Article 32 and 21 of the Constitution.

But in this case the court failed to grant compensation to the victims of human rights violations. This gross human rights violation was committed by the army and it was clearly proved beyond doubt. This incident occurred while they were travelling in the Express train, it shows the negligence of the

guard in protecting the travelers from the criminals. If the ordinary principle of vicarious liability was applied in this case the state would be liable for this human rights violation. Even though there is no sufficient law to protect the rights of rape victim, the court would have applied the ordinary vicarious liability principle to determine the liability of the state.

In *Chairman, Railway Board v Mrs Chandrima Das and others*[59], where gang rape was committed by the railway employees in building of railway, namely, Yatri Niwas, on a woman from Bangladesh, it was held that the Central Government would vicariously be liable to pay compensation to the victim was brought before the bench consisting of S. Saghir Ahmad and R.P. Sethi, J.J. In this case Mrs Chandrima Das a practicing advocate filed this petition under Article 226 of the Constitution against the Chairman, Railway Board, and others claiming several relief's including direction to the respondent to eradicate anti-social and criminal activities at Howrah Railway Station and claiming compensation to Smt. Khatoon a Bangladeshi National who was gang raped by the employees in the building of Railways. It was not an act committed by railway employees in discharge of functions delegated to them as referable to sovereign powers of government. Running of Railways is a commercial activity. Establishing Yatri Niwas at various railways stations to provide lodging and boarding facilities to passengers on payment of charges is a part of commercial activity of the Union of India and this activity cannot be equated with the exercise of sovereign powers. The

[59] AIR 2000 SC 988.

employees of the Union of India, who are deputed to run the Railways, and to management, including the Railway Stations and Yatri Niwas, are essential components of the government machinery, which carries on the commercial activity. If any of such employees commits an act of tort, the Union Government of which they are the employees can, subject to other legal requirements being wronged by those employees. It was so when instant case was under public law domain and not in a suit instituted under private law domain against persons who, utilizing their official position got a room, in Yatri Niwas booked in their own name, where the act complained of was committed.

The train ticket examiner asked her to wait in the ladies waiting room because of having only a wait listed ticket. On being certified by the lady attendants engaged on duty at the ladies waiting room, she accompanied railway staff to Yathri Niwas and then to the rented room where she was raped by these employees. Clearly visualizing the facts and circumstances of the case the court awarded a sum of Rs 10 lakhs as compensation. The question whether the state is bound to protect non-citizens. The court referred *Anwar v State of J & K*[60], in which it was held that Article 20,21,and 22 are available not only against the citizen but also against the non-citizen and these are in consonance with the Article 3,7,9 of the Universal Declaration of Human Rights, 1948. According to which not only the citizen but also the tourist even though she is a foreigner is entitled to enjoy right

[60] AIR 1971 SC 337.

to life and so state is under an obligation to protest the life of every citizen in the country.

In a welfare state, the theory of sovereign power pronounced in Kasturilal is no longer applicable. If any activity of tort is committed by the employees, the railways would be vicariously liable for the act. Under Article 226 of the Constitution the High Court has been given power and jurisdiction to issue appropriate action for the enforcement of the Fundamental Rights. So the High Court has jurisdiction not only to grant relief for the breach of enforcement of fundamental rights but also to enforce any other legal rights including the enforcement of public duties by public bodies. The matter relates to the violation of the fundamental right or enforcement of duties by public bodies the remedy would still be available under public law notwithstanding that a suit could be filed for damages under private law. It is not a matter of violation of an ordinary right of a person but the violation of the Fundamental rights which is involved. So the court directed the Union of India that the amount of compensation shall be made over to the High Commissioner for Bangladesh in India for payment to the victim.

In *Nilabati Behara v State of Orissa and others*[61], the court bench consisting of J.S. Verma, Dr. A.S.Anand and Venkata Chala, J.J, the Supreme Court while awarding a compensation of Rs. 1.5 lakh in case of custodial death of a 22 year old boy observed that defence of sovereign immunity is

[61] AIR 1993 SC 1960.

not available if there is contravention of human rights and fundamental freedom by the state and its agencies. In this case, Nilabati's son was taken into custody for questioning in connection with a theft case, and thereafter his dead body found in a railway track. The police stated that he escaped from custody and was run over by train. Failure of the police to registered a case regarding the escape from custody shows some doubt on the police and even the police did not go immediately to the railway track to take over the dead body. It held that 'a claim in public law for compensation for contravention of human rights and fundamental freedom, the protection of which is guaranteed in the Constitution, is an acknowledged remedy for enforcement and protection of such rights and such a claim based on strict liability made by resorting to a constitutional remedy provided for the enforcement of fundamental right in distinct from, and in addition to the remedy in private law for damages for the tort resulting from the contravention of the fundamental rights. The defence of sovereign immunity being inapplicable to the concept of guarantee of fundamental rights, there can be no question of such a defence being available in the constitutional remedy. There is no dispute regarding the liability of the state for payment of compensation for violation of Article 21.

It is this principle which justified award of monetary compensation for contravention of fundamental rights guaranteed by the Constitution. When that is the only practicable mode of redress available for the contravention made by the state or its powers and enforcement of the fundamental right

is claimed by resort to the remedy in public law under the Constitution by recourse to Article 32 and 226 of the Constitution. Its power of enforcement imposed a duty to 'forge new tools' of which compensation was an appropriate one. In this case the state failed to provide their innocence, the death was presumed to have been caused by the state employees. In these circumstances, it is the duty of the court to compensate the petitioner for the violation of their guaranteed rights. The refusal of the court to pass an order of compensation in favour of the petitioner would be like mere lip-service about fundamental right to liberty. In this situation, if the court passes an order merely to release an illegally detained person would amount to denuding the significance of Article 21 which guarantees the right to life and liberty. The true foundation of democracy rests on the principle of respecting the rights of every individual. The person detained in custody already met with death due to the act of the agencies of the state, so it is necessary to compensate the loss for protecting the fundamental rights of the citizens. The court began to move away from the defence of sovereign immunity. When the state officials extinguished the human lives the remedy must be readily available. The defence of sovereign immunity being inapplicable and alien to the concept of guarantee of fundamental rights, there can be no question of such a defence available in the constitutional remedy. The defence of sovereign immunity should not be applicable against violation of fundamental right like right to life, liberty and dignity these basic rights are inherent in nature.

According to Justice Anand the public law remedy must ensure the rule of law and civilize the public power and protect and preserve the rights of the citizen and sovereign immunity cannot defeat the claim for the enforcement of fundamental rights. Arrest and detention without legal justification or if it is done without just cause and excuse limits the personal liberty guaranteed under the Constitution. The wrongdoer and the state must be responsible and accountable if the person taken into custody of police has been deprived of his life without due process of law. The remedy under public law is by way of penalizing the wrongdoer and fixing the liability of the state for the public wrong when it fails in its public duty to protect the fundamental rights of the citizen. It is this principle which justifies in awarding monetary compensation for contravention of fundamental rights guaranteed by the Constitution.

In *Saheli, a Women's Resources Centre v Commissioner of Police, Delhi*[62], bench consisting of B. C. Ray and S. Ratnavel Pandian, JJ., The fact that Kamaleshkumari was a tenant in a rented house, land owner evicted all persons, Kamaleshkumari succeeded in getting a stay order from the court. But the landowner attacked her several times, molested her, trespassed into her house. Then nine year old son came to her rescue, he was also beaten thrown on the floor and suffered serious injuries and later he died. Complaint filed by Kamaleshkumari about torture, harassment of the accused but police was reluctant to register a case. The fact that the child

[62] AIR 1990 SC 513.

was done to death on account of the beating and assault by the agency of the sovereign power acting in violation and excess of the power vested in such agency, the mother is entitled to get compensation for the death of her son. An action for damages lies for bodily harms, which includes battery, assault, false imprisonment, physical injuries and death.

in this case Supreme Court in a public interest litigation directed the state Government to pay Rs. 75,000/- as compensation to the mother, whose nine year old child died due to beating and assault by Delhi police officer before the bench consisting of B.C. Ray and S. Ratnavel Pandian J.J, While fixing the liability the court considered the torture suffered by the petitioner and her son. Death was also due to torture. The court stated that its officers infringed a person's fundamental right given under Article 21 of the Constitution. Naresh was done to death on account of the beating and assault by the agency of the sovereign power acting in violation and excess of the power vested in such agency. The court further observed that in case of assault, battery and false imprisonment the damages are at large and represent a mental pain, distress, dignity, violation of liberty and death. This is a clear case of excess by the police. It also proved that how human rights violation of the citizen can be committed by the officials indirectly. The court referred to the preceding cases while determining state liability and clarified that there is no need of distinguishing the function as sovereign and non-sovereign, this is because of the lack of firmness in law. In the matter of liability of the state for torts committed by its employees, it is now the

settled law that the state is liable for tortious acts committed by its employees in the course of their employment. In this case the landlord could influence the police officials and doctors and could manipulate the post mortem report and station diary because the local police was involved in this case. The court must have power to take action against the police officials who failed to register the case, when the complainant approached them. The police being the guardian to protect the fundamental rights and if they act contrary to this principle, the citizens can expect protection only from the court. It is the duty of the court to take into consideration the injustice suffered by the victim, to take action against the officials and to compensate the petitioner for his/her suffering.

Viewing the case from the point of view of the fact the court stated that, there should be no difficulty in holding that the state should be as much liable for tort in respect of a tortuous act committed by its servant within the scope of his employment and functioning as such as any other employer. The immunity of the crown in the United Kingdom was based on the old feaudalistic notions of justice, namely, that the king was incapable of doing a wrong and that he could not be sued in his own courts. In India, even since the time of the East India Company, the sovereign has been held liable to be sued in tort or in contract, and the Common law immunity never operated in India.

Smt. Chiranjit Kaur v Union of India and others[63], the petitioner's husband, a commissioned army officer died, in service. Writ petition was filed to take action against army officers and for claiming compensation, for the death of a military officer. The petitioner's husband Mukhbain Singh suffered from chest pain on diagnosis he was suffering from heart disease. When his wife reached there she found her husband lying in a make shift hospital without any life saving treatment and unable to move. She requested the authorities to give air lift to Ambala or Srinagar military hospital for proper treatment. But this was refused. Thereafter she found the burned body of her husband and it was proved that there was gross negligence on the part of authorities who caused mental torture to the widow. The authorities did not disclose to her the circumstances under which her husband had received the burns. She contended that his death was under mysterious circumstances because he was unable to move then the question was how he received such burn injuries. When she applied for getting a copy of the report for submitting an application for family pension this was refused on the ground of privilege in keeping the confidential document. Petitioner approached the Supreme Court claiming family pension. The authorities admitted the fact that the report of death of her husband being the confidential matters it was not disclosed to her. The case reveals the irresponsible attitude of the officers.

[63] AIR 1994 SC 1491.

After verifying the fact and circumstances of the case the court concluded that the officer died while in service under mysterious circumstances and his death is attributable to and aggravated by the military service. The court therefore, stated that the petitioner is entitled to suitable compensation as well as to the Special Family Pension and the Children Allowance according to the relevant Rules from the date of the death of her husband. The court awarded her compensation of Rs. 6,00,000/- to the wife and directed that the said amount be paid to her within six weeks from that day. The court also directed that the arrears of the Special Family Pension and the Children Allowance be paid to her within eight weeks from that day with interest at 12% per annum, and directed to pay the costs of the writ petition which were fixed at Rs. 6,000/, the court under Article 32 held that, this case is a glaring example of gross negligence and callousness on the part of the authorities and the consequent mental torment and physical and financial hardship caused to the widow and the two minor children of an army officer. The officer died while in service in mysterious circumstances and his death is attributable to and aggravated by the military service. The responsibility of his death is prima facie traceable to the act of criminal omission and commission on the part of the concerned authorities. The deceased and his family has to suffer gross human rights violation due to the criminal acts of the other army officers. The court considered the whole plea of the widow of the victim and grievance and suffering of the victim and their family for giving justice. While deciding the liability of the state the

court could have fixed the liability of the irresponsible officers also. By providing compensatory relief to such of the people and enhancing the concept of compensatory jurisprudence in public law.

In next case the petitioner approached the court for granting compensation in custodial death allegedly committed by the police officials in *Bahlen Balmuchu v State of Bihar*[64], the fact of the case was three persons namely Udai Sharma, Wilson Alias Pappu and Jonsin Koro were taken to custody, in connection with a dacoity and they were subjected to brutal attack by iron rod resulting in their death. When the complaint filed by the widow it was not considered by the police officials and no action was taken. Thereafter they moved the Supreme Court and the concerned officials were arrested by the order of the court. It was proved that the death was due to excesses and abuse of power and a criminal case was charged against them. The accused persons were held guilty and court sentence them to undergo rigorous imprisonment and of Rs. 20,000/-.

After considering the grievous human rights violation suffered by the victims due to the act of the police, the case was the contravention of fundamental right by the state or its agency compensation could be awarded under section 226 of the Constitution of India. The court directed to pay compensation to the petitioner and fixed the liability by considering the loss of her husband, the mental torture, the feeling of loneliness and the loss of the care and protection of the head of the family calculated the

[64] 2003 Cri.L.J. 3803.

compensation of Rs. 10,00000/-. In the case of threat to fundamental right due to state atrocities the Supreme Court would be a welcome step to help and promote justice to the victim and legal heirs.

Chapter III

Tortious Liability of State in Tort Law in India

The present state of law relating to liability of the State in tort in India is that the law is neither just in its substance, nor satisfactory in its form. It denies relief to citizens injured by a wrongful act of the State, on the basis of the exercise of sovereign functions of the State. A political organization which is set up to protect its citizens and to promote their welfare, should accept legal liability for its wrongful acts, rather than denounce such liability"[65]. It appears that, the liability of the State to compensate for the negligence of its officers is not analyzed to its logical end. The dilemma remains unresolved and unanswered.

Therefore relief must be given even where injury occurs during discharge of sovereign function. It is morally, ethically and even legally wrong to say that, injury caused due to discharge of sovereign functions, should never be compensated[66]. The Law Commission is strongly of the view, that this is one area of law where the need for a clear statement of the law in a statutory form is urgent, the legal maxim *Ubi jus incertum, ibi jus nullum* (where the law is uncertain, there is no law), can be applied, with great force.

[65] Dr. Rajeev Joshi, Sovereign powers and liability of state in tort, AIR 2011 Journal 206.
[66] V.S. Chauhan, Sovereign Immunity v. Fundamental Rights : A Gray area of tension in the constitutional law of India, AIR 1992 Journal 134.

The present method of determining the liability of the State in tort law in India is by distinguishing the function of the State as sovereign function and non-sovereign function. The first portion of this study deals, with the exemption from liability on the ground of sovereign function and the second portion deals with the liability of the State with respect to non-sovereign function.

3.1. Exemption from liability of the State on the ground of sovereign immunity

After the decision of Peninsular and Orientation Steam Navigation Co. Case, and In Nobin Chander Dey and Hari Banji, 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'. 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 rationale criterion to determine a particular act as sovereign. Now let us go through the subsequent cases where the court exempted the State from liability.

In *Mc Inery v Secretary of State*[67], the plaintiff sustained injury, while walking along the public road by coming into contact with a post set up on the road, due to the negligent act of the employee of the State. By putting up a post, the government was not carrying commercial or trading

[67] ILR 38 Cal. 797 (1911).

operation. Flecher. J by relying on Nabin Chander Dey said that the maintenance of public path is not a commercial function which is relating to sovereign function.

So the State was exempted from liability on the ground of privilege of doing public function. He questioned that 'what commercial undertaking or other trading operations was the government of India carrying on in maintaining the public path on the public highways?' He further restricted the State liability for such functions only, where there was some benefit or advantage to the government there could not be any liability unless it resulted in its benefit. Then court applied the theory of benefit and held the State not liable as it did not benefit by the act. The theory propounded is that State liability would extend only where there were some benefits to the government out of the alleged tortious act. The very purpose of the institution 'state' is for the benefit of the people. Instead of compensating the infringement of the rights of the people, the court tested whether the State benefited from the public function.

In *Shiva Bajan v Secretary of State for India*[68], In this case the goods were seized while exercising statutory authority but it was refused after the order for release. Without considering the breach of duty of the employee the court dismissed the suit on the ground of non-maintainability of the actions for the statutory function done by the employees. Here the statutory

[68] ILR 28 Bom 314.

privilege was extended to the consequence of the act even if the concerned officer had done the act negligently, without keeping it in safe custody.

In this case the police officer who seized the goods under a statutory authority, failed to return the same after the release, when he went to claim for. In an action against the State for compensation for the loss of goods, the court dismissed the suit on the ground of exercise of public function. There is no justification in extending the privilege to negligent act. Here the court failed to see that the statutes are made for the purpose of exercising a statutory duty by the employee of the State without any hindrance. This can be enjoyed, provided if he had done the act in good faith. There is no need of extending this privilege in case of negligence abuse or excess of power.

The same way in *Kesoram Podar & Co. v Secretary of State*[69], when the war goods were brought by the private company due to commandeering orders, the authorities failed to take delivery of and pay for it. In an action by the company, the court held that the suit was not maintainable on the grounds of sovereign immunity. Here the court had to see that the company had acted on the basis of valid order, and the government failed to comply with it and so it was necessary to compensate the company by the government for the value of the goods. Instead, the individual company had to bear the loss and this was great injustice shown towards the company by the court on the ground of sovereign immunity.

[69] (1927) 54 ILR 909.

In *Etti v The Secretary of State*[70], when the child was lost due to the negligence of the hospital authorities, the court exempted the State from liability on the ground of sovereign immunity and stated that the hospital was run for the benefit of public out of the revenue. But the court failed to understand that the revenue can be used to compensate the injured due to the act of State as explained in P & O.

In *Gurucharan Kaur v Province of Madras*[71], the police officer acted in good faith according to the instruction of the public authority, but mistakenly prevented the Maharani instead of the Maharaja from leaving the station and boarding the train. Dismissing the appeal, the Federal court confirmed that the government could not be held liable for the improper conduct of the public servant unless those acts had been done under the orders of the government or had been ratified by the government. If the decision depends upon the ratification, the State can easily escape from liability. It is also necessary to note failure on the part of employer in complying with the statutory duty of selecting the good and efficient workmen while giving employment. If a suit for compensation is filed by the aggrieved for the wrong committed by the employee of the State, the court has to see whether the act committed by the employee was ratified by the State or not. If ratified, State would be liable for it. So the judiciary can exercise its discretion to favour the State by exempting it from the liability.

[70] AIR 1939 Mad. 663.
[71] AIR 1944 F.C. 41.

These privileges can be used to protect the concerned officer who had done the act in good faith but this privilege cannot be used to determine the State liability. Actually this would help the State to enjoy more privilege if the liability depends upon the ratification by the State. The State can ratify the acts which would not impose liability.

In the case of *Secretary of State v Cockcraft*[72], when the driver of the military vehicle suffered serious injuries, due to the negligence of the P.W.D employee, suit for compensation was dismissed on the ground of sovereign immunity. There is no logical in dismissing the suit on the ground of sovereign immunity. Here the injury was caused because of negligently storing the heap of gravel, on the sides of the road and after committing negligence, the State claimed privilege. What is the justification, in granting privilege, on the ground that there is no profit, to the government by conducting public function?

In *Ram Gulam v Government of U.P*[73], bench consist of Seth J., the ornaments were stolen from the house of the plaintiffs. On a search made by the police they were recovered from another house and seized as stolen property. They were kept in the Collector Malkhana, from where they were again stolen, and were untraceable. As per the decree of magistrate the government was not liable to compensate the plaintiffs.

[72] AIR 1915 Mad.993.
[73] AIR 1950 All. 206.

On account of the negligence of the defendant's servants the ornaments were not available at Malkhanas. The plaintiff therefore, pressed the alternative relief for the recovery of their price on the ground that the ornaments were lost on account of the negligence of the government servants. Sovereignty is an essential attribute of a state, which means that it is the supreme and ultimate authority within its territory, so suit cannot be maintained against the government without the consent of the state. Court referred the number of the cases previously decided and reached the conclusion that it is settled law that an action lies against the state in respect of torts committed by government servants when engaged in undertakings carried on by the government but which could be carried on by a private person without possessing sovereign powers. Whether the immunity extends in respect of torts committed in the performance of all transactions carried on in the exercise of sovereign powers or in confined to particular kinds of transactions only. The rule embodied in the maxim '*respondeat superior'* is subject to the well recognized exception that a master is not liable for the acts of his servants performed in discharge of a duty imposed by law. Therefore, it has been concluded that the government is not liable to answer the plaintiff's claim is correct and should be upheld.

Union of India v Harbans Singh[74] at Delhi bench consisting of D. Falshaw and Mehar Singh, JJ., an appeal filed by the Union of India, the defendant against the decree dated 24-7-1953 issued by the first class

[74] AIR 1959 Punj 39.

Subordinate Judge of Delhi. The plaintiffs are the sons, daughters and widow of Khushial Singh, the deceased and they brought an action to recover Rs. 50,000/- as damage, on account of the death of their father resulting from the defendant a driver of the military department of Union of India for knocking him down and running over him when he was riding his cycle. The plaintiff alleged that 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. A number of defences were taken by the defendant, Union of India one of them 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/-

It was contended by the Union of India that it was not liable for the torts committed by its driver while driving the military truck for bringing meals from the cantonment and for distributing the same where military personnel were working. When it was being used the accident took place resulting in the death of the person. In the appeal before court, the only point raised was one regarding liability of the State for damages by the act of the defendant, the employee of the Union of India. In this case the court referred the P&O Steam Navigation Co. v Secretary of State in India, case to test whether particular act in question is sovereign function or not, and came to the conclusion from it that 'the Secretary of state in Council in India is liable for damages occasioned by the negligence of servants in the service

of the government if the negligence is such as would render an ordinary employer liable'. "There is a great and clear distinction between acts done in exercise of what are usually termed sovereign powers and acts done in the conduct of undertaking which might be carried on by private individuals without having such powers delegated to them".

What was done in this case was carrying meals to the military personnel in a military vehicle and on the basis of illustration given for sovereign function in P&O case as any act of duty done for military or naval etc, this act of the defendant was done while he was engaged in military duty in supplying meals to the military personnel and the East India Company could not have been liable and not be sued if the company were doing these acts. In this particular case the learned judge Mehar Singh J, came to the conclusion that the act was the type of act that could be carried on by private persons without reference in any delegation of power by the sovereign for carrying it out.

In this case the court failed to note that Military function may be a sovereign function but the person got injured due to the negligent act of the military staff while carrying meals to them. After committing a negligent act and thereby killing the plaintiff's father, there is no justification to say that the State is exempted from liability because they were exercising sovereign function. They forgot to consider that vehicle used by the defendant was in military service and the accident happened because of the negligence of the driver and it was in the course of employment. Without applying ordinary

vicarious liability, the privilege granted to the State is not justifiable even if in the name of military work. So there was no cause of action against the Union of India because the position of Union of India was like that of East India Company; no action would lie against it. The court concluded by applying technical ground that at the time of accident it was engaging in a sovereign function.

In this case the court had taken the view that meals being taken by the truck belonging to the military department from cantonment 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.

In *K. Krishnamurthy v State of A.P*[75], 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 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 up to wrist. The accident could have been avoided if the driver had not been negligent. He failed to give warning to the persons standing there. The accident occurred because of the rash and negligent act of the driver.

[75] AIR 1961 A.P 283.

The trial court took evidence and came to the conclusion that the accident was the direct result of negligence. It was due to the rash and negligent driving of a road roller by the driver. As contended by the driver the accident was not inevitable. The court also came to the conclusion that the damages claimed were reasonable and in any way excessive. The disability incurred by the plaintiff was permanent and the plaintiff has to suffer for this disability in future. But the court expressed its difficulty of giving favourable decision by taking into consideration the condition of the boy. In appeal it was proved beyond that the accident occurred because of the negligence 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.

The court explained that the acts done for the exercise of governmental powers may fall under different categories. They are one 'acts of State' where the immunity is absolute and other class of acts are those which are done under the sanction of municipal law or statute and its exercise of powers thereby conferred. This classification again is divided into two. They are those connected with detention of crown land and the one connected with duties. Here the driver was an employee of the PWD and was entrusted with the work of highways. The road roller was sent from this department and halted there in the department after the work got over. 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 Kumarayya 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 itself 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. In the present case, the small boy had taken reasonable care and caution and the accident occurred because of the negligence of the driver. 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. Even after the employee committing negligence which resulted in the injury, what is the justification in telling that State has not benefited out of the act and so the victim has to go without remedy. 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 *Kasturilal Ralia Ram Jain v State of Uttar Pradesh*[76], bench consisting of P.B. Gajendragadkar, C.J, K. N. Wanchoo, M. Hidayatullah, Raghubar Dayal and J. R. Mudholkar, JJ. Plaintiff was arrested by police officer in U.P on

[76] AIR 1956 SC 1039.

suspicion of possession of stolen property on search large quantity of gold and silver was seized. Gold and silver was taken in police custody until the disposal of cases. Ultimately he was released but the gold seized from was not returned the in charge of the police had absconded with the valuable property including the gold seized from the plaintiff. what is the justification in telling the owner that the seized goods were lost and the State is not liable for the damage suffered by the plaintiff, because the officers acted on the ground of statutory function. In this case the court would have followed the decision of Vidhywathi v State of Rajasthan in which it was stated that there is no justification distinguishing the function of the State as sovereign and non-sovereign in a Democratic Republican form of State while fixing the liability for its acts.

Instead of following the above decision, Gajendragadkar C.J said that the employee of the act had acted under a statutory authority which could not be done by private person. The water tight compartmentalization as sovereign and non-sovereign or governmental or non-governmental function was out of tune with a modern jurisprudential thinking and unworkable in practice. Actually this privilege is given to protect the public servant from liability and not to protect the State from liability. Whenever a public servant is engaged in statutory duty he has to comply with it so this privilege is extended to the consequence of the act also. But there is no need of extending this privilege in the case of State if the citizen suffers by the act. The privilege can be extended, provided he has committed the act

without any negligence. 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.

The above discussion indicates that the cure for the present law lies in the hands of the judiciary and not the legislature[77]. The Crown Proceedings Act, 1947, in England and the Federal Tort Claims Act, 1946, in the United States have not solved this problem in the respective countries. Especially, this is an area which requires careful balancing of public interest and private claims and the legislation by enacting provisions on one way or the other will not be able to clear up the practical difficulties which may arise from time to time. The task is empirical and it must be left to the courts to bring the law in turn with new conditions of society[78].

In *Maharaja Bose v Governor General in Council*[79], the suit was against the Governor General in Council, for damages due to malicious prosecution. The fact of the case is that on the evening of Feb 3rd 1944, the plaintiff boarded an interclass compartment in Punjab Mail at Howrah. On 4th, the said train stopped at Asansol railway station, then three soldiers holding third class ticket forced their way into the said compartment. One of the

[77] The Law Commission of India has recommended legislation, First Report: Liability of the State in Tort (1956).
[78] Alice Jacob, 'vicarious liability of government in torts, Vol. 7 1965 JILI p 251.

[79] AIR 1952 Cal 242.

soldiers occupied the plaintiff's seat. He approached two employers of the defendant's company but no steps were taken against them. When the train started, the said soldiers threatened him thereupon out of fear he pulled the emergency chain and caused the train to stop. Defendants servants to whom the plaintiff had earlier complained reached there and made certain enquires and asked the soldiers to vacate it. While this was being done the Assistant station master on duty rushed into the compartment and accused the plaintiff for pulling the chain and abused him by using filthy languages.

The plaintiff who was a renowned dancer was on the way to take part in a dance programme at Patna in aid of Red Cross. But the plaintiff failed to give his name and identity so the railway servant arrested him and with the assistance of others he was dragged out of the compartment and was taken in custody of the railway police on false charges and detained there and later released on a personal bond. On Feb 23rd, 1944 he was prosecuted before the Magistrate ultimately acquitted on July 24th, 1944. When he claimed compensation on the ground of vicarious liability, the defendant contented that the suit was maintainable because he was arrested because of his failure to give his name and identity and he had honestly believed in the guilt of the plaintiff. According to section 132 of the Railways Act, the railway employee was empowered to arrest a person if he failed to reveal his name and identity. Mitter C.J. stated that 'Whatever the damage he suffered in consequence of the unfortunate episode must be borne by him; the tax payer cannot be answerable for the same'. This act was committed

by the employee incidental to the act of commercial undertaking by the State.

Then the doubt arose regarding the maintainability of the suit. Here the maintainability of the suit against the State was determined by referring decision of P&O, by Sir Barness Pea Cock, in which, reference distinction had been made between the acts which are done by the crown in pursuance of ventures, which a private individual is undertaking and acts done in exercise of governmental powers, which would not be lawfully exercised by the sovereign authority or persons to whom the sovereign authority might delegate such powers.

So in this, suit would lie against the government in a business or commercial undertaking owned by the State based on the theory of benefit. While conducting the alleged wrong the employee was engaged in a commercial function which is incidental to the conduct of commercial undertaking. An undertaking which a private individual can equally undertake. So it is not in the exercise of sovereign powers. Thus the action was maintainable. Next question was whether the State had committed the alleged wrong of malicious prosecution. Here the plaintiff failed to give his name and identity so the railway servant was empowered to arrest the plaintiff. So the State was not held liable for the act of employee.

There is no rationale in applying theory of benefit to determine the maintainability of the suit. This theory would help the court to show a

leniency towards the State than protecting the injured citizen. According to this theory, liability of the State depend upon, whether the State had benefited out of the act committed by the employee. After injuring the rights of the people, it is not justifiable to say that the State had not benefited out of that wrong so the suit against the State would not be maintainable.

In *State of M.P v Saheb Dattamal and others*[80] , it is an appeal by State from the judgment and decree against it passed by the Addl. Dist judge Indore in favour of heirs and the dependents of Lala who was killed by a shot alleged to have been fired by the police while controlling riot on 21st July 1954. On that day there was a student's agitation at the main road at Indore. The District Magistrate ordered firing. When Lala and his grandson after closing the shop were returning their house, police from behind fired and one of the shots bored through the body of the car from behind and hit Lala on his back as a result of which he died. The shooting was illegal and damage was claimed. The trial court decreed Rs. 5,000/- and Rs. 4,000/- for Lala's car unusable to others and Rs. 1000/- to the grandson for the loss of guidance in his business by grandfather.

On appeal by State against this order the appellate court said that liability of the State would not arise while exercising sovereign function to maintain law and order. There is no remedy in Indian law as we have no similar law like the Crown Proceeding Act. Lala was shot while the police

[80] AIR 1967 M.P 246.

were trying to disperse the mob and the price of the car was allowed in the appeal and the grandson could not prove how much business loss was suffered or affected due to the death of his grandfather. In this case, the court failed to consider the grievance of the victim and the violation of guaranteed right to life.

In *Baxi Amrik Singh v Union of India*[81], on 14th May, 1967, there was an accident between a military truck and a car on the Mall Road in Ambala Cantt. Due to the negligence and rash driving by the truck driver Sepoy Man Singh, who was also an army employee, Amrik Singh an occupant of the car, received serious injuries. Subsequently, he brought an action against the Union of India to recover compensation amounting to Rs. 50,000/-. The Union of India apart from pleading that there was no fault on the part of military driver, he was acting in exercise of the sovereign power of the Union Government at the time of accident in so far as he was detained for checking army personnel on duty throughout that day, and therefore there was no liability of the Union of India to pay compensation.

The full bench of Punjab and Haryana High Court, after discussing in detail the various authorities on the point, came to the conclusion that the checking of the army personnel on duty was a function intimately connected with the army discipline and it could only be performed by a member of the Army Force and that too by such a member of that force who is detained on such duty and is empowered to discharge that function. It was, therefore,

[81] (1973) 75 P.L.R. 1.

held that since the military driver was acting in discharge of a sovereign function of the state, the Union of India was not liable for injuries sustained by Amrik Singh as a result of rash and negligence driving of the military driver.

In *State of Orissa v Padmalochan Panda*[82], bench consisting of G. K. Misra, C. J, and P. K. Mohanty, J. the plaintiff, an advocate practicing at Bargarh in the district of Sambalpur, claimed compensation of Rs. 10,500/- as general damages and Rs. 500/- as special damage from the defendants. There was a students agitation on 28th Oct 1964, while he was standing in the court premises he saw students were assaulted by O.M.P personnel in front of the court premises indiscriminately and recklessly when the normal court work was going on and later he himself became the victim.

But the defence of State was that four students went into S.D.O's office and asked him to comply with the demands. The S.D.O told the students that their demands had been forwarded to the Collector, Sambalpur. On refusal they forwarded to the collector. The four students threatened the S.D.O Saying that they would break law and order if the decisions on their demands were not communicated to them by the evening of that day. The four students had some

[82] AIR 1975 Ori 41.

discussion and break law and order and committing cognizable offences. Then S.D.O specially deputed OMP personnel for this purpose, came to maintain law and order but the students snatched away their lathis. So they were forced to use force to maintain peace and order. Injuries caused to the plaintiff by the police personnel with a view to disperse the unlawful crowd were in exercise of the sovereign function of the state. The state is therefore, not liable to pay damages for illegal acts committed either by defendants or by any other police personnel through the plaintiff suffered injuries in exercise of the sovereign function of the state.

In *State of Madhya Pradesh v Chironji Lal*[83] bench consist of H. G. Mishra, j., 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 resisted the claim of the plaintiff and contended that the State cannot be made liable for the damage even if caused by the acts complained of by the plaintiff. The trial court decreed the suit for Rs 377/- and dismissed the rest of the claim of the plaintiff. Aggrieved by this judgment and decree the defendant

[83] AIR 1981 M.P 65.

preferred an appeal which has been dismissed hence this second appeal. Before the appeal court, the learned counsel argued that under section 30 of the Police Act deals with the regulation of procession and section 144 of Code of Criminal Procedure Code with the maintenance of law and order. Quelling of riot is considered as sovereign function and the State government is immune from liability. It was contended that here the issue was regarding the exceeding of power by the police and the State is liable for the unlawful acts committed by the employees in the course of employment.

In this the court concluded that lathi charge was used only when the mob became unruly. This loud speaker kept in the auto which was used for leading the procession when hurriedly taken to the other side of the road became damaged on account of lathi charge.

The court made a reference to Peninsular and Oriental Steam Navigation Co. 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 upon the principle of respondent superior". Then the court referred to the cases like State v Dattamal, in which the liability was sought to be imposed on the State on the ground of the firing was in excess of the need and it was held that the State was not

liable for the act and immunity was extended to the consequence of the act. In the State of Rajasthan v Vidyawathi it was held that the State can be made vicariously liable for the tortious acts, like any other employer in the case of Rooplal v Union of India, the State was held liable due to the nature of the acts complained of in that case. In this case the court applied the Dictum laid down in Kasturilal as stated earlier, the test to know whether the State is liable in a given case or not has been decided in the light of it. "If the tortious act committed by a public servant gives rise to a claim for damages the question to ask is, was the tortious act committed by a public servant in discharge of statutory functions which are referable to and ultimately based on the delegation of the sovereign powers of the State to such public servants? If the answer is affirmative the action for damages for loss caused by such tortuous acts will not lie. On the other hand if the tortious act has been committed by a public servant in discharge of duties assigned to him not by virtue of the delegation of any sovereign power, an action for damages would lie.

This function of regulation of procession is delegated to the police by section 30 of the Police Act and Section 144 Cr.P.C is used to maintain law and order and these functions cannot be performed by private individuals. They are the powers exercised by the state or its delegates only and by their very nature, these functions are to be

regarded as sovereign function of the state, this case also falls within that dictum and so the State is immune from the liability sought to be enforcer by the plaintiff.

In *Pagadala Narasimham v Commissioner and Special Officer, Nellore Municipality, Nellore and others*[84], bench consist of P. Venkatarama Reddy, J. the suit was filed by the plaintiff as an indigent person. Claiming damages of Rs. 50,000/- against the defendants, the Commissioner and Special Officer of Nellore Municipality and the Superintendent of police, Nellore. The suit was filed on the allegations that the plaintiff was the owner of the bus APA 8230, and while it was kept for repairs near the work shop, the Municipal and the police officials removed the same on the ground that it was causing obstruction on the public road. When he approached the municipal officials for the release of the vehicle they advised him to contact the traffic police officials and when he approached the concerned police station he was directed to contact the municipal authorities. The bus was under hire purchase agreement. The plaintiff estimated the damages caused on account of the illegal seizure and detention of the bus at Rs. 50,000/-. It was contended that the suit for damages against the police officials who discharging sovereign functions of the state was

[84] AIR 1994 AP 21.

not maintainable. The fundamental requirement has not been satisfied in the present case and court dismissed the suit.

The removal of bus causing obstruction to traffic by the police or even by the employees of the municipality cannot be regarded as a wrongful act or an act committed in excess of their powers and functions. When the bus was removed there was no engine to the bus and it was not in working condition. The plaintiff was not the owner of the bus but he was hirer having possession of the vehicle. The suit for damages is not maintainable as the alleged tortuous act was committed and discharge of statutory functions i.e the sovereign power of the state. If the plaintiff's bus was wrongly detained by the police, the plaintiff was to sue against the state of Andhra Pradesh.

In *State of Assam v Md. Nizamuddin Ahmed*[85], bench consist of J. N. Sarma, J. An appeal has been filed against the judgment and decree sated 16/03/1994 passed by District judge. A suit was filed for realization of compensation damage for alleged illegal seizure of seeds and loss of business the claim was for an amount of Rs. 80,000/- with interest @18% till realization with cost and other reliefs.

The plaintiff being a seed merchant used to store and sell seeds of different agricultural production and is a member of Indian Farmers Association. On 22/04/1987 Bilasipara police station seized certain seeds

[85] AIR 1999 Gauhati. 62.

from the shop of the plaintiff and seized some other seeds from the house of the plaintiff. The value of the goods so seized was claimed by the plaintiff to be Rs. 70,000/-. The police station has no storage facility to keep the seeds and ultimately the seeds were damaged because of the negligence, and carelessness. The illegal seizure has completely damaged the plaintiff's business for whole year and thereby plaintiff had sustained a loss not less then Rs. 10,000/- as profit.

Respondent contended that the seizure was in exercise of sovereign power of the state and the plaintiff is not entitled to any damage or compensation. The court referred the Kasturulal v State of U.P 'there is a great and clear distinction between act done in the exercise of what are usually termed sovereign powers, and act done in the conduct of undertaking which might be carried on by private individuals without having such power delegated to them'.

It was alleged by the plaintiff that the loss was caused by the negligence of the police officer who had not taken care of the said property. The court agreed that the police officer acted negligently but it held that since the police officer acted in exercise of sovereign function of the state was not liable for damage caused. So in particular case, it was held that the seizure of the seeds were in exercise of the sovereign power and the plaintiff is not entitled to any damage as claimed.

In *State of Haryana v Raj Rani*[86], bench consisting of R. C. Lahoti, C .J, J. P. Mathur and P. K. Balasubramanyan, JJ, the plaintiff, a woman, had undergone a sterilization operation of the state of Haryana. Subsequently to the performance of the surgery, the woman became pregnant and delivered a child. Suit was filed against the doctor who had performed the surgery, claiming compensation based on the cause of action of unwanted pregnancy and unwanted child attributable to the failure of the surgery. State of Haryana was impleaded, claiming decree against it on the principle of vicarious liability.

Several textbooks on medical negligence have recognized the percentage of failure of the sterilization operation due to natural causes to be varying between 0.3% to 7% depending on the techniques or method chosen for performing the surgery out of the several prevalent and acceptable ones in medical science. The fallopian tubes which are cut and sealed may reunite and the woman may conceive. The methods of sterilization so far known to medical science which are most popular and prevalent are not 100% safe and secure. Inspite of the operation having been successfully performed and without any negligence on the part of the surgeon, the sterilized woman can become pregnant due to natural causes. In the absence of proof of negligence, the surgeon cannot be held liable to pay compensation. Then the question of the state being held vicariously liable also would not arise.

[86] AIR 2005 SC 3279.

3.2. Liability of the State on the ground of non-sovereign function

There was no doubt regarding the liability of the State in case of non-sovereign function. But an observation and illustration cited by Justice Peacock in Peninsular Orientation and Steam Navigation case regarding sovereign functions of the State made confusion and had been interpreted differently by different courts in *Nabin Chander Dey* and in *Hari Banji cases*. According to the interpretation given in *Nabin Chander Dey*, 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. According to the decision in *Hari Banji* the immunity of the State should be limited to the 'Act of State'. Thus in *Hari Banji*, 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.

Even before the decision of Peninsular and Orientation Steam Navigation case the liability of the State was determined in *Bank of Bengal v Union Co,* rejecting the plea of sovereign immunity raised by the company. In *Peninsular and Steam Navigation case*, while determining the liability of the State, under Section 65 of the Government of India Act 1858, with respect to non-sovereign function, the court clarified that State would be liable in case of non-sovereign function.

In *Mohammad Murad Ibrahim Khan v Govt. of U.P*[87], bench consisting of Raghubar Dayal and Brij Mohan Lall, JJ. In this case the plaintiffs are a son and a daughter of one Mohammad Farahim Khan. They were minors and their grandfather Hnji Mohammad Yusuf Khan, was appointed their guardian under the provisions of the Guardians and Wards Act. Certain jewellery belonging to a minor was entrusted with the Nazir for custody by an order of the District judge. The Nazir committed a default in the performance of statutory duty and was guilty of negligence with the result that the jewellery was stolen.

The minor after attaining majority brought a suit against the U.P Government for return of the jewellery or alternative for its value. Held that both the District Judge and the Nazir were functioning under certain provisions of law and in the performance of their duties they were negligence. The defendant contested the suit and denied the allegation of negligence. Further it was contended that the government was not liable for the tortious acts of its servants. Where the servants acts in performance of the duties imposed upon him by law, the master has no light to control him nor to give him any instruction. Servant is obeying the law and not the master and naturally the master should not be held liable for anything which the servant does while carrying out the duties. The government is not liable for orders passed by courts of justice.

[87] AIR 1956 Allahabad 75.

In an appeal by the plaintiffs against a decree of the court of justice, the question that arises for decision is whether the government is liable to pay damages on account of the price of the said jewellery. After verifying the facts and circumstances of the present case while referring the previous cases could stated that the position of the District judge was that of a bailee and therefore the Government is liable for value of the jewellery.

In *Rup Ram v The Punjab State*[88] Rup Ram, 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 'Act of State'.

The State is not immune from liability merely the act complained of may have been done in the exercise of governmental power. The State is liable for tortious 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.

[88] AIR 1961 Punj. 336.

In *Union of India v Smt. Jaso W/o Rakha Ram and others*[89], bench consisting of D. Falshaw, Mehar Singh and A. N. Grover, JJ. The military truck driver driving a truck loaded with coal from store to the general Headquarters building at Simla for the purpose of heating the room in discharge of his duties. The fact of the case is that on the morning of the 7th December 1954 Rakha Ram deceased was fatally injured by a military truck which was carrying coal and being driven by an army driver to the army general headquarter building at Simla. His widow and two children instituted a suit for the recovery of Rs. 20,000/- as damages against the Union of India alleging that the death of the deceased was due to the rash and negligence driving the truck, and Union of India was liable to the damages caused by the rash and negligence driving of its employee. Union of India defence was two fold firstly, a denial of any negligence on the part of the driver of the truck and secondly that the Union of India was not liable for the tortious act of its servants. But the lower court held that the death of the deceased was due to the rash and negligent driving and that Union of India was liable.

After verifying the facts and circumstances of the present case court stated that it is difficult to see how it can possibly be held that driving of a truck loaded with coal from some store to the general headquarter building at Simla for the purpose of heating the rooms is something done in the exercise of a sovereign power, since such a thing could be done by a private

[89] AIR 1962 Punj. 315.

person. Union of India held vicariously liable for damage for the tortuous act of the driver.

In *Prem Lal v U.P Government*[90] the district collector, purporting to act under the U.P. Requisition of Motor Vehicles Act, illegally and maliciously requisitioned the motor truck and a car of the plaintiff, Prem Lal. This was done to teach a lesson to the plaintiff, a Jana Sangh Sympathizer. This political organization was considered by the government as undesirable to them.

The Plaintiff alleged that his car was kept uncovered during the period of requisition with the result that the paint was damaged and some parts become rusty and so he had to repair it.

When the plaintiff filed a suit against the State it raised the plea of immunity which was rejected as it was out of any governmental need. So it was held that the requisition order of the vehicle by the government as illegal and held the government liable to pay compensation because the act was malafide and abuse of power, although under the statutory power for which the government cannot claim immunity.

In this case the court took a bold step to protect the right of a citizen against the arbitrary acts of the State. The magistrate misguided by his zeal, abused the powers delegated to him by the government and took away the vehicle of the appellant not because the government needed them but he

[90] AIR 1962 All. 233.

wanted to take revenge on him. In the above case, the defence of sovereign immunity was rejected by taking into account, the illegal and the arbitrary acts of the employees of Union of India. If the officers of the State exceeded the power in the course of employment, immunity is not a defence. Thus the court began to limit the application of sovereign immunity in case of abuse of power.

In *State of Rajasthan v Vidhyawati*[91], the bench consisting of B. P. Singh, C.J, J. L.Kapur, M. Hidayatullah, J., C. Shah and J. R. Mudholkar, JJ., where the driver of a jeep, owned and maintained by the state of Rajasthan for the official use of the Collector of a district, drove it rashly and negligently, while bringing it back from the workshop after repairs and knocked down a pedestrian and fatally injured resulting in his death. His widow sued the state of Rajasthan for damages for the tort committed by their servant and claimed the compensation. The court took a bold step to promote justice to the widow for the death of her husband due to the 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.

[91] AIR 1962 SC 933.

In *State of Gujarat v Memon Mahomed Haji Hasam*[92] *bench consisting of R. S. Bachawat, J. M. Shelat and V. Bhargava, JJ,* In this case, the State under the Sea Customs Act seized certain Motor Vehicles and other articles of the plaintiff but the articles while in the custody of the authorities remained totally uncared for. In an action for damages by the owner, the State pleaded that they were not bailee and so not liable. The State failed to raise the defence of sovereign immunity before the trial court. The order of the Customs officer was not final as it was subject to an appeal and if the appellate authority found that there was no good ground for the exercise of that power, the property could no longer be retained and under the Act to be returned to the owner. The property being liable to returned there was no statutory obligation to return but until the order of confiscation became final an implied obligation to preserve the property. So the state government was bound to return the said vehicle once it was found that the seizure and confiscation were not sustainable.

The court clarified that one reason sounds good that the taking care of the property seized and the duty to return the same is just like the duty of a statutory or duty arising out of bailment and cannot fall within the sovereign power. When this defence of sovereign immunity was raised before the High Court, it was refused on technical grounds. The Supreme Court observed that bailment is dealt within contact Act only but it was not correct to say that there could not be a bailment. Before deciding the case

[92] AIR 1967 SC 1885.

as seizure of vehicle and other goods by the State was held illegal, the vehicle was sold as unclaimed and could not be returned to the respondent, which he was entitled to. The court held that the articles seized under the Customs Act belonged to the owner till the decision became final and the government was under a duty implicit in the statutory provision to take care of the goods and its position was that of a bailee to take care of goods to keep and preserve it and to return it in case where the order of confiscation could not become final. The government was not absolved from responsibility merely because an order had been passed by the magistrate for disposal of the articles as unclaimed property. So the government was vicariously held liable for the negligence of its servants in the course of bailment, for which there was no need of considering, whether the responsibility of taking care of goods confiscated was arisen out of contact. The very good decision taken by the judiciary in this case, would help to remind the State to become more responsible, while selecting the officers for the purpose of exercising statutory duty. There was an obligation on the state government either to return the said vehicle or in the alternative to pay their value.

The *Satyawati v Union of India*[93], bench consisting of S. K. Kapur and S. N. Andley, JJ, in this case the vehicle was engaged in carrying hockey and basket-ball teams to Indian Air Force Station, New Delhi to play a match against Indian Air Force, New Delhi. It appears that after the match was over

[93] AIR 1967 Del. 98.

the driver went to the guard room to report about his return and was at the time of accident going to park the vehicle at the sub-motor terminus. The mishap was caused by an air force vehicle used for carrying the hockey team to Indian Air Force station to play a match. The driver of the military vehicle was dazed by the glare of the head lights suddenly put by the motor cyclist coming from the opposite direction while he was on the way to park the vehicle after the match was over. Shiam Narain Singh the deceased, motor cycle driven by the right side hit against the vehicle and was killed in an accident with a three tonner Air Force Vehicle which was at the time of accident being driven by M. N. Kanji Lal.

Mr. Parkash Narain, the learned counsel for the respondents says that it is one of the functions of the Union of India to keep the army in a proper shape, giving physical exercise of its hockey team for the proper maintenance of the force is a sovereign function and so exempted from the liability.

The court observed that even if the driver was dazed, he should have stopped the vehicle rather than attempting to turn it. It is the nature of act that has to be taken into consideration to determine whether the particular function was sovereign or not. In this incident the act was not of sovereign character so the government was held liable for the mishap.

In *Rooplal v Union of India*[94], the jawans 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.

In *Shyam Sunder v State of Rajasthan*[95], (Bench consisting of K.K.Mathew and A. Alagiri Swami JJ) In this case Navneet Lal was a residence

[94] AIR 1972 J & K 22.
[95] AIR 1974 SC 890.

of Udaipur. He was in the employment of the state of Rajasthan and was at the time working in the office of an executive engineer, in the office of the Public Works Department as a store keeper. In connection with the famine relief work undertaken by the department he 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. Parwati Devi widow of Navneet Lal brought a suit against the state of Rajasthan for damages. 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 roadworthy 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 for his act and court assessed the damages at Rs. 14,760/- a decree for the amount of plaintiff. But the state appealed to the High Court, reversed the decision.

The Supreme Court inferred that the cause of the accident was due to the negligence of the driver. It was made clear that the radiator was getting heated frequently and water was being poured in the radiator after every six or seven miles of the journey. The main point for consideration in this appeal was whether the truck caught fire due to the negligence of the driver in the course of employment usually Res Ipsa loquitur is used in imparting strict liability to the cases of negligence. Here also the driver was in the

management of the vehicle, the accident was such that it would not have happened in the ordinary course. 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. So the court apply Res Ipsa loquitur even if it was not possible for the plaintiff to give any evidence. Here there was no justification in applying the principle of sovereign immunity. 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 still lingered the archaic principle of sovereign and non-sovereign without saying any criteria of determining what is sovereign and non-sovereign. The court said that the liability of the state for a tort committed by its servant in the course of his employment would depend upon the question whether the employment was of the category which could claim the special characteristic of sovereign power. The question whether the immunity of the state for injuries on its citizens committed in the exercise of what are called sovereign functions has any moral justification today.

In Shyam Sunder case also the court even stated that the famine relief work was not a sovereign function as it had traditionally understood and the determination of the function as sovereign and non –sovereign was mainly depended on the traditional custom followed in a country. There was no authoritative principle behind it to categorize the function as sovereign and non-sovereign. This case is an illustration to show that the court is unhappy with the traditional distinction between sovereign and non-sovereign function as a basis for liability. While it would be difficult to say the famine relief is not a sovereign function, saddled liability for negligence in connection with famine relief operation, is tantamount to saying that the sovereign and non-sovereign distinction is of doubtful validity.

In *Thangarajan v Union of India*[96], bench consisting of Kailasam and Maharajan, JJ., 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 years 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. 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

[96] AIR 1975 Mad 32.

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 of causing damage by the employee of the State.

In *Smt. Basava Kom Dyamogonda Patil v State of Mysora*[97] (the bench consisting of P.N. Bhagawathi, R.S.Sakkaria and S.Murtaza Fazal Ali JJ) theft took place in the house of the plaintiff. plaintiff's stolen articles including large number of ornaments and cash worth more than Rupees ten thousand were recovered and produced by the police before the magistrate, who directed the sub-inspector to keep them with him in safe custody to get them verified and valued by a gold smith. After the trial was concluded the plaintiff submitted a request to return the articles or for the value of the goods. But they were stolen from the Malkhana, the police guard room. This request for the claim of goods was disallowed by the court on the ground that the articles were not in the custody of the court. He appeal to the Sessions court and then to the High court failed, then she filed an appeal before the Supreme Court. In a proceeding taken under section 517 of the Code of Criminal Procedure 1898, the Supreme Court observed that "Seizure

[97] AIR 1977 SC 1749.

of the property by the police amounts to a clear entrustment of the property to a government servant, the idea is that the property should be restored to the original owner, after the necessity to retain it ceases".

It was also held that 'property is stolen, lost or destroyed and there is no prima facie defence made out that the State or officers had taken due care and caution to protect the property, the magistrate may in appropriate cases, where the ends of justice so require, order payment of the value of the property'. Thus the appellant was held to be entitled to receive the seizure of the property by the police amounts to a clear entrustment of the property to a Government servant and the idea of returning the restored property to the original owner after the necessity to retain it ceases, is a best example to show that the Supreme Court began to take a step forward to determine the governmental accountability for the negligent acts committed by the officials of the State. Here the court had adopted a liberal approach in interpreting the area of State liability without considering the decision taken in P & O and Kasthurilal. Even then the judiciary was unable to lay down a clear cut test to determine State liability. In a modern perspective it is not necessary to consider the so called distinction of sovereign and non-sovereign for the determination of State liability.

In *Iqbqi Kaur v Chief of Army*[98] the damages claimed under Section 110 B of Motor Vehicles Act 1939 against the driver of the military truck and the Union of India for negligent and rash driving in which the deceased was

[98] AIR 1978 All 417.

killed. The claim was opposed on the ground that the accident was caused due to the negligence of the deceased and not due to the negligence of the driver of the vehicle. The contention on behalf of the Army Chief was that the vehicle did not belong to them. The vehicle was used for training recruits and the driver was engaged in the performance of statutory duty. The claims tribunal held that the claim was not sustainable since the driver of the vehicle was not driving rashly and negligently and the military officers were not liable since the vehicle did not belong to them and the Union of India will not be liable since the driver was engaged in his statutory duty at the time of accident.

But the Allahabad High Court held that the accident occurred due to the rash and negligent driving of vehicle and the driver as well as the Union of India were liable and rejected the plea that the act resulted in the exercise of statutory sovereign power because the truck was engaged in imparting training to the new recruits. Even if the military officers were engaged in the statutory sovereign duty at the time of accident, it was due to the rash and negligent driving so there is no need to distinguish the function as sovereign and non-sovereign. After causing death what is the justification in claiming privilege on the ground of statutory sovereign function. Here the trial court failed to consider these points and the High court also decided the case on the ground that at the time of accident they were imparting training so not engaged in sovereign function.

In *Nandram Heeralal v Union of India*[99], Indore bench consisting of G. L. Oza and G. G. Sohani JJ, In this case appeal has been filed by the two appellants parents of deceased Santoshkumar, who died as a result of an accident on the Bombay Agra Road by a military vehicle driver of army employee. It was alleged that at the time of the incident Santoshkumar who was about six years of age was standing on the left side of the footpath by the side of the road. At that time an army vehicle which was coming from Manpur was being driven at a high speed and in a negligence manner. This vehicle collided against the boy standing on the side of the road, as a result of this accident the boy was taken to the hospital where he ultimately died. Union of India contended that vehicle was being driven while discharging his duties carrying military personnel was discharging sovereign function of the state.

The Court stated that today, hardly any one agrees that the ground for exempting the sovereign from suit is either logical or practical. We do not also think it necessary to consider whether there is any rational dividing line between the so called sovereign and proprietary or commercial functions for determining the liability of the state. The concept of sovereign functions and the immunity of the state from tortuous liability is not accepted in the modern context. The government is vicariously liable for the tortuous acts of its servants committed in the exercise of its sovereign functions or in exercise of the sovereign powers delegated to such public servants. Though

[99] AIR 1978 MP 209.

maintenance of army is a sovereign function of Union of India, it does not follow that the Union is immune from all liability for any tortious act committed by army personnel. It has been passed that the respondent held liable for the compensation amount awarded in favour of the appellants.

In *Lucknow Development Authority v M.K. Gupta*[100] *bench consisting of kauldip Singh and R.M. Sahai, JJ.,* Lucknow Development authority undertook certain plots of land for the construction of dwelling housing units. After the construction was complete the authority invited applications from the desired persons for purchasing the flats. Since the number of applicants were more, the authority decided to draw it on lots, and so a flat was allotted to the respondent. He deposited the entire amount in July 1988 and the flat was registered in his name. Thereafter he approached the authority to hand over the possession of the flat to the respondent that could not be done because the construction was not complete.

The respondent approached the authority but no steps were taken to handed over the flat to him. Consequently he filed a complaint before the District Forum that even after the payment of the entire amount by the respondent possession was not handed over according to their terms and conditions. The State Commission by its order on Feb 15, 1990 directed the appellant to pay 12% annual interest upon the deposit made by the respondent and to hand over the possession after the completion of work within June 1990. In case of failure of construction of flat within the time

[100] (1994) SCC 243.

allotted, to handover the flat to the respondent, by determining the deficiency in the work and estimate the amount required for the completion of work and directed to refund the same amount to the respondent. Instead of complying with the order of the court, the State authority approached the National Commission challenging the jurisdiction of the courts in issuing such an order. The Lucknow Development authority constituted under the State Act to carry on planned development of the cities in the State were amenable to Consumer Protection Act 1986 for the act or omission relating to housing authority such as delay in delivering the possession of house to the allotters non-completion of the flat within the stipulated time or defective or faulty construction.

Dismissing the appeal the court held that it is not necessary to consider whether there is any rationale or dividing line to determine whether the act was sovereign or non-sovereign for determining the liability of the State. By the sovereignty vested in the hands of the machinery, it was obliged to comply with its duties. In case of failure to do the duty by the public functionaries or any capricious or malicious act by the authorities, the complainant was entitled to compensation and the State could not claim the privilege. The cross appeal filed by the respondent was allowed and it was further directed the appellant to pay the Estimated amount of Rs 44,615 for the completion of work to the respondent. The Commission held that the action of the appellant amounted to harassment, mental torture and agony

to the respondent and it directed the appellant to pay Rs 10,000 as compensation.

The judiciary itself felt the difficulty in applying the principle of sovereign and non-sovereign without any rationality and guidelines. The court also expressed that the constitutional machinery is obliged to be people oriented. It is better to fix the liability of the State without giving privilege in case of negligence and abuse of power. There must be accountability or social responsibility for the wrong of its servants.

In *Jay Laxmi Salt Works (p) Ltd. v State of Gujarat*[101], the State of Gujarat made a plan to erect reclamation bund to prevent the flow of sea water into certain areas and accordingly the construction was completed in 1955. Before constructing the bund, the appellant approached the concerned authority to abandon the idea of construction of bund or to change the location of it otherwise it would cause destruction to his factory. They did not accede to it. When there was heavy rain fall, the water level in this bund increased to a higher level, he approached the concerned authority to limit the water level in this river. Due to the negligence of the concerned authority the water level rose to such an extent it burst the bund and the water overflowed into the premises of the appellant's factory. Aggrieved by this, he claimed compensation of Rs. 4 lakhs from the respondents. Then the committee was appointed to assess the loss suffered

[101] (1994) 4 SCC 1.

by the appellant and it was estimated as Rs. 1,58,735/- since this amount was not paid he filed this for compensation.

The defence of the State was that the suit was not maintainable because of time barred and there was no negligence on the part of the State in constructing the bund; besides the estimate made by the committee could not be accepted by the State. The trial court dismissed the suit accepting the contentions of the State and concluded that the damage occurred because of the Act of God. On appeal before the Division Bench of High Court the single judge found that the construction of bund was for non-natural use of land. There was negligence in the act of planning and the construction by the officers concerned. The Learned judge set aside the finding of the trial court that damage was caused due to the Act of God yet dismissed that the suit was time barred.

Due to the difference of opinion regarding the decision this was referred to a third bench. They considered that liability arising out of tort was due to breach of duty and that is towards the people generally. What is fundamental is the injury and not the manner in which it had been caused. Strict liability, absolute liability, fault liability are all for the benefit of the society. In order to get redress from court it was necessary to claim by the aggrieved in a particular category of wrong so the appellant challenged it under the head negligence.

Rule in *Rylands v Fletcher*[102] is that strict liability arises, from the presence and absence of mental element. A breach of legal duty willfully or deliberately or even maliciously done is negligence, emanating from fault liability but injury or damage resulting without any intention yet due to lack of foresight is strict liability. What is fundamental is that there must be in jury and not the manner in which it has been caused. No one has the right to cause harm upon others intentionally or innocently. In this, the court preferred the rule of fault liability and took decision in favour of the appellant. Negligent in the performance of duty was only a step to determine, if the action of the government resulting in loss or injury to common man should not go uncompensated. If the construction of bund was for common man or public duty then any loss or damage arising out of it gave to tortuous liability. In the modern developing sense, the common man could not go unredressed because the wrongdoer was the State. The suit of appellant for Rs. 1,58,735/- as the amount of damage determined by the trial court was decreed with costs and also directed to pay the interest also as fixed by the court.

In this case, the court said that if any loss or damage is caused due to the act of the State, it is bound to compensate the aggrieved. The problem seen in all these cases is that even if judiciary faces difficulty with the principle of sovereign immunity which is one of judicial creation, and was introduced while deciding P & O, they could not abrogated it by their

[102] (1868) L.R. 3 H.L. 330.

creativity. According to them remedy lies in the hands of the legislature and not in the hands of the judiciary. Any way these cases reveal that there is an urgent need to modify the existing law so as to meet the ends of justice.

In *Nagandra Rao & Co v State of A.P*[103] bench consisting of R.M. Sahaj and B.L.Hansaria, JJ, the appellant was carrying business in fertilizers and food grains legally. His premises were inspected and goods were seized under the Essential Commodities Act. On 29-6-76 proceeding was terminated in his favour and the confiscation order was quashed. Collector directed the release of the goods but sub ordinates delayed it so that the goods were spoiled and decayed in quality and quantity. The Appellant then asked for compensation which was denied and therefore he filed a suit and then the State claimed sovereign immunity. The trial court decreed the suit in his favour and the State filed an appeal before the High court which set aside the decree relying on the decision of Kasturilal.

In this civil appeal, the main issue was regarding the liability of the State in case of negligence of the officers of the State while discharging their statutory duty. This was answered in the negative by the High court of Andhra Pradesh on the rationale laid down in Kasturilal, while reviewing the decision for payment of Rs, 1,06,125,72/- towards the value of the damaged stock with an interest. There was an interest at the rate of 6% granted by the trial court for the loss suffered by the appellant due to non-disposal of the good seized under the various contract order issued under Essential

[103] AIR 1994 SC 2663.

Commodities Act 1955. The claim of the appellant was negative on the ground of sovereign power of the State. Whether the seizure of the goods was in exercise of statutory powers under the Act or immunized the State from any loss or damage suffered by the owner. In this case the court clarified that in modern sense, the old archaic concept of sovereign immunity does not survive and sovereignty now vests with the people. The distinction between sovereign and non-sovereign does not exist. It depended upon the nature of power and the manner of the exercise of legislative supremacy under the constitution arising out of constitutional provision. The Executive was free to implement and administer law. The defence available to the State were for raising armed forces, making peace or war, foreign affairs, power to acquire and retain territory were the factors which were indicative of external sovereignty and were political in nature. So they were answerable to the jurisdiction of the civil court. The necessity to accept a new law in keeping with the dignity of the country and to remove the uncertainty etc was considered and than the appeal was allowed.

The court distinguished Kasthurilal from this case, in Kasthurilal the function of the police like search and seizure is an inalienable sovereign function of the State while in Nagendra Rao the State engaged in commercial activities and committed negligence where sovereign immunity is not a defence. Even if similar power is conferred under the Essential Commodities Act who exercised statutory power while searching inspecting

and seizing the property or goods, no constitutional system can condone the negligent functioning of the State its officers. When a citizen suffered any damage due to the negligence of the employee of the State the latter was liable to pay damages and the defence of sovereign immunity would not absolve it from this liability. Now the application of sovereign immunity is limited and sovereign and non-sovereign based on any of the rationality, is no longer allowed to exist.

The court stated that no civilized legal system could allow an executive to pay with the people of its own country. Uncertainty of law results in the abuse of judicial power. According to justice Holms certain justice is better than uncertain justice. The State and the laws are for the benefit of the people so there is no need of hesitation in making law in this line. In this case the court admitted the need of the State to have an extraordinary power but at the same time the State cannot claim sovereign immunity for the suffering caused to the common man by its officers acting illegally or negligently. In this case, the court determined the liability of the State with intent to compensate the plaintiff for the damage or loss suffered by the victim due to the act of government employee, the court have overruled Kasthurilal's decision at that time. Any way the court expressed its difficulty in deciding the case due to uncertainty of law. Though the decision of the Supreme Court in this case, restricted the decision of Kasthurilal to a considerable extent it failed to provide a satisfactory solution. So even after this decision, if a tort is committed by the State while repressing crime,

maintenance of public order, the plea of sovereign immunity absolve the State from liability. There are area where human rights violation are on the increase[104]. But the ill effect of the sovereign immunity of the State still stands and this has to be rectified by the State as early as possible.

In *P. Gangadharan Pillai v state of Kerala and others*[105], bench consist of Mrs. K. K. Usha, J., On the murder of a priest of the mosque at Kattoor, there arose communal disturbance in certain parts of Kerala which led riot in some places. There was a 'harthal' in Fort Cochin area to protest against the murder of the priest. Respondents who were in charge of law and order in the district were aware of the fact and no any precautions were taken in time. On 19/10/1990, 11.30 in the morning about 100 persons armed with deadly weapons and instruments attacked petitioner's business premises caused severe damage to the doors and windows and entered the hotel. Petitioner is staying at about 18 km from the place where the hotel is situated. Workers who were inside the hotel were threatened by the mob, and destroyed valuable items of properties inside the hotel. Though the respondents were aware of the possibility of such riots in Fort Cochin area but respondents miserably failed to discharge their duty, and filed a suit against the state claiming damages.

It has been contended that so long as the petitioner has no legal right to claim compensation of violation of his fundamental right under Article 14

[104] Girish, "Compensating the Victims of Human Rights Violation-Need for Legislation", The Academy Law Review (Vol 22 : 1&2) 1998 p.178.
[105] AIR 1996 Kerala 71.

of the constitution on the ground he was denied compensation. Petitioner is not entitled to claim any compensation as per law. But it has been well settled by the court that this court can pass an order in exercise of its jurisdiction under Article 226 of the Constitution for payment of money if such an order is in the nature of compensation consequential upon the deprivation of fundamental right. The award of compensation in proceedings under Article 32 by Supreme Court or under Article 226 by the High Court is a remedy available under public law based on strict liability for contravention of fundamental rights to which the principle of sovereign immunity does not apply, even though it may be available as a defence in private law in an action based on tort. So the respondent is liable to compensate the petitioner for violation of his fundamental right.

Taking into consideration all the facts and circumstances of this case the court stated that interest of justice will be served if the respondent is directed to pay an amount of Rs. 35,000/- as compensation within a period of one month with interest at the rate of 12% from 01/05/1991 till the date of payment.

In the *State of Haryana and others v Smt.Santra*[106], the respondent under went a sterilization operation at the general hospital, Gurgaon as she had already seven children and there was the advantage of the scheme of sterilization launched by the State government of Haryana. She was then issued a certificate that her operation was successful. Even though she was

[106] (2000) 1.SCC 182.

assured that she would not conceive a child in future, she conceived and gave birth to a female child, so she sued for compensation for Rs 2 lakhs as damage for medical negligence. The explanation given by the medical officers was rejected by the trial court. The trial court as well as the lower court recorded the concurrent findings that the sterilization operation performed upon Santra was not complete as the operation was conducted on the right tube but left the other tube untouched. The courts expressed that there was exhibited negligence on the part of the medical officers. In spite of the unsuccessful operation, she was informed that she would not conceive any child in future. The High court also dismissed the second appeal. Before the Supreme Court one of the contentions was relating to the vicarious liability of the State for the negligence of its officers in performing the operation. But the State contended that the negligence of the medical officers in performing unsuccessful sterilization operation would not bind the State.

By rejecting the theory of sovereign immunity, in the light of *N. Nagendra Rao & Co. v State of A.P*[107]. Common Cause, A Registered Society v Union of India, the court decreed the suit for a sum of Rs. 54,000/- with an interest of 12% and this decree was affirmed by the appellate court and the High court. This implementation programme was in the hands of government officers involved in the family planning programme. So she was entitled to claim full damage from the State government to enable her to

[107]AIR 1994 SC 2663.

bring up the child at least till she attained puberty. In the above cases the court was reluctant to apply the principle of sovereign immunity, while fixing the liability of the State.

In the *electricity Board v Shail Kumari and others*[108], the cyclist aged 37 was electrocuted from broken live wire that had fallen on the public road. The claim for damage filed by the dependent of the deceased was resisted by the board. Then the High court directed the board to pay compensation of Rs 4.35 lakhs to the claimants. Before the Supreme court, the appellant sought exception to the rule of strict liability. Even assessing that all safety measures had been adopted by the board, if the activity was hazardous or risky exposure to human life, it would be under the law of torts to pay compensation for the injury suffered by him. The basis of such liability was foreseeable, risk inherent in the very nature of such activity. The defence of "Act of stranger" would not apply in this case because there was no evidence to show that the board had anticipated the act of strangers and it had already taken precautionary measures to prevent it. In this case the court expressed its view that even if all safety measures had been provided if the activity affects the human life, it is the bounden duty to pay compensation. This principle is application only in case of hazardous cases so the victim has to prove that the case comes within the purview of this category. So this principle can be enforced in certain circumstances as specified in Rylands v Fletcher. This can be applied in cases relating to State liability by taking into consideration its duty. In a welfare State it engages in all activities which are beneficial to the society.

[108] (2000) 2 SCC 162.

In *State of A.P v Challa RamKrishna Reddy and Others*[109] , bench consisting of S. Saghir Ahmad and D.P.Wadhwa, JJ. In the instant case the deceased, father of claimant and claimant were involved in criminal case. The deceased as also his son who apprehended danger to their lives had informed the Inspector of Police that there was a conspiracy, to kill them and their lives were in danger, the inspector did not treat the matter seriously and said that no incident would happen within the jail. In spite of representation made by them, adequate protection was not provided to them. Extra guards were not appointed for duty. But a bomb was hurled into the cell and in the bomb explosion his father died and the respondent suffered serious injuries. When sued for compensation the State raised the defence of sovereign immunity.

The trial court allowed the contention and dismissed the suit on the ground of sovereign immunity relying on Kasturilal Ralia Ram Jain v State of U.P that the maintenance of jail is a part of the sovereign activity of the government and so suit for damages would not lie as the State was immune from being sued on that account. On appeal the High court also relied on the decision of Kasturilal but did not dismiss the appeal. But the court clarified that the right to life is one of the basic human rights. It is guaranteed to every person by Article 21 of the Constitution and not even the state has the authority to violate that right. It is a part of fundamental right of a person and a person cannot be deprived of his life and liberty except in accordance with the procedure established by law and the suit was liable to be decreed as the officers had acted negligently without taking adequate precaution even after sufficient information was given by the petitioner and his father about the danger to their lives.

[109] AIR 2000 SC 2083.

On appeal before the Supreme court, so far as fundamental rights and human rights 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 it action or the tortuous action of its officers by raising the plea of immunity for sovereign acts or acts of state, which must fail. The court referred to the observation made by the court in Nagendra Rao & Co and Common Cause, A Registered Society v Union of India and rejected the theory of sovereign immunity. The Supreme court stated that the concept of public interest has changed with a structural change in the society. No legal or political system can place the State above the law as it is unjust and unfair for a citizen to be deprived of his property by the negligent act of the officers of the State without any remedy. The basis of sovereign immunity has gone round and now the emphasis is more on liberty, equality and rule of law. The watertight compartmentalization of the functions of the State as sovereign and non-sovereign or governmental or non-governmental is not sound.

It is contrary to the modern jurisprudential thinking. The need of the State to have extraordinary power cannot be doubted. But statutory power being statutory duty for the sake of society and the people, the claim of a common man or ordinary citizen cannot be thrown out because it was done by an officer of the State even though it was against the law and negligent. The needs of the State, duty of its officials and the right of the citizen are required to be reconciled so that the rule of law in a welfare State is not shaken. In a welfare State, the functions of the State are not only defence of the country or administration of justice or maintaining law and order but it extends to regulating and controlling the activities of people in almost every sphere educational, commercial, social,

economic, political and even marital. The demarcating line between sovereign and non-sovereign powers for which no rational basis survives has largely disappeared.

Therefore, the functions like administration of justice, maintenance of law and order and repression of crime etc which are among the primary and inalienable functions of the constitutional government the State cannot claim any immunity. In this case the court referred the case of Common cause, A Registered Society v Union of India in which after going into the history of sovereign immunity which existed during the time of East India Company, this theory was rejected. Then a series of cases like Nilabati Behera v State of Orissa, death of Sawinder Singh Grower and D.k. Basu v State of West Bengal, decided protecting human rights and fundamental rights and promoting human dignity and so the law marched ahead like Pegasus. Still the government attitude clings to the old doctrine of sovereign immunity and it tries to defend it in the name of immunity or Act of State. After stating the above reasons the appeal filed by the State was dismissed. The judiciary took a progressive attitude in protecting and promoting the rights of the people. Now it is necessary to have a change in the attitude of the government. It is the need of the hour to modify the existing law in this line still the government goes back and cling on to old principle of sovereign immunity.

In *State of Punjab v Des Raj and Others*[110], the plaintiff filed a suit for recovery of damages for malicious prosecution launched against him by one food inspector. The plaintiff was illegally detained for seven days based on false report

[110] AIR 2004 P & H 113.

made by the said inspector, both the trial court and the first appellate court, found the plaintiff innocent and a lunching of prosecution against him and his consequent arrest was malicious. Damages were qualified as Rs. 2000/- holding the State vicariously liable for illegal and the wrong act done by its agent. The appellate court held that the State could not be immune from the consequence of the act of its agent.

In *Rakesh Sami and others v Union of India*[111], passengers were hit by a running train when they were boarding another train and the total failure of electricity at the relevant time. The deceased along with other passengers were compelled to cross the railway track meant for the incoming train to board the train standing at the outgoing track. There was Negligence, on the part of railway, in not providing proper platform as well as over Bridge. Compensation awarded to the dependents of the deceased, compensation would amount to Rs. 4,75,200/-

In *State of Jammu & kasmir v Zarina Begum and others*[112], Mohammad Bashir was electrocuted on 2nd August 1996. He came into contact with a broken live electric wire when he proceeded towards the main road. Negligence was attributed to the officials of the electricity department. The deceased, 30 years of age was earning Rs. 150/- per day. The total income of the deceased was said to be Rs. 4,500/- per month. Breach of duty and the consequence damage failure to keep required caution and safeguard would amount to negligence which were actionable under law. The court held that the State could be made liable to pay damages on account of negligence on the part of officials. The question as to

[111] AIR 2004 Del. 107.
[112] AIR 2004 J&K 23.

whether the appellant State was liable to pay damage and whether the negligence could be attributed to it was examined. The violation of duty was considered by the Division Bench and the compensation was calculated by considering the deceased person's earning per day Rs. 150/- and his compensation was fixed as Rs. 5,08,000/-

From the above cases, it was concluded that decision and the observation of Justice Pea Cock in P&O, made confusion in distinguishing sovereign and non-sovereign function. This became more evident in the case of Nobin Chander Dey and Hari Banji when they interpreted the law differently in determining the immunity in the light of P&O. The interpretation followed in Nabin Chander Dey influenced the court more, than the 'Act of State' principle of Hari Banji. There was no doubt about the liability of the State in cases of non-sovereign functions.

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 or non-sovereign. There were no guidelines issued by the court or legislature 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 functions 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. While determining liability for the non-sovereign functions, the court in certain cases applied the theory of benefit and ratification to restrict the liability of the State for non-sovereign functions also.

In *State of Madhya Pradesh v Smt. Shantibai*[113], the bench consisting of S.P.Khaere, J., On 26/12/1989 there was a strike of the students against the reservation policy of the government. There was traffic jam and violence. The police personnel resorted to using tear gas and lathi charge. Even then violence increased and therefore they fired in the air so that mob may disperse. The bullets from the firearms of the police hit the two ladies who are the plaintiffs and who were standing on the roof of their house which was at a height of about 10 feet from the ground. These ladies were injured. They were admitted in hospital. The plaintiffs claimed an amount of Rs. 1,75,000/- as compensation, according to them they spent about Rs. 25,000/- in medical treatment. They claimed remaining amount as general damages for the pain and suffering and permanent disability.

In the present case the only question to be decided is whether the doctrine of sovereign immunity is attracted and the state can seek protection under it. The doctrine of sovereign immunity in England was based on the common law maxim: 'king can do no wrong'. The crown was not liable in tort at common law for wrongs committed by its servants. But the Crown Proceeding Act, 1947 abolished the doctrine of sovereign immunity and thus it disappeared from the country of its origin. In Kasturilal case Supreme Court held that the state is not liable if the wrongful act was committed by its employees in exercise of delegated sovereign power. In certain decision of the court the doctrine of sovereign immunity found

[113] AIR 2005 M.P 66.

reference. But in the subsequent decisions the Supreme Court narrowed down the scope of sovereign immunity and stated that the defence of sovereign immunity is not available when the state or its officers acting in the course of employment infringe a person's fundamental right of life and personal liberty as guaranteed by Article 21 of the Constitution. In Rudul Shah case Supreme Court laid more emphasis on the principle that if a tortious act has been committed causing injury to any person he would be entitled to claim reasonable compensation from the state for the wrongful act done by its employees. The maintenance of law and order and repression of crime are the traditional sovereign functions of the state and the doctrine of sovereign immunity must be confined to that sphere alone. In that field also state can be liable to pay compensation to its citizens if their fundamental rights have been violated and they suffered injuries on that account.

In view of the above legal position the plea of sovereign immunity is not available to the state. The plaintiff sustained injuries at the hands of police officers even though unwillingly, they deserve some compensation from the state to repair the damage done to them. As per the judgment of the court the amount of Rs. 50,000/- has been awarded as compensation to Shantibai and amount of Rs. 25,000/- to Jagrani with interest at the rate of Rs. 12% per annum.

In *Jeetindera Singh v State of Himachal Pradesh and others*[114], the bench consist of Kuldip Singh, J. in this case the appellant was coming from Tarna Temple, Mandi, where he received bullet injury. He fell down and was taken to hospital. Due to bullet injury appellant suffered 25% permanent disability. The injury suffered by the appellant was on account of rash and negligence act of the police force deployed by the respondents. The agitators of Anti Mandal Commission got violent, started raising slogans and set on fire the government and private property. The respondents use all lawful means to prevent mob from further arson and violence. The appellant was injured due to police firing. The appellant filed suit for recovery of Rs. 1,00,000/- damages on account of bodily injury, loss of earning capacity, loss of job, mental shock, loss of health and money spend by the appellant on his treatment along with interest. The respondents contested that the officers were performing sovereign function of the state and limitation. The police had been performing sovereign function for saving the lives and property of government. It has been submitted that in order to prevent the bigger loss of life and property use the force and opened fire so as to protect the public, private property of innocent lives. The police action of opening firing was taken into large public interest and that too strictly in accordance with law. In case the appellant has sustained bullet injury, the appellant is not entitled to damages on account of the sovereign immunity of the state.

[114] AIR 2012 HP 61.

The trial court held that there is no evidence to prove that before opening of fire warning was given to the crowd to disburse from the place, the opening of fire by government servants was not only rash and negligence but the same was also illegal, therefore, the state would not entitled to any immunity. After referring previous cases and in view of the above legal position it has been decided by the court that the plea of sovereign immunity is not available to the state in the present case. The plaintiffs sustained injuries at the hands of police officers even though unwittingly. They deserve some compensation from the state to repair the damage done to them. They were innocent victims.

After the commencement of the constitution, a considerable change was made by the judiciary, by narrowly interpreting the sovereign immunity to protect the right of the citizen of a democratic country, as decided in Vidyawathi's case. In an action against the negligent or arbitrary acts of the employee of the State, under the statutory function like injury due to rash and negligent driving, seizing the goods illegally and arbitrarily by the employee and refusing to return the goods even after the conclusion of trial was over. Thus the courts began to limit privilege to the consequence of the act. In cases like Nagendra Rao and Lucknow Development Authority, the court was reluctant to consider the sovereign immunity but is not inclined to overrule the decision of Kasturilal. Because of uncertainty in distinguishing these functions, decision depends on the discretion of judges.

Chapter IV

Remedies Available for Tortious Liability of State in India

People seek the aid of tort in order to achieve remedies for the wrongs they believe that they have suffered at the hands of others. If the claimant is successful the law of tort provides one or more of a range of remedies and the most usual remedy in tort is that of an award of money by way of compensation known as 'damages'. The basic principle is that damages should be calculated with the aim of putting the claimant into the same position as he or she would have been if the tort had never been committed. 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[115]. 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[116]. In our society where the law has been conceived to be an instrument for bringing about the social change, the people naturally develop the habit of looking towards the state for every social political or ethical conflict. This leads to the state interference at every step of human relations and therefore numerous instances of suppression and abuse of Human Rights. But this also provides a fertile ground of experimentation in

[115] P.Leelakrishnan, "Compensation for Government Lawlessness", 27 Cochin University Law Review (1992) p 56.
[116] Vikram Raghavan, "The Compensating Victims of Constitutional Torts ; Learning from the Irish Experience," AIR 1998 Journal 105.

evolving means for combating Human Rights violation and oppressions and development of Human Rights Jurisprudence. Therefore, Indian system from the very beginning has attempts towards establishing peace and harmony all over the world ensuring basic Human Rights to all members of Human society[117].

While dealing with State liability, it is necessary to understand the remedy available under Article 32 and 226 of the Constitution in writ petition to the aggrieved in cases of human rights violation by the State agencies. 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 the High Court. Writ is an order of the court to a person or authority to do some act or forbear from doing some act. Writs are expeditious and are an effective judicial tool to hold the government and its functionaries to the performance of their duties in the right spirit[118].

The power of judicial review guaranteed under Article 32 and 226 of the Indian Constitution has been inherited from British. Traditionally this Article was used only by persons whose fundamental rights were infringed. Before the commencement of the Constitution, the High Courts other than those of Madras, Bombay and Calcutta had the power to issue prerogative writs in the nature of writ of Habeas Corpus under Section 491 of the

[117] A. P. Singh, "Human Rights: The Indian Context", AIR 2000 Journal 8.
[118] V. M. Shukla, "Legal Remedies as available under various Enactments in India", Eastern Book Company, Lucknow (1991) p.6.

Criminal Procedure Code 1898. Later this position was altered with ample power of issuing writ to the High Courts under Article 226[119]. After the commencement of Constitution, the High Courts and the Supreme Court were empowered to protect the precious rights of the citizen under Article 226 and Article 32 of the Constitution to give immediate remedy or relief to victim when a citizen's fundamental rights or legal rights are infringed. Writs mentioned under Article 226 were known as prerogative writs. The rights obtained under Article 32[120] and 226 as constitutional remedy for enforcing fundamental rights are considered as the crowning sections of fundamental rights[121].

Today the courts can be moved by filing application/ complaint/ plaints/ counter claims etc. The constitutional courts, namely the High Courts and Supreme Courts, have evolved a formula to entertain grievances of the citizens in relation to violation of more sacred fundamental rights embedded in Article 14, 21 and 22 etc. of the Constitution of India even by entertaining a telegram, post-card, letter or through other modes[122]. The restriction has been considerably relaxed by the Supreme Court. Now the court has widened the scope of public interest litigation or social interest litigations. So that the public spirited persons can approach the court for the welfare of the poor, socially and economically disadvantaged and weaker

[119] G.C. Venkata Subb Rao, " Prerogative Writs and Fundamental Rights", Madras Law Journal office, Madras (1953) p 20.
[120] Dr. B .R. Ambedkar said in Constitutional Assembly Debates that Article 32 is the most important Article in the Constitution and it is the very soul and heart of the Constitution.
[121] P. Ishwara Bhat, "Fundamental Rights", Eastern Law House, New Delhi, (2004) p. 87.
[122] Justice Binod Kumar Roy, 'Role of Judiciary in the Present Day Context', AIR 1998 Journal 17.

sections of the society, who are unable to approach the court for relief when there is infringement of constitutional and legal rights. The court laid down the guidelines that even a letter written to the Supreme Court by the poor in India can be treated as petition to enforce their fundamental rights and the court is empowered to grant remedial relief in appropriate cases. In the same way ignorance and illiteracy cannot be an impediment in the way of obtaining justice from the court.

Today courts cannot, and do not any longer remain passive with the negative attitude and it is no longer in doubt that judgment of today govern the lives of citizens and regulate functions of the state. The law must be respond, and be responsive and there should be endeavour of the legislature as well as the courts to close or considerably narrow the gap between law and morality[123].

4.1. Origin, and sources of the Writ in India

The Writ was developed in the sixteenth century in the English law which clung to the principle that "King can do no wrong" by which the king was subject to law and could not break the law. According to English law, writ was an order of the king, it was issued to the defendant to appear before the court and to show cause against the plaintiff's claim. In the beginning, the writ was the monopoly of the crown's concern. This was used by the king as his prerogative to superintend over his officers and

[123] Justice Binod Kumar Roy, 'Role of Judiciary in the Present Day Context', AIR 1998 Journal 20.

subordinate courts to protect or safeguard the liberty of the citizen. In short, the purpose of a writ was to see that the crown's machinery of public administration works properly as well as to see justice is done to the individuals.

There was no human agency to enforce law against the king. The courts were the king's courts like other feudal lords, the king could not be sued in his own court, he could be a plaintiff but he could not be a defendant. In the prerogative remedies available to the aggrieved, the crown was the nominal plaintiff. No form of writ or execution would be issued against the Crown. The defendant might have infringed the legal right vested in the plaintiff. This writ was issued to the defendant only if the claim made by the plaintiff came within the recognized form of action. If the plaintiff failed to get the writ and if his claim would not fall within any one of the categories of recognized forms of right, he will go without remedy. No one could bring an action without obtaining writ from the officer of the king.

4.2. Different types of writs

There were different kinds of writs known in the family of prerogative remedies like Habeas corpus, Certiorari, Mandamus, Prohibition and Quo Warranto. The five writs specifically mentioned in Article 32 and 226 of the Constitution are known in English law as prerogative writs, they had originated in the king's prerogative power of superintendence over the due observance of law by his officers and tribunals. The prerogative writs are

extra-ordinary remedies intended to be applied in exceptional cases in which ordinary legal remedies are not adequate.

The writ of *habeas corpus* means that they have the body to submit or answer. It is a prerogative writ for securing the liberty or subject from the wrongful deprivation of liberty of the subject or unlawful detention of the subject against his will[124]. The main object of the writ of Habeas Corpus is to give quick and immediate remedy to the person who is unlawfully detained by another. If the court is satisfied that such a detention is illegal or improper, it can direct the person to be set at liberty. And they are under legal obligation towards such subjects and the writ of habeas corpus will lie for the enforcement of duties.

The writ of *Mandamus* is the order of the superior court commanding a person or public authority to do or forbear from doing something in the nature of public duty or statutory duty.

The writ of *certiorari* is an order, quashing the decision of the inferior courts, if it is issued due to the excess of jurisdiction, or disregarding the principles of natural justice. The purpose of issuing this order is to cure the defects or, for correcting the error apparent on the face of record, or to comply with the principles of natural justice.

The writ of *prohibition* is an order issued to prevent an inferior court or tribunal from exceeding its jurisdiction, preventing the inferior courts

[124] G.C. Venkata Subba Rao, "Prerogative Writs and Fundamental Rights", Madras Law Journal office, Madras (1953) p 53.

from usurping the jurisdiction. It is designed to keep the inferior courts within their appropriate jurisdiction.

The writ of *Quo Warranto* is issued calling upon a person or authority to show what is the authority of such person is to hold the office. By this writ, a holder of a public office is called upon to show the court, under what authority he holds the office and to prevent a person from holding office without authority or to prevent him from continuing to hold which is not legally entitled to.

Writ gives immediate remedy to the victim and takes measures to prevent the ongoing human rights violation. The violation of right by the State agencies can occur in different ways and are due to breach of duty, inaction, negligence or excesses of power or abuse of power. These gross human rights violation like encounter deaths, custodial deaths and rape, custodial torture, arrest and illegal detention occurs in the course of exercising their duty like maintenance of law and order, prevention or riot and controlling terrorism etc. Then the question of vicarious liability of the State arises.

In a welfare State its functions are multifarious so there may be chance of interference of fundamental rights of the citizen by the State, and the States are justified in using a reasonable force for protecting the person and the property and at the same time the fundamental rights of the citizens are guaranteed by the State through the Constitution. If these rights

are violated, the victim is entitled to approach the court for getting a remedy. In such a situation, the question is what the remedy available from writ court is and whether the present legal system is sufficient to determine the liability of the State.

4.3. The Private law Remedy to Compensation for breach of duty

In private law, generally the wrongdoer alone will be liable for the act but in certain circumstances a person will be liable for the wrong of another, termed as vicarious liability.

At present if a wrong is committed by the State, the aggrieved party can institute suit against the State in the civil court. Similarly civil suit may be resorted to in case of violation of fundamental rights. This trial starts in the lowest courts so the aggrieved can approach the court without spending much money, it is not expensive. Elaborate trial is conducted to find out the truth. After taking evidence if the damage or wrong is established money compensation for the damage suffered by the plaintiff is ordered. The compensation will be equivalent to the harm suffered by the injured party. It will be decided by the court and is left to the discretion of the court. This procedure is followed in the private remedy under the law of torts.

4.4. The Public law Remedy to Compensation for breach of duty

The purpose of public law is not only to civilize public power but also to assure the citizens that they live under a legal system which aims to

protect their interests and preserve their rights[125]. The State is also liable for breach of duty. The State being an artificial person, can act only through its agents and servants. Question may arise as to whether the act of the servant or agent should be treated as that of the State, for the purpose of liability.

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[126]. 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 as has been noted earlier, 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.

Therefore, when the court moulds the relief by granting compensation in proceeding under Articles 32 or 226 of the Constitution seeking enforcement or protection of fundamental rights[127], it does so under the

[125] Dr. Prakash Chandra Mishra, "Victim Compensation Scheme: An aspect of Modern Criminology", 2014 Cri. L. J p 138.
[126] Salmond & Heuston; Law of Torts, Universal Law Publishing Co. Pvt. Ltd. London, 1998 p. 444.
[127] Articles 32 or 226 of Indian Constitution, which grant wide power to higher courts to protect the fundamental rights. The public law proceeding serves a different purpose than a private law proceedings. The relief of monetary compensation as exemplary damage, in proceeding under Article 32 by Supreme Court or under Article 226 by the High Court, for establishing infringement of the indefeasible right guaranteed under Article 21, of the Constitution is a remedy available in public.

public law by way of penalizing the wrongdoer and fixing the liability for the public wrong on the State which has failed in its public duty to protect the fundamental rights of the citizens. In case of violation of fundamental right by the State the aggrieved parties can approach the Supreme Court and High Court under Articles 32 and 226 of the Constitution. The difference between public law remedy and private law remedy is that in the case of public law remedy sovereign immunity is a defence whereas in the case of private law remedy sovereign immunity is not a defence. The purpose of public law is not only to civilize public power but also to assure the citizen that they live under a legal system which aims to protect their interests and preserve their rights. The wrong commited by the State it would become vicariously liable for the act on the basis of strict liability.

The public law proceedings serve a different purpose than the private law proceedings. The primary source of the public law proceedings stems from the prerogative writs and the order for monetary relief is therefore to be read into the powers of the Supreme Court under Article 32 and of the High Courts under Article 226 of the Constitution. The grants of compensation for violation of Article 21 is an exercise of the courts under the public law. It is for penalizing the wrongdoer and fixing the liability for the public wrong on the state which failed in the discharge or its public duty to protect fundamental human rights of the citizens[128]. Though there is no express constitutional provision for grant of compensation when right to life

[128] Dr. A. Raghunadha Reddy, "Liability of the government hospitals and breach of right to life" AIR 1998 Journal 154.

is violated, the Supreme Court has judicially evolved the constitutional remedy by way of compulsion of judicial conscience. It is the only practical mode of enforcement of the fundamental rights with a view to preserve and protect the rule of law.

4.5. Remedies available under Articles 32 and 226 of the Constitution

Under the Constitutional scheme as framed for the judiciary, the Supreme Court and the High Courts both are courts of record. The High Court is not a court subordinate to the Supreme Court. In a way the canvas of judicial power vesting in the High Courts is wider in as much as it has jurisdiction to issue all prerogative writs conferred by Article 226 of the Constitution for the enforcement of any of the rights conferred by part III of the Constitution and for any other purpose while the original jurisdiction of Supreme court to issue prerogative writs remains confined to the enforcements of fundamental rights[129]. So far as the appellate jurisdiction is concerned in all civil and criminal matters, the Supreme Court is the highest and the ultimate court of appeal. It is the final interpretation of the law. Under Article 139-A, the Supreme Court may transfer any cases pending before one High Court to another High Court or may withdraw the case to itself. Under Article 141, the law declared by the Supreme Court shall be binding on all Courts, including High Courts within the territory of India. Under Article 144 all authorities, civil and judicial in the territory of India and

[129] Justice Palok Basu "Law Relating to protection of Human Rights", Second edition, Modern Law Publication, New Delhi,p 906.

that would include High Courts as well shall act in aid of the Supreme Court[130].

4.5.1. Illegal arrest and detention

There are number of cases which deals with remedy granted for illegal detention of enforcement agencies, out of which *Rudul Shah v State of Bihar*[131] in this case the petitioner brought the writ petition before the bench consisting of Y.V. Chandrachud C.J, Amarendra Nath Sen and Ranganath Misra, J.J, stated that he had already completed his sentence of imprisonment and the prison officials did not take care to release him. He was kept in illegal incarceration for many years. When the petitioner approached the court the State contended that even though he was acquitted by Session Court, he was illegally detained in jail for a period of fourteen years on the ground of insanity. But the jailor could not produce evidence before the court to show that he was insane at the time of detention. When the petition came before the court he was already released and the writ petition became not fruitful even then the court interfered to show the reason for his illegal detention and why he was not given compensation for the infringement of his fundamental right to freedom.

The jailor could not give any sufficient reason for his detention and so his detention in jail was wholly unjustified. After going through the injustice

[130] Tirupati Balaji Developers Pvt. Ltd. v State of Bihar AIR 2004 SC 2351.
[131] AIR 1983 SC 1086.

shown by the jail authorities the court wanted to rectify it by exercising the power under Article 32 of the Constitution. According to the version of writ court money claim could be instituted in a lowest competent court. But here in this case the petitioner had been detained in the prison for a period of fourteen years after his acquittal. He contended for getting compensation for the illegal detention. Otherwise it would be denial of the guaranteed right provided in Article 21. Taking into consideration of all these things the court evolved a new remedy of providing compensation to the victim of tortuous acts done by the government during sovereign functions and issued a direction to the State of Bihar to award appropriate compensation and denial of justice. So the State was directed to pay Rs. 30,000/- in addition to Rs. 5,000/- and also clarified that this order would not preclude the petitioner from claiming compensation from the civil court. In this case Chandra Chud C.J, Clearly expressed that even though our precious rights guaranteed under Article 21 have been violated by the instrumentalities of the State, due to their unlawful act in the name of public interest, the only method available to the court is to apply compensatory justice to the victim. In this landmark case, the court without referring the sovereign immunity, explained the need of respecting the fundamental right in a democratic country.

The writ court has made an innovatory step to promote human rights jurisprudence. It is not fair on the part of the writ court, to tell the petitioner to approach the civil court for getting damages for the injury suffered by

him. Here the writ court expressed that this order did not preclude him from claiming compensation from civil court. This happens because of the uncertainty or lack of law in this line. The writ court can serve its purpose only if it takes immediate action in case of emergency to prevent human rights violation. This must be avoided by finding out alternative remedy to the victim of human rights violation by the State. The main purpose of the writ court must be to protect the life of a person in danger and only urgent cases must be dealt with in the writ court then only the writ court can serve the purpose of giving immediate remedy to the victim.

In *Bhim Singh v State of J&K and others*[132] a member of legislative Assembly of Jammu and Kashmir was arrested and not produced before the magistrate within the requisition time and was prevented from attending the session of the legislative Assembly. The writ petition by his wife was declare his detention was illegal. He was released on bail on 16th September 1985 by the Session Judge. Then he filed an affidavit that he was unlawfully detained in the lock-up from 10th September to 14th September 1985. It was made clear from the evidence that even before receiving information about the case registered against him the officer in charge of the police station had instructed to arrest him. Without producing him before the magistrate the police got remand order from the Magistrate and the Sub judge. Further submission of remand for two days was on the ground of illness of the accused. Bhim Singh denied the fact that he was examined by a doctor. In a

[132] AIR 1986 SC 494.

case relating to illegal detention and arrest, the affidavit of the officer who arrested, officer in charge of the police station, is essential and inevitable but this was not produced before the court. Bhim Singh was not produced before the magistrate and sub judge and the application was brought before them after the office hours at their residence. Officers who granted remand was not bothered whether the person whom they were remanding to custody had been produced before them. The police officers, acted deliberately, maliciously and the Magistrate and the Sub-Judge aided them. The police were alerted to arrest him and to prevent him from proceeding to attend the Session of the Legislative Assembly. All these incidents reveal the high handedness of the police in the citizens guaranteed rights. The Supreme Court was shocked when it learned that a member of legislative assembly of Jammu and Kashmir was wrongfully arrested with the sole object of stopping him from attending the Session.

Shri Pranab Jyothi Gogi v State of Assam[133] the writ of Habeas corpus petition dated 18-03-1991 was filed by Dhruba Jyothei Petitioner, for the illegal arrest and detention of his brother by an army personnel on 17-03-1991. This petition became infractuous as he died in the custody of the army authority on 19-03-1991, before delivering the court order on 20-03-1991. The purpose of the writ itself was defeated due to the delay, in deciding the case. This could have been avoided if immediate steps were taken by the writ court.

[133] 1992 Cri. L.J. 154.

Inder Singh v State of Punjab and others[134] this was a habeas corpus petition to secure the release of the seven persons abducted by the senior police officer and other police men by using the official machinery. In this case the police officers admitted that crime was committed by the Deputy Superintendent and his accomplice. In this case also if the official had taken immediate step to release the persons taken into custody the crime would have been prevented.

In *Aryendra Nath Gupta v State of Meghalaya and others*[135] this writ petition had made a prayer for declaring the arrest and detention for the period from 20th to 29th January 1997 as illegal and praying for the direction on the respondents to grant Rs 2lakhs and Rs 1lakh for the suffering of the members of his family. However he was released on bail on 29th January 1997 in view of the registration of the case against the petitioner, the central government class 1 employee was suspended from service as he could not come out on bail within 48 hours and he suffered both financial and otherwise during his custody period. Though the charge sheet filed against him was dropped, the petitioner was tried for the rest of the offence and later on he was acquitted. The petitioner filed a writ petition for malicious prosecution. When sued it was resisted on the ground that it was not maintainable as there was alternative remedy available in criminal procedure code for taking action for Section 250 which deals with provision for accusation without reasonable cause and section 211 of the IPC also

[134] AIR 1995 SC 312.
[135] 2003 Cri. L.J 1058.

provided to institute any proceeding against the person who took action of false charge was made. As there was an alternative remedy for it, writ court could not entertain while exercising its jurisdiction under Article 226 of the Constitution and so the writ petition was dismissed.

4.5.2. Medical Negligence

Negligence is both a civil and criminal wrong and punishable either by compensation or with imprisonment. As a civil wrong or tort it has been defined 'as a breach of legal duty to take care, which results in damages, undesirable by the defendants to the plaintiff[136]. Under the Indian Penal Code 1860, section 304A provides that if any death is caused of a person by the rash and negligence act of another person, the latter shall be punishable with imprisonment upto two years, or fine or both. The principles underlying negligence have been clarified in numerous cases.

In *Achutrao Haribhau Khodwa v State of Maharashtra and others*[137], bench consisting of S. P. Bharucha and B. N. Kirpal, JJ., Chandrikabai was admitted to the government hospital where she delivered a child on 10th July, 1963. She had a sterilization operation on 13th July, 1963. This operation is not known to be serious in nature and in fact was performed under local anaethesia. Complications arose thereafter which resulted in a second operation being performed on her on 9th July, 1963. She did not survive for long and died on 24th July, 1963. Both Dr. Divan and Dr.

[136] Mahesh C. Bijawat, "Hospital and Doctors Negligence", JILI 1992,P 255.
[137] AIR 1996 SC 2377.

Purandare have stated that the cause of death was peritonitis. In case like this the doctrine of *res ipsa loquitur* clearly applies. Chandrikabai had a minor operation on 13th July, 1963 and due to the negligence of respondent a mop (towel) was left inside her peritoneal cavity. But it also happens that complications can arise when the doctor acts without due care and caution and leave a foreign body inside the patient after performing an operation. There was no doubt that the mop left in the abdomen caused it, and it was the pus formation that caused all the subsequent difficulties. There is no escape from the conclusion that the negligence in leaving the mop in Chandrikabai's abdomen during the first operation led, ultimately to her death.

Two questions which arise for consideration in this appeal was: Whether the state of Maharashtra can be held liable for any negligence of its employees and secondly whether the respondents or any one of them acted negligently in the discharge of their duties. The court referred the number of previously decided cases in Nagendra Rao case, the demarcating line between sovereign and non sovereign powers for which no rational basis survives has largely disappeared. The determination of vicarious liability of the state being linked with negligence of its officer, but the crown was held immune on doctrine of sovereign immunity has become outdated and sovereignty now vests in the people, the state cannot claim any immunity and if a suit is maintainable against the officer personally, then there is no reason to hold that it would not be maintainable against the state.

The State must be held to be vicariously liable to the negligent acts of its employees working in the said hospital. Once death by negligence in the hospital is established, the state would be liable to pay the damages.

In P*. N. Rao v G. Jayaprakasu*[138] In this case P. N. Rao was an E.N.T surgeon ans S. Sharkar Rao was the Chief Anaesthetist at the General Hospital, Guntur. The plaintiff G. Jayaprakasu was a brilliant young man of 17 years in age 1966. He was a government scholarship holder a d offered a seat in B. E. degree course in four engineering colleges. He suffered from a minor ailment chronic nasal discharge for which his mother took him to P. N. Rao for consultation, who diagnosed the disease as nasal allergy and suggested an operation for the removal of tonsils. The plaintiff was admitted on 6/07/1966 and the operation was performed on 7/7/1966. His father who was the government servant and other relatives were present in the hospital at the time of operation, none of them were allowed to be present when the operation took place. The plaintiff was brought out from the operation theatre in an unconscious stage about one and half hours after he was taken there. The doctor informed the patient's father that the patient would regain consciousness after three to four hours. He was kept in the E. N. T ward where he did not regain consciousness for the next three days and thereafter for another fifteen days he could not speak coherently. He was discharged on 28/08/1966 and at that time he could barely recognize the person around and utter a few words. He could not even read or write numerical. He had lost all the knowledge he had acquired.

His father alarmed at his condition took him to Vellore where he was examined by the K. V. Mathai Neuro-Surgery, Christian Madical College. After examining the patient, Mathai in his written opinion stated that the plaintiff had cerebral damage and his intellectual ability was that of a boy of five years. The boy was then taken to Bangalore where he was examined by S. A. Ansari,

[138] AIR 1990 A.P. 207.

Assistant Professor of Psychiatry, at the Indian Institute of Medical Health. Ansari was of the opinion that there was organic damage which was due to cerebral anoxia and the damage to nerve cells was total and irreversible. The prolonged unconsciousness of the plaintiff was due to cerebral anoxia suffered during the operation.

In this case a suit was filed against the doctors and the government and claim for Rs. 50,000/- for the permanent damage suffered by the brilliant boy, due to the negligence of the doctors. The judge after considering the evidence on record concluded that during the operation the respiratory arrest occurred due to Sharkar Rao, the anaesthetist, who removed the tube from the mouth of the plaintiff without giving fresh breaths of oxygen and then there was delay in noticing the respiratory arrest and inserting the tube for the second time. The respiratory arrest led to cardiac arrest which made chest compression to assist circulation of blood. The judge also held that the symptoms of the plaintiff on the operation table would have led any prudent doctor to easily suspect cerebral anoxia, but Sharkar Rao did not care to ascertain the reason for the pulse abnormality of the patient nor did he record the levels of blood pressure after the respiratory arrest and resuscitation or inform the surgeon about this.

Thus Sharkar Rao was clearly negligent in discharging his duty towards the patient. P. N. Rao the surgeon was also held to be negligent because he was aware of the respiratory failure still he carried on the operation merely because the anaesthetist informed him that the patient was fit for it. The state government was vicariously liable since both doctors were employees of the government hospital. The judge awarded only Rs. 22,000/- as damages, though

the sum asked for was Rs. 50,000/-. An appeal was filed against the judgment by the state government. The anaesthetist, Sharkar Rao died after his evidence was recorded. The High Court was truly shocked by the case. The court found the surgeon guilty of negligence.

Regarding the vicarious liability of the government, the court was of the opinion that it cannot escape from the responsibility in such cases, this principle has already been established in many cases. The government was thus held vicariously liable for negligence by the court. With regard to the quantum of damages awarded by the lower court, the High Court was totally dissatisfied by the amount given. It felt that for a grave injury of the nature sustained by the plaintiff no amount of money would be 'a perfect compensation'. He was entitled to substantial damage which was estimated to be Rs. 2 lakhs. But the plaintiff had asked for only Rs. 50,000/-, it had no option to increase it and so this amount was awarded along with interest at 12% from the date till realization.

The Joint Director of Health Services, Sivagangai v Sonal[139], Mrs. Panchavarnam gave birth to her third child on 4/12/1989. A motivator of family planning encouraged her to undergo a sterilization operation. The patient was admitted to Paganeri Government Hospital. On 14/12/1989 Mrs. Panchavatnam was operated upon by the medical officer who on the same day performed five more operations. She was discharged on 15/12/1989 from hospital and thereafter kept in the Health Sub-Center at Melappasalai for two days and sent home after discharge. The stitches were removed by the motivator at the residence of the patient. The motivator was not a qualified person. After discharge from the

[139] AIR 2000 Mad 305.

Paganeri Government Hospital and during her stay in the Health Sub-Center at Melappasalai the patient complained of abdominal pain and continued doing so at home. The patient expired on 0/01/1990 after being taken to Madurai District Hospital on 22/12/1989.

The trial court relied upon the evidence of a medical practitioner who opined that correct post-operative care was not given to Mrs. Panchavarnam as was expected from medical practitioner. The patient was not given any advice on her discharge from hospital. Further, it was shown at the trial that the motivator, who was not a qualified person, had removed the stitches at the home of the patient. Both the trial court and the Lower Appellate Court, held that the first two defendants (the medical practitioner employed by the Government Hospital and the motivator) were guilty of negligence while the third and fourth defendant (Director of Medical Services and State of Tamil Nadu) were vicariously liable to pay compensation to the plaintiffs (husband of deceased and three children). The state of Tamil Nadu preferred a second appeal to the Madras High Court.

Two substantial questions of law were raised in the appeal before the Madras High Court by defendant numbers 3 and 4 in the memorandum viz, whether the courts below were correct in holding that death occurred due to negligence in carrying out an operation and whether the plaintiffs are entitled for relief claimed in the suit. The Madras High Court held that vicarious liability is based on the legal principle that 'masters' (employers) are held liable for the torts (wrongs) committed by their 'servants' (employees), even though the tort is one which is not ordered or authorized, if the wrong committed by the servant, is within the course of his employment. The common sense rule behind the legal

principle is that employees are usually people of slender means and it is fair that an injured person should be entitled to seek compensation from those who control and profit by the organization in which he is employed. The proof required in a suit by an injured plaintiff is that the defendant who has committed the tort must be a 'servant' and the injury complained must have been committed by the servant acting during the course of his employment.

The definition of a 'servant' is any person who works for another upon the terms that he is to be subject to the control of that other as to the manner in which he shall do his work. Drivers, casual labourers and apprentices are clearly servants. Thus a servant is said to be employed under a contract 'of service' while an independent contractor is said to work under a contract 'for service'. From this basic premise law has widened the meaning of a servant to include those skilled workers who are employed – thus hospital authorities have been held vicariously liable for the negligence of nurses, radiographers and even of whole-time medical officers.

Though a master is held liable for acts of his servant he cannot be held liable for every wrongful act his servant commits, but only for acts committed by his servant when going about his master's business. Whether any particular act does thus fall within the scope of the servants employment must be largely in each case be a question of fact. In the instant case, the second defendant was a motivator of family planning and had got the deceased admitted in the Paganeri Government Hospital where the first defendant had operated upon her. The second defendant had visited the house of the patient and had removed the stitches though she was not even a qualified nurse. Hospital authorities could not

have permitted the act of the second defendant and may even have impliedly prohibited it but was still held vicariously liable.

Overruling the decision of the High Court that the Government was exercising sovereign functions in the Supreme Court observed, “We do not think that this conclusion is correct. Running hospital is a welfare activity undertaken by Government but it is not an exclusive function or activity of the Government so as to be classified as one which could be regarded as being in exercise of its sovereign power. Just as running of passenger buses for the benefit of general public is not a sovereign function, similarly the running of a hospital, where members of the general public can come for treatment, cannot be regarded as being an activity having a sovereign character. This being so the state would be vicariously liable for damages which may become payable on account of its doctors or other employees”.

On the principle declared by the Honorable Supreme Court, it has to be held that the state is also liable for damages caused by the death of the late Panchavarnam. Thus, while Government hospitals/ health centers/ dispensaries would not be liable to be sued under the Consumer Protection Act, 1986 for damages for causing injury by a negligent act by one of its employees an injured patient could claim right of damages from the state under the general law of the land.

4.5.3. Custodial Rape

Custodial violence by the police against women are on the increase. Whether the state would be liable if the custodial violence is committed by the officials of the state in the course of employment, or the court in India is sufficient to prevent remedy with the existing legal system.

In *P. Rathina v Union of India and others*[140], the writ petition before the bench consisting of Ranganath Misra and M. N. Venkatachalian, JJ, filed that four of the police officers of different grades involved in the incident of rape had been suspended and taken into custody and are being proceeded against. Their bail was cancelled by the High Court and the court directed the state government to pay an interim compensation of Rs 20,000/- to the victim Kalpana Sumathias. She had to face physical and mental suffering due to custodial rape. This humanitarian decision of the court is commendable as it had taken into consideration the suffering of the victim while imposing punishment to the accused.

In this case Kalpana Sumathi was taken into custody in connection with the kidnapping of a relative, she was stripped naked by the police before the crowd and subsequently was raped by several persons in the cabin of a truck when it was rerouted to the local police station.

In Arivander Singh Bagga v State of U.P and others[141], In this case the petitioner was pressurized by the police officers to write a letter which was dictated by the police officers and their intention was to abandon her marriage. She was continuously tortured by the police several days by using physical force

[140] 1989 supp(2) SCC 716.
[141] AIR 1995 SC 117.

like abusing, threatening, assaulting on her leg with Danda, and hitting on her head. Ultimately they succeeded in making her write the letter as dictated by them.

The petition filed by Nidhi for illegal detention and harassment of the petitioner by the police officers. She was tortured to abandon her marriage with Charanjit Singh Bagga which had been duly performed in Arya Samaj Bhoor and had been duly registered in the office of the Registrar of Hindu Marriages under the U.P Hindu Marriage Registration Rules, 1973 framed by the Governor in exercise of the powers conferred by Section 8 of the Hindu Marriage Act, 1955. After conducting a lawful marriage the police officers interfered in their right to privacy.

While determining liability of the state, the court would have determined the liability of the individual erring officials also. The court held in this case of atrocities against women, if there is clear proof there is no need of waiting to get sanction from the department to take action against the officials. The court expressed that in the case of Constitutional torts compensation must be according to the responsibility for the damage committed by each person. The court directed the state to pay compensation of Rs 10,000/- to Nidhi Rs 10,000/- to Charanjit Singh Bagga and Rs 5,000/- to each other person who were illegally detained and humiliated. The court also directed to recover the amount of compensation from the concerned police officers.

In *Vishaka and others v State of Rajasthan*[142], this case was brought before the Supreme Court bench consisting of J.S Verma C.J, Mrs Sujata V. Manohar and

[142] AIR 1997 SC 3011.

B.N. Kirpal JJ, to focus the attention towards the sexual harassment of working women. A writ petition has been filed to enforce the fundamental rights of working women under Article 14, 19 and 21 of the Constitution, to prevent sexual harassment in all working places and to make necessary legislation for the protection of women. The main reason for filing this petition was due to the alleged brutal gang rape of a social worker in the village of Rajasthan. In this case, the petitioner wanted to lay down some guidelines for the protection of working women and to eradicate this social evil.

The action was also brought by social activists and N.G.O'S focusing all attention to prevent sexual harassment. Immediate cause for filing this petition was an incident of alleged brutal gang rape of a social worker in a village of Rajasthan. This was to invite the urgency for an alternative mechanism in the absence of legislative mechanism. So this case reveals the lack of alternative mechanism. In the absence of domestic law to check the social evil of sexual harassment of working women at the place and to take effective measures, an international convention consistent with fundamental rights and in harmony with the spirit must be read into the provision to enlarge the meaning and content of the Constitutional guarantee. It is necessary to formulate law in the light of international conventions and norms can be used for the guarantee of gender equality, right to work with human dignity under Article 14, 15, 19 (i) (g), and 21 of the Constitution and the safeguards against sexual harassment which is implicit in Article 51(c) and this enabling power of the Parliament to enact laws for implementing the international conventions and norms by virtue of Article 253 read with entry 14 of Union list in the seventh Schedule of Constitution. So the

International Conventions and norms have a great significance in the formulation of guidelines to achieve this purpose.

1) It shall be the duty of the employer to prevent sexual harassment

2) deals with definition

3) to take preventive measures

4) criminal proceeding

5) disciplinary action

6) complaint mechanism

7) complaint committee

8) working mechanism

9) awareness

10) third party harassment

11) the central and the state government are required to take suitable measures including legislation

12) these guidelines will not prejudice human rights protection Act, 1993.

The Supreme Court directed that guidelines and norms would be strictly observed in all workplace for the prevention of their rights and to enforce guarantee of equality.

The court also laid down certain guidelines and norms to be followed by the employer in the work place. A suitable legislation is required to protect the right

of the women to live with dignity and to compensate the victim by taking steps, to strengthen and ensure the fundamental right to life and liberty to women. The court had given directions to the central government and the state government to follow certain guidelines and norms to be observed in all work place to protect the right of working women.

In Chairman Railway Board v Mrs. Chandrima Das and others[143] this was the case brought before the bench consisting of S. Saghir Ahmad and R. P.Sethi, JJ, Mrs. Chandrima Das a practicing advocate filed this petition under Article 226 of the Constitution against the Chairman, Railway Board and others claiming ceveral relief's including direction to the respondent to eradicate anti-social and criminal activities at Hawrah Railway Station and claiming compensation from the central government to Smt. Hanuffa Khatoon a Bangladeshi National who was gang raped by thje employer in the building of Railways.

The fact of the case has been Smt. Hanuffa Khaatoon an elected representative of the Union board arrived at Howrah Station on 26th Feb 1998 at about 14 hours to avail express. As she had only a wait listed ticket, the train ticket examiner asked her to wait in the ladies waiting room. On being, certified by the lady attendants engaged on duty at the ladies waiting room. She accompanied railway staff to Yathri Niwas and then to the rented room where she raped by these employees. On the basis of the above facts the High Court awarded a sum of Rs 10 lakhs as compensation to Hanufa Khatoon as the rape was at the building of Yathri Niwas belonging to the Railways and was perpetrated by the railway employees.

[143] AIR 2000 SC 988.

4.5.4. Custodial Deaths

In *Sebastian M. Hongray v Union of India*[144], the petitioner a student of political science in Jawaharlal Nehru University and a member of Naga community from Manipur, filed a writ petition as to know the whereabouts of the two respectable persons of his village C.Daniel and C.Paul who according to him were detained by the army personnels on March 10, 1982. It was argued that these two persons after being taken into the army camp under arrest never left the camp and was anxious to know what had happened to them.

The petitioner said that the Sikh regiment set up a camp at Phungrei, and they had certain persons into custody, most of them were released on March 6, 1982. Later the jawans ill treated the women of that locality. Subsequently there was a disturbance of peace and order. The jawans resorted to firing which resulted in the death of one Luinam. On March 7, 1982, Magistrate visited the plakhe to enquire into the incident. The jawans who were present in the village produced before the officers, certification of villagers exonerating them from the allegation of ill treatment and the conduct of jawans under duress from local residents. On March 7, 1982 Paul and Deniel were on Sunday service, they were disturbed by the jawans and these jawans proceeded to get signature from the villagers. The certificate was obtained to show that the army officers had not treated the villagers with force and cruelty. They tried to get signature on blank papers from the villagers. On March 10 these two persons were arrested by the army jawans and were taken away from the village. As they did not return to the village till March 15, 1982 their wives went to the camp in search of them and

[144] AIR 1984 SC 1026.

they saw that they were being led away by army jawans to the west. They filed a complaint to the Deputy commissioner on March 10 and telegraphic messages were sent to the Superintend of police on March 15, 1982 requesting them to enquire about them. After having filed complaints they filed a habeas corpus petition before the Supreme Court (Bench consisting of D. A. Desai and O. Chinnappa Reddy J.J) on February 1983, as the detention was illegal invalid and contrary to Article 21 considering the seriousness of the offence, the court directed to serve notice on February 9, 1983. In the counter statement they stated that they were not arrested but they had called for attending the identification parade to find out the suspects involved in the allegation and they had been allowed to go on March 11, 1982, and since then security force had no knowledge about them.

When the court called for the report of the superintendent of police about the action taken against the complaint by the petitioners, the Government of Manipur claimed privilege on the ground of public interest. Counsel appearing for the State failed to give any information regarding the disappearance of those persons. From the evidence it was found that these two persons were last seen in Phugrei camp on March 11, 1982. Widows of these persons had last seen them on March 15, 1982 while they were being taken by the 4th respondent again under the custody of jawans. Even in case of ex-parte the court issued an order by considering the seriousness of the incident and called for the report. After the perusal, it was found that it would not give any help. The court allowed the petition and issued a writ of Habeas corpus to the Union of India and other concerned officials, commanding them to produce C.Deniel, retired Naik subedar of Manipur Riffles and Head Master of the junior high school of Huining village

and C. Paul, Assistant Pastor of Huining Baptist Church who were taken into custody by military jawans. On November 24, 1983 the court by its judgment and order directed to produce Deniel and Paul before the court on December 12, 1983. The Director stated his inability to produce them even after their best efforts. The Government also failed to locate them. The C.B.I submitted its report of not locating these two persons. They had a legal obligation to produce those person who were taken into custody illegally. There was willful disobedience on the part of State in not responding to the writ of habeas corpus and misleading the court that they had left the camp. So it amounted to civil contempt.

Hence rejecting the submission the court consisting of D.A. Desai and Chinnappa Reddy J.J said that the civil contempt was punishable with imprisonment as well as fine and directed the Union of India to award exemplary costs of Rs 1 lakh to each of the woman and also issued a writ of Mandamus to the Superintendent of police to commence investigation under Cr. P. C. The court said that Union of India cannot disown responsibility and to commence investigation as prescribed by the relevant provision of the code of criminal procedure. From the facts and circumstances of the case, the court came to the conclusion that they might have met with unnatural death. By considering the mental suffering of these two widows, the court held that the government was liable for civil contempt. In this case the State neither complied with the duty of protecting and securing the life of citizen, but also it committed torture, agony and mental oppression to the wives of the victims. This judgment was one of the excellent verdicts given by the court without referring to sovereign immunity. Here in this case after through enquiry was made bt the investigating officers, the court expressed doubts that they might have met with an unnatural death. If we

had a special court to deal with human rights, involvement of officials in this offence could have been decided and the liability determined for each persons at the trial.

In *People's Union for democratic Rights v State of Bihar*[145] this was a writ petition under Article 32 of the Constitution (before the bench consisting of Ranganath Misra and M.M.Datt J.J) to issue writ or order in the subject of payment of compensation to the victims, relating to dead or wounded by police firing, to withdraw the police case, to direct the State of Bihar to resolve the land dispute with poor families and to institute judicial enquiry into the incident. Facts of the case is that the police opened fire on 19-04-1986 at a peaceful meeting of 600 – 700 persons, a group of landless person belonging to the backward class at Gandhi library in Arwal. Most of the people were from the Gaya district Bihar. The firing started without previous warning or without any provocation. The police surrounded the gathering and opened fire. Twenty one persons died and some were injured. The government granted interim relief of Rs. 10,000/- it also directed Sri Vinod Kumar, member of Board of Revenue Bihar, to conduct an inquiry into the incident. The Report was produced before the court with a claim of privilege against disclosure. After visiting the locality Shri B.D.Sharma Asst. Commissioner of S.C. & S.T. also submitted a report before the Supreme Court with a privileged claim by the Union government. Meanwhile the petitioner requested to transfer the petition pending before the High Court of Patna, to the Supreme Court. The Supreme Court took a decision that it would be convenient to transfer the matter to the High Court, So that the court would have to go into the details of whether the disclosure of committee report would affect public interest

[145] AIR 1987 SC 355.

or not and the parties could produce materials before High Court. The Supreme Court directed the State to pay compensation of Rs.20,000/- to the legal heirs of the deceased, and Rs. 5,000/- to the injured. The enquiry report submitted by the member of the board of revenue and the Asst. Commissioner of SC & ST were essential, to know whether there were excesses by the agencies of State or not. In the case of human rights violation, immunity is not a defence and strict liability is the rule and so the court fixed the liability of the State without considering the fault of the employees. The main defect in the above case was that the same cause of action had been pending in two writ courts. It would result in inconvenience and be expensive to the parties. The Supreme Court directed the high court to decide the issue regarding the disclosure of the investigation report and the very same court could have determined the compensation also. It was essential to see whether the agencies complied with the rules of procedure while firing. Or whether there were excesses by the agency, here the Supreme Court directed the State government to enhance the compensation given by it. While granting compensation by the State government they deviated from the ordinary principle of giving Rs. 20,000/- in the case of death and granted only Rs. 10,000/-. This reveals that there must be a specific law to fix the amount of compensation in case of death.

This raises a question whether there should not a law to lay down a standard regarding the quantum of compensation. The other important question is whether the disclosure of documents can be allowed. In this case it was proved that people of that locality were attending a peaceful meeting and there was a sudden attack on them. This is a gross human rights violation committed by the officials in the name of public interest. Then what is the use of allowing disclosure

of documents in such a case. It is not justifiable to allow such a privilege of claim to the State in case of human rights violation. Use of force can be justified only in the circumstances when in case of failure to use force would affect danger to the life of person or property then the burden must also be on the officials to prove that such a situation existed in that particular time. Otherwise if the use of force is justified, in the name of maintenance of peace and order by the writ court, it cannot guard the rights of the citizen. The claim of privilege of documents must be restricted if the act of the agencies of the State amounted to State terrorism and affected the human rights of the citizens.

The State liability came up for consideration in *Saheli v Commissioner of police*[146], before the Bench consisting of (B.C Ray and S.Ratnvel Pandian J.J.) the writ petition was filed under Article 32 of the Constitution by a women's association through Nalini Bhanot and others claiming compensation for police atrocities. Kamaleshkumari was a tenant in a rented house. Even after the land owner evicted all persons: Kamaleshkumari succeeded in getting a stay order from the court. But the landowner attacked her several times with help of Station House Officer. They trespassed into her house and tore her cloths, molested her. She was dragged away and hit with a brick on the back and head. Then her nine year old son came to her rescue and he was also beaten and this son who clung to her leg also beaten and thrown on the floor and suffered serious injuries and later succumbed to his injuries.

The police was reluctant to register a case against the accused even after a complaint filed by Kamaleshkumari about torture and harassment of the accused.

[146] AIR 1990 SC 513

After the death of Naresh, the post mortem report revealed that the injuries caused with blunt force and the injuries received were not sufficient to cause death and death was due to pneumonia as diagnosed. There was high level pressure on the doctor. When the petitioner had been brought, the court directed Medical superintendent to keep record relating to the death of Naresh. Puran Sing, Inspector, Crime Branch, Delhi opposed the bail on the ground that there was a high level conspiracy in getting the rooms of tenants vacated by the landlord. If the accused was bailed out; it would be difficult to find out the truth. DD entries revealed the involvement of local police in the entire episode and the conspiracy or connivance of the local police with the accused.

It was apparent from the report dated 5/12/1987 of the inspector of crime branch, Delhi as well as the counter affidavit of the Deputy Commissioner of police, Delhi and also from the fact that the prosecution has been launched in connection with the death of Naresh showing that Naresh was done to death on account of the beating and assault by the agency of the sovereign power acting in violation and excess of the power. The mother of the child, Kamlesh Kumari, was entitled to get compensation for the death of her son from the respondent, Delhi Administration. An action for damages was for harm which included battery, assault, false imprisonment, physical injuries which resulted in the death of her son and represent a solarium for the mental pain, distress, indignity, loss of liberty and death. Here the Court applied well settled principle of vicarious liability of the State.

The court relied on the *Peoples Union for Democratic Rights v Police Commissioner Delhi*[147] where State was held liable to pay compensation. The court also considered the principle involved in Vidhyawati[148] that the common law immunity never operated in India, it had also emphasized the inapplicability of the case Kasturilal Ralia Ram Jain v State of Uttar Pradesh[149], it was related to the value of goods seized due to the fault of the employee where in the sovereign immunity was upheld to determine the vicarious liability of the State, which was distinct from the State's liability for contravention of fundamental rights to which the doctrine of sovereign immunity has no application. It followed that a claim in public law for compensation for contravention of human rights and fundamental freedoms, the protection of which is guaranteed in the Constitution, is an acknowledged remedy for enforcement and protection of such rights, and such a claim based on strict liability made by resorting to a constitutional remedy provided for the enforcement of a fundamental right is distinct from, and in addition to the remedy in private law for damages for the tort resulting from the contravention of the fundamental right.

In the light of these cases, the court directed the State to pay Rs.75,000/- as compensation to the mother of the victim and to take appropriate steps by Delhi administration to recover the amount from those who were responsible for it. This is a clear case of excess by the police. It also proved that how human rights violation of the citizen can be committed by the officials indirectly. In this case the landlord could influence the police officials and doctors etc could manipulate the

[147] AIR 1990 SC 513. In this case one of the labourers when demanded wages for the work done by him the police tortured him to death. The court directed to pay Rs 75000/- as compensation to the legal heirs of the victim.
[148] AIR 1962 SC 933.
[149] AIR 1962 SC 933.

Post mortem report and station diary because the local police was involved in this case. The police being the guardian to protect the fundamental rights and if they act contrary to this principle, the citizens can expect protection only from the court. The court referred to the preceding cases while determining State liability and clarified that there is no need of distinguishing the function as sovereign and non-sovereign, this is because of the lakh of firmness in law. The court must have power to take action against the police officials who failed to register the case, when the complainant approached them. It is the duty of the writ court to take into consideration the injustice suffered by the victim, to take action against the officials and to compensate the petitioner for his/her suffering. Here the writ court succeeded in granting compensation still it failed to take precautionary measures against the officials.

Shri Pranab Jyothi Gogi v State of Assam[150] this writ of Habeas corpus petition dated 18/03/1991 before the bench consisting of Manisana and Smti. M. Sarma .J.J, for the illegal arrest and detention became infractuous due to delay in providing immediate remedy. Later after the death of the victim, the court issued direction to produce the post mortem report to see whether it was custodial death or not. In this case, the counsel appearing for the legal heirs, of the deceased victim argued that the people felt insecure and had lost confidence in the civil administration. They were not in a position to collect and produce the relevant materials and necessary particulars before the court in support of the case and requested to appoint a counsel to inquire into the matter relating to the custodial death of the victim.

[150] 1992 Cri. L .J. 154.

In this case, the army authority filed a counter that they got information about the presence of militants in the village of Neharani. This area was cordoned off. While they were searching in that area one person suddenly turned back on being chased, he entered into a bamboo grove and attempted to hide. On being surrounded from all sides, the person attempted to throw a grenade and to use weapon on the party. During that encounter Dhruba Jyothi was hit on his head with rifle and ultimately he was overpowered.

On perusal of the case diary, the court found that the Deputy Commissioner had ordered for a magisterial enquiry. It was conducted by SDO, in which it was stated that the death would not be found out through such an enquiry. Initially a case was registered, thereafter regular case had been registered against the army personnel under section 302, on the basis of FIR dated 22-3-1991, by the Investigating officer who examined the petition on 27-3-1991 and thereafter no further investigation was done by the investigating officer. The same thing happens in every incident of custodial death. In this case, the Gauhati High Court said that Dhabri Jyothi suffered injuries and he must have suffered continuous pain. At the time of his death he was a student of degree course aged 22. Both parents of the deceased have been suffering from mental agony thus considering the mental strain and agony of the petitioner's wife and children, the court stated that in the case of death resurrection is not possible and money will not compensate it, the only possible way is by applying compensatory jurisprudence. So the court directed the Union of India to pay Rs 2,00,000/- to the victim's legal heirs.

In each case the court has to see what measures have to be taken to prevent similar crime in future. Here the death could have been avoided if the writ court had worked immediately as expected by the citizen. Delay in deciding case would be denial of justice to the parties. When the petition was brought before the court, it failed to note that the officers failed to comply with Article 22(2). After taking him into custody, the Army did not hand him over to the police and did not even produce him before the magistrate but kept him under their custody. In the case of custodial death, it is difficult to produce evidence before the court of law because this is committed within the four walls of lock-up cells. Most of the witnesses may be from the same department, belong to the same group of the accused. If a person is taken into custody, burden lies on the authority to prove that they had been released without causing human rights violation. Departmental enquiry will be always in favour of their department. Especially in case of custodial torture death and rape nothing can be proved by departmental enquiry. This is done only to let the public to see that the government had taken all measures to expose the case. As usual the departmental authority may suspend the alleged officers from service and in the course of time they may be reinstated into the same department with promotion. So in the case of human rights violation strict action is necessary against the officials who are involved in the alleged crimes. It is better to appoint a CBI enquiry.

In a case of *Golak Chandra Jena v Director General of Police*[151], the petitioner's son was taken into custody for the alleged crime and nothing was heard about him thereafter. The story of the police was that he committed

[151] 1992 Cri .L .J. 2901.

suicide while in custody. The suspicion that the police had finished him was aggravated by the fact that the dead body was not handed over to his relative and the dead body was cremated by the police. An enquiry conducted after the alleged suicide, it was recorded that there was no external injuries on his body. A Magisterial inquiry was conducted by the sub-Divisional Magistrate Jaipur, who also reported that the death of Pramode was due to the suicidal hanging.

In the court, (the bench consisting of B.L. Hansaria C.J, and K.C.Jagadeb Roy. J) did not accept the story of suicide and held the authority as guilty of taking away the life. It should have been done in accordance with the law. The compensation of Rs 30,000/- was awarded out of which Rs. 10,000/- to be given to the petitioner and Rs. 20,000/- to the widow of the deceased. This case also illustrates the difficulty of relying on the reports prepared by authorities allegedly responsible for the custodial death. Our Constitution guarantees fundamental right to life to all people even though he or she is veteran dacoit, criminal or prisoner nobody can take away one's life by torturing and this can be done only in accordance with law. It is the duty of the court and not the police to decide whether the person has committed the wrong or not.

Nilabati Behara alias Lalita Behera v State of Orissa and others[152], in this case, Nilabati's son was taken into custody for questioning in connection with a theft case, and thereafter hid dead body found on a railway track. Nilabati claimed compensation alleging custodial killing. The version of the police was that he escaped from custody and was run over by train. Failure of the police to register a case regarding the escape from custody threw doubts on the police

[152] AIR 1993 SC 1960.

version, it was also clear that the police did not immediately go to the railway track to take over the dead body on receipt of the information regarding the death.

There was no dispute regarding the point that he was taken into custody and was detained there for interrogation in connection with a theft case. When his mother and grandmother visited him in jail, he was hand cuffed with another accused and tied together. Next day he was found on the railway track with multiple injuries without being released from custody. The burden was, therefore, clearly on the respondents to explain how he sustained those injuries which caused his death. Allegation of custodial death was denied and then it was the responsibility of the respondents to reveal about the unnatural death, without the victim being released from custody. The court considered the deposition of the doctor that there was handcuff on the hands of the deceased when his body was found on the railway track and the report of the forensic department that the two cut ends of the rope, do not match with each other. This negatives the suggestion that he managed to escape from police custody by chewing off the rope. Now the question was regarding the liability of the State, for Suman Behera's custodial death. The learned Additional Solicitor General had no dispute regarding the liability of the State for payment of compensation for violation of Article 21.

The writ court clarified that Article 32 could not be used as a substitute for the enforcement of rights or obligations which could be enforced through the ordinary processes of courts, civil and criminal. A money claim had to be adjudicated in a suit instituted in a court of the lowest grade competent to try it.

When the petitioner filed a suit for compensation and if the facts were controversial in nature a civil court might or might not uphold the claim. But if the petitioner filed a suit to recover damages for his illegal detention a decree for damages would have to be passed in the suit but in the absence of evidence it was not possible to predict whether the decision would be in his favour or not. It is said that Article 226 and 32 can be used to protect the fundamental rights of the citizen In the case of custodial death by agencies of the State. When the legal heirs of the victim approach the writ court, it says that proper forum to claim compensation is the civil court and session's court, the lowest court competent to try it. So for the same cause of action the petitioner has to approach different courts. After conducting a trial, in this case it is not justifiable to tell the petitioner to approach other courts for getting justice.

The important question for consideration was whether writ court was empowered to exercise jurisdiction under Article 32 to pass an award of compensation for the deprivation of fundamental right. In this case the state failed to prove their innocence, the death was presumed to have been caused by the State employees. In these circumstances, it is the duty of the court to compensate the petitioner for the violation of their guaranteed rights. The refusal of the Court to pass an order of compensation in favour of the petitioner would be like mere lip-service about fundamental right to liberty. In this situation, if the court passes an order merely to release an illegally detained person would amount to denuding the significance of Article 21 which guarantees the right to life and liberty. The right to compensation would be some palliative for the unlawful acts of State instrumentalities. The true foundation of democracy rests on the principle of respecting the rights of every individual. If it is so, when the

aggrieved approach the court seeking the order of writ to release a person from custody, meanwhile the person detained, already met with death due to the act of the agencies of the State, writ court being the guardian of fundamental right, it is necessary to compensate the loss for protecting the fundamental rights of the citizens.

The court (the bench consisting of J.S.Verma, Dr.A.S.Anand and Venkata Chala J.J.) referred Radul Sah to show that if a person taken into custody dies the burden lie on the State to show that the person detained was seen alive by the detaining authority. The court also considered the similar cases like Bhim Singh, Saheli where the State was held liable to pay compensation. The court began to move away from the defence of sovereign immunity. When the State officials extinguished the human lives the remedy must be readily available in the case of have-nots. According to Justice Anand the Public law remedy must ensure the rule of law and civilize the public power, and protect and preserve the rights of the citizen, and sovereign immunity cannot defeat the claim for the enforcement of fundamental right. In the case of private law action based on tort, the sovereign immunity is a defence. The defence of sovereign immunity being inapplicable and alien to the concept of guarantee of fundamental rights, there can be no question of such a defence being available in the Constitutional remedy. The defence of sovereign immunity should not be applicable against violation of fundamental right like right to life, liberty and dignity; these basic rights are inherent in nature. Arrest and detention without legal justification or if it is done without just cause and excuse limits the personal liberty guaranteed under the Constitution. The wrongdoer and the State must be responsible and accountable if the person taken into custody of police has been deprived of his life without due process of

law. The remedy under public law is by way of penalizing the wrongdoer and fixing the liability of the State for the public wrong when it fails in its public duty to protect the fundamental rights of the citizen. It is this principle which justifies in awarding monetary compensation for contravention of fundamental rights guaranteed by the Constitution. When that is the only practicable mode of redress available for the contravention made by the State or its servants in the purported exercise of their powers, and enforcement of the fundamental right is claimed by resort to the remedy in public law under the Constitution by recourse to Articles 32 and 226 of the Constitution.

Misra C.J discussed in *Union Carbide Corporation v. Union of India*[153], the need of developing law to construct a new principle of liability to deal with an unusual situation. Venkatachaliah, J. in Bhopal gas case, stated the power of the court to grant relief in the light of Article 9(5) of I.C.C.P.R. 1966[154], and also clarified that this enforceable right to compensation is not alien to the concept of enforcement of a guaranteed right. This being the clear case for awarding compensation to the petitioner for the custodial death of her son, the court considered the age of deceased Suman Behera and his monthly income etc and the total amount of compensation was calculated as Rs 1,50,000/-. State of Orissa was directed to pay the sum of Rs.1,50,000/- to the petitioner and a further sum of Rs. 10,000/- as costs to be paid to the Supreme Court Legal Aid Committee. The mode of payment of Rs. 1,50,000/- to the petitioner would be, by making a term deposit of that amount in a scheduled bank in the petitioner's name for a period of three years, during which she would receive only the interest payable thereon,

[153] AIR 1992 SC 248.
[154] Article 9(5) provides "Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation".

the principal amount being payable to her on expiry of the term. The Collector of the District will take the necessary steps on this behalf, and report compliance to the Registrar of this court within three months.

Article 21 of the Constitution guarantees right to life, these precious rights are available to all irrespective of convicts and under trial prisoners. This can be curtailed only according to the procedure established by law. So the great responsibility of protecting these rights lies on the State. If this is violated by the State they can approach the ordinary civil court for claiming compensation. Liability being strict, State is accountable for it. In case of violation of fundamental rights by the State, the aggrieved parties can approach the Supreme Court and High Court under Articles 32 and 226 of the Constitution. The difference between public law remedy and private law remedy is that in the case of public law remedy sovereign immunity is a defence where as in the case of private law remedy sovereign immunity is not a defence. The purpose of public law is not only to civilize public power but also to assure the citizen that they live under a legal system which aims to protect their interests and preserve their rights.

Though the court expressed the difficulty of operating compensation by the writ court in assessing the compensation, directing them to approach civil court, the problem of claim being defeated on the ground of sovereign immunity might arise, this points to the need for making a law and abrogating any claim for sovereign immunity. As we have seen earlier, the same result can also b achieved through judicial activism to negative the principle of sovereign immunity. In any case it is clear that when the superior courts direct that the claim must be

persuaded in the lowest courts, Sovereign immunity should not be allowed to stand as a hurdle in the path of justice and it is also worth maintaining.

In the case of human rights violation by the State the public law and private law comes and the remedies are entirely different so it is necessary to have a specialized court to deal with such cases. The compensation must be according to the responsibility for the damage committed by each person. Without going into the question of wrong committed by the State it would become vicariously liable for the act on the basis of strict liability. Here the court evolved a principle to determine the liability of the State by applying strict rule. This decision reminds us of the French systems of law, which considers the responsibility of the State while dealing with cases of State atrocities here lies the difficulty, it is left to the discretion of the court and the people do not feel faith in the legal system. Now it is high time to modify, the law of fixing the liability of the State in case of State atrocities.

Even though the higher courts are aware, of the action for damages brought before the civil court it may be debarred by the defence of sovereign immunity, in such cases it is not justifiable to direct the victim to approach the lowest competent civil court for compensation. If the writ court grants merely issuing the order for release of prisoner from custody without compensating the violation of right it would be a denial of guaranteed rights. According to the present system, for the same cause of action the suits are pending in different courts, civil court, session court and writ court. If this system was modified into one system to deal with cases of human rights violation by State it would have

saved the time of the court, it would be convenient to the State and the aggrieved victim, and could have given speedier remedy.

In the case of death of Sawinder Singh Grover R.E[155] the court concluded on October 21,1992 in the light of the facts and circumstances of the case there was a prima facie case for investigation and for prosecution and directed the CBI to register the FIR and to prosecute all the accused for appropriate offences under the law. A healthier trend in the matter of compensation in case of custodial death is seen in Sawinder Singh Grover R.E. In this case the victim was a South Delhi businessman, Sawinder Singh who had been tortured and murdered under suspicious circumstances while being questioned by the enforcement directorate. According to the District Judge the fabricated story given by the police regarding the circumstances of suicidal jump which led to the victim's death was not reliable. So the court directed the enforcement directorate to grant an ex-gratia payment of Rs 2,00,000/- to the widow of the deceased Sawinder Singh. The observation made in the order would not affect the investigation, prosecution and the trial disposed of accordingly. This decision helped to avoid delay in granting compensation to the victim.

In all these cases, it was proved beyond doubt that death occurred due to torture by the enforcement agencies. Even though the court felt difficulty in fixing the State liability with the present legal system, the court considered the need for protecting the human rights of the citizens in case of State atrocities. In case of death, resurrection is not possible the court was reluctant to allow the claim sovereign immunity. But the defect seen in it was in most of the cases the court

[155] 1994 SCC (Cri) 464.

issued ex-gratia payments and in some cases the court even directed the petitioners to approach the civil court as it was the proper forum for claiming compensation, at the same time raise a doubt whether the petitioner would succeed in such an attempt in claiming the compensation. In many case, initial grant of ex-gratia payments and referring the case for further adjudication through civil court would contribute some financial strength or further pursuit of the matter in the civil court. Such a step is welcome in cases where the court find it difficult to grant full compensation without further procedure in civil court.

Smt. Charanjit Kaur v. Union of India and others[156], this writ petition was filed to take action against army officers and for claiming compensation, for the death of a military officer. The petitioner's husband Mukhbain Singh was a lieutenant in the Indian Army. He was promoted to the rank of Major on 24-05-1978 and posted at Kargil on 10-06-1978 when he suffered from chest pain on 12-06-1978 he was removed to Leh on 16-06-1978, on diagnosis, he was suffering from heart disease. On receiving the information regarding her husband's disease, his wife reached there with children on 16-06-1978. Then he was lying in a make shift hospital without any life saving treatment. She found him in a precarious condition and was unable to move. Both the petitioner and her husband requested the authorities to give air lift to Ambala or Srinagar Military hospital for proper treatment. This was refused and was threatened with court martial. After a great deal of persuasion and pleading on 19-06-1978 one Dr Major Bofflo agreed to shift him to Ambala but her request to accompany him was denied. When the petitioner and her children reached there at Ambala they were informed that her husband was not well and she should return to Leh. There to

[156] AIR 1994 SC 1491.

their great surprise they found the burned body of her husband. It was proved that there was gross negligence and callousness on the part of the authorities who caused mental torture and financial hardship to the widow and the children of the Army officer.

According to the authorities, even though the complained of chest pain, his condition was not so critical, and on that day he had gone to the cook house and later his charred body was found with 98% burns due to kerosene oil. The authorities did not disclose to her the circumstances under which her husband had received the burns. Later on, she was only given a report of the post-mortem examination conducted by the Army Medical Authorities at Leh which attributed the death due to “extensive burns”.

She contended that his death was under mysterious circumstances because he was unable to move then the question was how he received such burn injuries. After sending several letters to the authorities and after seven years of this incident the finding of the enquiry was that the death of her husband was not attributable to the military service. When she applied for getting a copy of the report for submitting an application for family pension this was refused on the ground of privilege in keeping the confidential document.

Then the petitioner approached the Supreme Court claiming family pension. The authorities stated that her application was incomplete due to failure to produce the document and took decision denying the family pension and she was informed to file an appeal against this decision within six months if she was not satisfied with the decision. They admitted the fact that the report of death of her husband being the confidential matters it was not disclosed to her. Her family

pension was not denied because she was informed to file an appeal to the government if she was not satisfied with the decision. They also made a contradictory statement that all the family of Army officers are not granted family pension, but granted only if the death was aggravated or attributable to the military service. They had conducted an enquiry they regretted to carry out the investigation at the late stage.

The responsibility of his death is prima facie traceable to the act of criminal omission and commissions on the part of the concerned authorities. The same way the petitioner sought the enquiry report and this was denied on the ground that the document was confidential. Even his condition became so worse his wife and children were allowed to meet him only after some persuasion. The case reveals the irresponsible attitude of the officers. In the said circumstances the court concluded that the office died while in service under mysterious circumstances and his death is attributable to and aggravated by the military service. The petitioner is, therefore, entitled to suitable compensation as well as to the special Family Pension and the Children Allowance according to the relevant Rules from the death of her husband. The court awarded her compensation of Rs. 6,00,000/- and directed that the said amount be paid to her within six weeks from that day. The court also directed that the arrears of the Special Family Pension and the Children Allowance be paid to her within eight weeks from that day with interest at 12% per annum. And directed to pay the costs of the writ petition which were fixed at Rs. 6,000/-.

Even though the deceased was an army officer, he and his family had to suffer gross human rights violation due to the criminal omission and acts of the

other army officers. It is painful to think about the irresponsible conduct of the other officers towards the member of their own fraternity. Defence version of the state based on suicidal attempt of the army officer would not stand as he was in a critical condition and not able to even move. They failed to give timely medical treatment, even though the victim and the widow requested it. The writ court considered the whole plea of the widow of the victim and grievance and suffering of the victim and their family for giving justice. While deciding the liability of the state the court could have fixed the liability of the irresponsible officers also. If complete liability was fixed on the state it would affect the financial stability of the state. Because of this gross injustice shown towards the respectable family of an army officer, the society would lose confidence in the legal system. Attitude of the court in redressing the grievance of the victim is admirable and would help to win the confidence of the society. Lf so cases of state atrocities are decided in one court, compensation and punishment for the wrong could be decided at one trial so it would save the precious time of the court.

In a case where the superintendent of police abducted seven persons from a house allegedly for seeking vengeance on some seven persons from a house allegedly for seeking vengeance on some of them for having helped the terrorist to finish off the superintendent's brother, though the police accepted the complexity and undertook to investigate the matter nothing concrete came out of it and a writ petition filed because infractuous.

In Inder Singh v. State of Punjab and others[157], when the efforts to release seven persons Sadhu Singh, Gurdeep Singh, Amanjit Singh, Hardev Singh,

[157] AIR 1995 SC 312.

Davinder Singh, Sukhdev Singh and Sharnjith Singh from the custody of police failed, this petition was filed by Inder Singh who is the son of Sandu Singh the brother of Gurdeep Singh the father of Hardev Singh and the uncle of Amanjith Singh, Davinder Singh, Sukhdev and Sharnjith Singh. The Facts of the case is that on 29th October 1991 a police party under the command of Baldev Singh came to the petitioner's residence and directed that all those present be lined up in the courtyard and plakhed them in a police van. The petitioner and his family were told that they would be given the dead bodies of the above said seven persons. They were lodged in the police station until 28th December 1991.

Addl. Solicitor General stated that the investigations revealed that the third respondent Deputy Superintendent of police, was guilty of causing the abduction of the seven persons in 1991 in complicity with other policemen and that the investigations have not revealed whether the abducted persons were alive or by the Deputy Superintendent the third respondent and his police accomplices. A charge-sheet was planked against him, and other police officers involved in it. The Punjab Police submitted that it was a rare case in which the police admitted that one of its officers had been guilty of abducting citizens, therefore they should be trusted to carry out the investigations. These persons taken into custody were not wanted by the Punjab Police in connection with any criminal offence.

He also clarified that the 2nd respondent had taken charge as Director General of Police Punjab on November 1991 and when received the complain dated 25th january 1992 regarding the abduction of seven persons, this was entered in the diary by his P.A as he was on leave on that date. When DIG asked the report from Majitha, on 23rd April, 1992, he stated that all allegations were

found to be false. Dissatisfied with this report, DIG again suggested for another investigation by a senior official this was again investigated by the same official Majitha.

The Special Branch, recommended registration of a case against the 3rd respondent under Section 364, Indian Penal Code[158] and he submitted that the 3rd respondent had abducted the said 7 persons on the suspicion that they had got his brother abducted through terrorists and it was "highly regrettable that a member of police force should have resorted to retaliatory action and taken the law in his hands". In the report it was stated that even though investigating officers had made all possible enquires to trace the whereabouts of the abducted persons under the guidance of senior officer, the police had not been able to locate them. Mean while the police had framed a charge sheet against the third respondent and a case was registered against him so the respondent prayed to dispose the writ petition as the trial on the incident was likely to commence in the criminal court.

The Supreme Court criticized that even though the complaint was filed on 25th January 1992 addressing the 2nd respondent. He stated that upto july 1994 he knew nothing about this incident. As he was on leave, the complaint was received by his personal Assistant and entered in the register by him. The court commended that this practice is merited by the Punjab police. When the court asked the reason for not bringing the notice of the superior officers about the illegal detention of these seven persons, it was answered by the P.A that in those days there were dire times in Punjab, and many such accusations were common

[158] 364 of IPC deals with Kidnapping or abducting in order to murder.

so no comment seemed necessary. No explanation was given for taking 18 months delay for submitting the report. But it was found that no disciplinary action was taken against the accused and he was not suspended from service. The court was surprised to see how leisurely the Punjab police had acted upon the complaint. The court was concerned about the safety of the citizenry at the hands of such errant officials being unchecked and highhanded.

The Supreme Court (the bench consisting of M.N. Venkatachaliah C.J., Dr.A.S.Anand and S.P.Bharucha JJ.) directed the CBI for high level investigation into the matter and directed the state government to ensure all assistance to the CBI. However the Supreme Court made it clear that it would be free to make an order for compensation when they receive enquiry reports after four weeks from the CBI with the assistance of state police. The action of the Supreme Court is a positive step for protecting the rights of the people and is a warning to the police which had to admit custodial disappearance. The complaint about the detention and the custody of the seven persons, submitted by the petitioner had not been recorded and registered by the police. They were lodged in various stations while the petitioners compliant were pending before the high officials. This is also one of the defect and loopholes seen in the existing system. If a complaint submitted by the aggrieved is not registered and no action is taken, how can the complainant prove that they had already given the compliant before the officials. Here the complainant had to approach the very same authority for filing his submission against them, can be rectified by allowing the complaint to be plakhed through NHRC.

In Bahlen Balmuchu v. State of Bihar[159], the petitioner approached the petitioner approached the court for granting compensation in custodial death allegedly committed by the police officials. Then the court had to consider whether the court was empowered to grant compensation while pending criminal case in the trial court and before attaining finality of the case. As far as the facts are concerned, three persons namely Udai Sharma, Wilson Alias Pappu and Jonsin Koro were taken into custody, in connection with a dacoity and they were subjected to brutal attack by iron rod and shouts, resulting in their deatg. When the complaint filed by the widow of Wilson and others was not considered by the police officials and no action was taken then they moved the Honorable Supreme Court and the concerned officials were arrested by the order of that court. Then a criminal case was charged against them. Finally they were tried by the second Additional Judicial Commissioner. The charges framed against the accused persons were proved in the court and they were held guilty and the court sentenced them to undergo rigorous imprisonment and to pay a fine of Rs. 20,000/-.

While the case was pending before the session court, the petitioner and others, had already moved, the Apex court and it had ordered an interim compensation of Rs. 25,000/- and this order had been carried out except the dependent of the deceased Udai Narayan as she was not residing at that station at the time of issuing the order for interim relief. Later she filed a petition before the High court under Article 226. Then the doubt arose whether the Jharkhand High court could pass an order for compensation at the stage of disposal of the criminal case. This was denied on the ground that if the police officials were found

[159] 2003 Cri. L.J. 3803.

guilty then the petitioner had to approach the competent court for getting compensation.

Again the refusal to grant compensation to the petitioner they approached Supreme Court. The court considered that Criminal case was passed on 27-03-1996 and the petitioner filed a writ application on 19-09-1996 and the G.P. failed to file counter against the order of Additional Sessions Judge, even after it served one more copy of the petition on 16-04-2003 as requested by him and expressed his inability to file counter as he had not received any instruction from the respondent. After considering the grievous human rights violation suffered by the victims due to the act of police in the name of dacoity, and the judicial commissioner having held the three person's guilty on the basis of post mortem report and deposition of eye witness, the state council failed to file counter and the right to file an appeals closed the said judgment deemed to have attained finality. It was well settled that in case of contravention of fundamental right by the state or its agency, compensation could be awarded under Article 226 of the Constitution of India. But the doubt in this case was whether an order of payment of compensation could be passed at that stage or not. It was found that the order of Judicial Commissioner had attained finality and in view of the observation made by this court in the earlier case relating to it that after the disposal of criminal case if it was found that aforesaid persons were murdered by the police officials it would be open to the petitioners to move for payment of compensation in accordance with the law. The petitioner had the right to move this court for payment of adequate compensation.

In this case the court clarified that on that fateful day; they took law in their hands and the protectors of law became destructors of law, such an attitude of the authorities would engulf the Article 21 of the Constitution and how could an Indian citizen believe that the Constitution ensured the right to life and the dignity. Justice Tapen Sen directed the respondents to pay compensation to the petitioner and fixed the liability by considering the loss of company of her husband, the mental torture, the feeling of loneliness and the loss of the care and protection of the head of family from every angle including the welfare of the children needed and calculated the compensation as Rs. 10,00000/-. However the entire amount was to be deposited in the nationalized bank in the name of the mother and minor children should have no right to withdraw any part of compensation money till they reached majority. And the petitioner could withdraw an amount of Rs. 2.5 Lakh and she would be at liberty to take it and in case of marriages and in the interest of education of their children if they brought sufficient record and furnished proof regarding the requirement to the concerned bank they could withdraw the amount. Thus the petition was allowed with no order as to costs.

It was already proved beyond doubt that death was due to excesses and abuse of power. As the evidence was weak, as the state did not seek permission to file an appeal, even after serving a copy to the G.P. as requested by him, he failed to file counter within the time expressing his inability due to lack of instruction. The court took a bold step to treat that the decision of the judicial commissioner attained finality. In the case of threat to fundamental right due to state atrocities resulting in constitutional torts the creative attitude of the Supreme Court would be a welcome step and help to promote justice to the

victim and the legal heirs. It took 12 to 13 years of delay in getting the compensation for the violation of fundamental rights by the state that was also because of filing two writ petitions. In the first instance only some ex-gratia payments were given on the ground of pending case in the Sessions court. To some extent granting of ex-gratia payments would be helpful to the victim to meet their immediate expense. After the incident though the complaints were submitted before the concerned officials by the legal heirs of the victim only after the intervention of the writ court they registered the case and charged for the wrong against them In this situation, the purpose of writ court is admirable.

Chapter v

Tortious Liability of State and its Remedies in UK

The present law relating to state liability in India is not adequate and it is indispensable to amend the law in this area. Law in the other Countries would shed some light on the proposal. England, after many years of uncertainty over the issue, had passed an Act 'Crown Proceeding Act, 1947, and thereby, subjected the crown to liability to the same extent as a private individual of full age and capacity. Earlier, in England crown was held not to be liable for the act of its employee[160].

In accordance with British jurisprudence no member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a court of justice. But when the person or the property of a person who is not a British subject and who is not residing in British territory is injured by an act "done by any representative of Her majesty's authority, civil or military, and which is either previously sanctioned or subsequently ratified by Her majesty the person injured has no remedy for such an act is an act of state[161] . An act of state is outside the ordinary law, it is essentially an exercise of sovereign power as a matter of policy or political expediency. Its sanction is not that of law, but that of sovereign power and municipal courts must accept it without question. Ratification by the sovereign power of the act of one of its officers is equivalent to a prior command and may render such act an act of state. It was Roman Law which propounded the theory

[160] Akaant Kumar Mittal, 'Crystallising the concept of Vicarious Liability of State in India, Challenges and Suggestions', AIR 2014 journal 89.

[161] Stephen, History of Criminal Law, vol II pp. 61,62.

of irresponsibility of the State, as the sovereign, to be sued in its own Courts. It was based on this principle that in England before 1947, the Crown enjoyed immunity from tortious liability because of the maxim "The King can do no wrong", which implies that neither any wrong can be imputed to the government nor could it authorize any wrong. Another reason for the doctrine of immunity was that it was regarded as an attribute of sovereignty that a State could not be sued in its Courts without its consent[162].

5.1. Law relating to State Liability in England

English law has always clung to the theory that the king is subject to law and, accordingly can break the law. But in practice rights depend upon remedies, and the theory broke down, because there was no human agency to enforce the law against the king. The courts were the king's courts and like other feudal lords the king could not be sued in his own court. He could be plaintiff and as plaintiff he had important prerogatives in the law of procedure, but he could not be defendant. No form of writ or executive would issue against him, for there was no way of compelling his submission to it. The maxim that 'the king can do no wrong' does not in fact have much to do with this procedural immunity. Its true meaning is that the king has no legal power to do wrong. His legal position, the powers and prerogatives which distinguish him from an ordinary subject, is given to him by the law, and the law gives him no authority to transgress. The crown could not be sued in tort in a representatives capacity, as the employer of its servants. But the king had a personal as well as a political capacity and in his personal capacity he was just as capable of acting illegally as was any one else, and there were special

[162] Abhinav Ashwin, "Government Liability in torts in the 21st century", AIR 2003 Journal 25.

temptations in his path. But the procedural obstacles were the same in either capacity. English law never succeeded in distinguishing effectively between the king's two capacities. One of the best illustrations of this is that, despite mystical theories that the crown is a corporation and that 'the king never dies', the death of the king caused great trouble even in relatively modern times. Parliament was dissolved, all litigation had to be begun again, and all offices of state (even all commissions in the army) had to be regranted. Until numerous Acts of Parliament had come to the rescue the powers of government appeared wholly personal, and it could truly be said that 'on a demise of the crown we see all the wheels of the state stopping or even running backwards.

Even today, when most of the obstacles to justice have been removed, it has been found necessary to make important modifications of the law of procedure. The Crown Proceeding Act, 1947, subjects the Crown to the same general liability in tort which it would bear, 'if it were a private person of full age and capacity'. The general policy, therefore, is to put the Crown into the shoes of an ordinary defendant. Furthermore, the Act leaves untouched the personal liability of Crown servants, which was the mainstay of the old law, except in certain cases concerning the armed forces.

The principle of the new law is that where a servant of the Crown commits a tort on the course of his employment, the servant and the Crown are jointly and severally liable. This corresponds to the ordinary law of master and servant.

The Act's specifically makes the Crown liable for;

(a) Torts commits by its servant or agents,

(b) Breach of duties which a person owes to his servants or agents at common law by reason of being their employer; and

(c) Breach of duties attaching at common law to the ownership, occupation, possession, or control of property.

(a) Torts commits by its servant or agents – It is subject to the proviso that the Crown shall not be liable unless the servant or agents would himself have been liable. This proviso gives the Crown a dispensation which a private employer does not enjoy in occasional cases where the servant has some defence but the employer is still liable as such.

(b) Breach of duties which a person owes to his servants or agents at common law by reason of being their employer - The doctrine is that personal defence belongings to the servant do not extend to the employer unless he also is entitled to them personally, and they may not prevent the servant's act from being a tort even though he personally is not liable.

(c) Breach of duties attaching at common law to the ownership, occupation, possession, or control of property – it is subject to the proviso that the Crown to the normal rule of strict liability for dangerous operations (Rylands v Fletcher), so that the position is more satisfactory than in the case of other public authorities.

The Crown is also given the benefit of any statutory restriction on the liability of any government department or officer. A number of statutes contain such limitations of liability, for example the Mental Health Act, 1959 which protects those who detain mental patients under the Act unless they act in bad faith or without reasonable care, and the Land Registration Act, 1925, which frees

officials of the land Registry from liability for acts or omissions made in good faith in the exercise of their functions under the Act.

5.2. Immunity of the Crown from liability

In England, the liability of the Crown was determined by the two ancient fundamental rules, which was existed in British Constitutional Law. They were substantive law based on "King can do no wrong" *Rex non potest peccare*, and Procedural law "King could not be sued in His own Courts". These two artificial theories of feudalism do not mean the king is above the law but he must be just and lawful.

In the political sphere, if the administration was badly conducted, it was not because of king's fault but it was because of the advice given by the ministers. In the legal concept, his privileged position and powers, is not amenable to the ordinary jurisdiction but law gives him no authority to transgress. 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. The king was not liable to be sued civilly or criminally for the supposed wrong doing. This was invoked to negate the right of the subject to sue the king for the redress of wrongs committed by him[163]. The maxim *qui facit per alium facit per se* and *respondent superior* had no application in case of wrong committed by the crown servants. No form of writ or execution could be laid against him as there was no way of compelling his submission to it. This practice made the crown servant who is sued in respect of a tort that he had committed in the course of employment,

[163] V.Edwin M. Borchard, "Government Responsibility in Tort",Y.L.J,757(1926)

personally liable for it. In 1234, the king's court proclaimed "Our Lord the king cannot be summoned or receive a command from any one"[164]. The king is the fountain of justice and equity and that he could not refuse to give justice when petitioned by his subjects. The king had to redress claims against him, and refer the matter to the courts. Later a standard of procedure in presenting the claims against the king by the petition of Right was introduced.

During the fourteenth and fifteenth century, number of petitions of different claims were brought to get justice from the crown. By the petition of 1256, an attempt was made to seek remedy, against the king's feudal powers, and their demand was to confer power to the royal courts, to deal with anti-feudal powers. The king and his officers could be sued, by waiving the privilege of non-suability, with the commencement of statute of Westminster 1275. The wrong done under a royal commission was made actionable in 1331. Abolition of Star Chamber in 1641 and the enactment of Habeas Corpus Act 1679 was a blow to feudalistic powers of the Crown. After the revolution of 1688, the king's powers gradually eroded, the judges began to enforce contract against the king. By the Petition of Right 1860, the difficulty of proceeding against the king due to sovereign immunity was relaxed. If the petition given to the Secretary of state for Home Department was rejected, there was no remedy against the king. When the fiat is obtained law suit is ensued between the petitioner and the Attorney General. After obtaining the fiat or justice, the plaintiff could seek the help of the regular courts for getting justice. But in the case of tort, there could be no remedy against the king. Thus in the past, the crown was not liable in tort.

[164] Quoted by G.P Verma, State Liability in India, (1993).p.25.

In the nineteenth century, the ordinary vicarious liability began to apply so that the personal liability of the official was recognized and this became the great bulwark of the rule of law. The damages were awarded and they were paid out of public funds. The laws, relating to the liability of the ministers were not adequate, and it was also necessary to prevent immunity of the officials so a draft bill with regard to the governmental liability was prepared by the Crown Proceedings Committee in 1927. In practice, the action against the officers concerned was defended by the Treasury Solicitor but the difficulty arose when the actual wrongdoer was not identified. Then the government department began to nominate a defendant, putting up nominated defendants was criticized by the House of Lords, as whipping boys[165]. But this practice was condemned by the House of Lords. Firstly there was no clear evidence as to which crown servant was liable and secondly the suit could be filed only against the representative suit and not against the real defendant. In *Adams v. Naylor* the court expressed its difficulty in exercising jurisdiction and in deciding the case against the defendant who is in truth not the real defendant. This case was decided on the ground that the claim failed by reason of the provisions of personal injuries (Emergency Provisions) Act 1939. The action failed because of statutory immunity of the Crown but the House of Lords pointed out that it would have also failed in common law. In the course of judgment, the court observed that the legislation on the subject or liability of the crown for the torts of its servants was overdue[166].

[165] Adams *v* Naylor(1946)2 All ER 241: Action for damages was brought against the army officer in charge of that area, for the death of a boy when he came into contact with wire fence of the mine field owned by the ministry House of Lords criticized the practice of instituting suit in the name of nominated defendant and dismissed as the negligence could not be attributed to the officers as he was no way responsible for laying the mines and causing death and injury to the boys. Mine field was in the occupation of the crown and not in the occupation of the nominated crown servant.

[166] (1946)2 All ER 241,245.

In certain kinds of torts the employer will be liable and not the servant example, for not providing adequate safety measures in the factory. In *Royster v Cavey*[167], the court expressed its inability to pronounce judgment against the defendant who in truth is not the real defendant. Such a practice of rendering non-guilty as guilty was also repugnant to the Rule of Law. The House of Lords refused and protested against the fiction of taking action against the nominated defendant who could be sued on the understanding that the crown would stand behind him indemnify him against damages.

In the above two cases, there was sufficient cause of action to sue for compensation. But immunity of the sovereign debarred the plaintiff from representing the crown as defendant. In both these cases the court expressed its difficulty of deciding the case due to lack of jurisdiction. Till 1946, a citizen's redress against the crown for tortious conduct committed by its servants was at best indirect. Even if various reforms were introduced before the Act of 1947, all attempts were refused by the powerful government department. Due to the change in the socio-economic conditions (from Laissez faire to welfare system, the crown became the largest employer of men and the largest occupier of the property) and modern civilization, the government felt intolerable with the old feudal doctrine and felt the need to change the crown immunity rule. The decision in *Adams v Naylor* in 1946 and the subsequent discussion, compelled it to introduce reform in the immunity principle as late as 1947 which resulted in the enactment of the Crown Proceeding Act 1947 which came into force on January 1, 1948.

[167] (1947)K.B.204(1946)2 All ER 642. In this case when an employee claimed compensation for breach of statutory duty against the occupier of the factory under Factories Act, suit being not lie against the state he took action against the nominated defendant supplied according to the agreement.

5.3. The Crown Proceedings Act 1947

The statutory duties can give rise to liability in tort, the Act therefore subjects the crown to the same liabilities as a private person in any case where the crown is bound by a statutory duty which is binding upon other persons[168]. The Act makes no change in the general rule that statutes do not bind the crown unless an intention to do so is expressed or implied[169], so the crown will normally be liable only where the statute in question says so. But many important statutes do expressly bind the crown, such as the Road Traffic Act, 1960, the Factories Act 1961, and the Occupiers Liability Act 1957. The crown becomes liable in the same way as any other occupier of premises for not taking reasonable care for the safety of visitors invited or permitted to be there. A visitor to a government office or workshop who was injured by a negligently maintained roof or staircase would be able to sue the crown for the tort. So far as the occupation of land is concerns, the crown shares both the common law and statutory liabilities of its subjects.

The Act does not allow the crown to shelter behind the fact that powers may be given (either by common law or statute) to a minister or other servant of the crown directly, and not to the crown itself. In such cases the crown is made liable as if the minister or servant were acting on the crown's

[168] Section 2(2). In Ministry of Housing and Local Government v Sharp (1970) 2 Q. B .233 at 268. Lord Denning M.R. says that the Crown is not liable for mistakes in the Land Registry by virtue of section 23(3) (f) of the Crown Proceedings Act, 1947. That provision however applies only to part II of the Act (jurisdiction and procedure) and does not exclude crown liability under Section 2(3). But Land Registry officials acting in good faith are not liable.
[169] Section 40(2) (f).

own instructions[170]. These primary rules for imposing liability in tort may be said, in general, to achieve their object well. The crown occasionally claims that public policy should entitle it to exemption in respect of its government functions. But this claim is rejected by the courts.

The liability of public authorities to pay monetary damages or compensation runs at once into difficulties of classification. In the first place, there is the problem of the Crown. Crown liability for torts such as trespass and negligence has a very different history from the liability of local authorities and other governmental bodies. But since the Crown Proceedings Act, 1947 the Crown has in principle been put on the same footing as public authorities generally. The need for a change in the law relating to tortious liability of the Crown was strongly felt as early as in 1921, when the Lord Chancellor Birkenhead appointed a committee of lawyers and others of consider the position of the Crown as litigant and to propose such amendments as might seen feasible. The committee in 1927 presented a Draft Bill, proposing the abolition of the petition of right and making the Crown suable in tort freely. However, the report was pigeon holed. Donoughmore Committee again recommended a case for legislation in this regard but the Administration of justice (miscellaneous provisions) Act, 1933 did not make Crown liable in tort. A large number of accident involving state transportation during the Second world War, and the fear of nationalization of many industries by the government so as to lead an increase in the

[170] Dorset Yacht Co. Ltd. V Home Office (1970) A.C. 1044.

governmental immunities, together with the outcome of two cases viz, *Adams v. Naylor* and *Royster v. Cavey,* led Lord Chancellor, viscount Jowitt to introduce in the House of Lords a government sponsored Crown proceedings Bill, mostly based on 1927 Draft Bill, on 13th Feb 1947. The Bill became an Act on 31st July 1947 and came into operation on 1st Jan 1948.

The Crown Proceeding Act, 1947, as the title suggested, changes the procedure relating to civil proceeding by and against the Crown and also fundamentally modifies the rights and liabilities of the Crown vis-à-vis the subject. Its preamble reads that it is an "Act to amend the law relating to civil liberties and rights of the Crown and to civil proceedings by and against the Crown, to amend the law relating to civil liberties of persons other than the Crown in certain cases involving the affairs or property of the Crown".

Section 1 of the Crown Proceedings Act, gives the plaintiff a right to sue the Crown without any fiat in cases where, if the Act had not been passed, he could: i) bring a petition of right, or ii) take any proceedings under special statutory provision, repealed by the Act. It does not create a new cause of action and the various limitations on the scope of the former petition of right continue to apply this right to action. However, by virtue of Section 13 of the Act, proceedings by way of petition of right stands abolished. Though on the face of it, it appears that Section 1 of the Act gives a general right to sue the Crown in all type of cases, the facts is that there is not as yet an unfettered right to sue the Crown. On a closer study of the wording of the section, the illusion is dispelled for it is seen that the "right of

direct action is only given where the claim might have been enforced before the Act by the old procedure of the petition of right or by other specially statutory provisions.

In respect of any breach of those duties which a person owes to his servant or agents at common law by reason of their being employer, i.e breach of common law duties owned by an employer to his employees, viz, to supply proper plant, to provide a safe system or working and to select fit and competent fellow servants. In respect of any breach of duties attaching at common law to the ownership, occupation, possession or control of property. This may include liability for nuisance the rule in *Rylands v. Fletcher* liability for dangerous chattels, etc. In all these cases the Crown has been made subject to all those liabilities in tort to which a private person of full age and capacity would be subject. However, the Crown shall not be liable 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. Though it cannot be said that section 2(1) of the Act provides a general right of action against the Crown in tort, certainly, it is widely worded for it is difficult to think of a commission of a tort by the Crown other than by its servants or agents, as the Act does not apply to proceedings by or against the Crown in its private capacity

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 crown[171].

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 in the course of relation with another state or with the subjects of another state, and the claim arising out of treaty rights[172]. The liability of the Crown with the respect to the failure to comply with the imposed statutory duty was dealt with in Section 2 (2) of the Act[173]. According to this provision the crown could be held liable for breach of statutory duty.

By means of Section 2(3) of the Crown Proceedings Act, the crown would be liable under common law, for breach of duty or breach of

[171] Section 2 of the Crown Proceeding Act 1947, provides that: "(1) Subject to the provisions 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 sub section 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.

[172] Garner, Administrative law, p 283.

[173] Section 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'.

statutory duty. So common law action for damages would lie against the crown if a wrong was committed by its agencies[174]. So that crown would be liable like that of an ordinary person, if any wrong was committed by its servants while exercising statutory duty. In order to raise claim against the crown for the wrong of its servants or officials, certain conditions were required. The crown would be liable only if the particular officer was appointed by the crown and paid out of treasury. This section had the effect of excluding the crown from liability, in cases of action taken by the servants of some statutory corporation. For example according to section 48 of the Police Act 1964, the chief constable was rendered liable to be sued and the injured victim was paid out of local funds. The purpose of giving such restriction was to exclude the crown from liability for the action taken by the officers or servants of the statutory corporation even if the particular corporation acted as an agent of the crown. In England, if a tort was committed by a police constable, the chief constable was responsible. The section 2(6) of the Crown Proceeding Act made it clear about the liability of the crown[175]. The crown was exempted from liability while discharging or purporting to discharge any responsibilities of judicial nature vested in him

[174] Section 2(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 torts while performing or 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.

[175] Section 2 (6) of the Crown Proceeding Act 1947, 'No proceeding shall lie against the Crown by virtue of this section in respect of any neglect or default of any officer of the Crown, unless that officer has been directly or indirectly appointed as an officer of the Crown and was at the material time paid in respect of his duties as an officer of Crown wholly out of the consolidated Fund of the United Kingdom provided by Parliament, the Road Fund or any other Fund certified by the Treasury for the purpose of this sub-section or was at the material time holding an office in respect of which the treasury certify that the holders thereof would normally be so paid'.

or any responsibilities which he has in connection with the execution of judicial processes. Section 9 and 10 of the Act also exempted the crown from liability in connection with postal and armed Forces.

5.4. Who is a Crown servants?

The question who is a servant of the crown, it must be remembered that the crown is liable to the same extent as a private person for torts committed by its servants or agents, and that 'agent' includes an independent contractor[176]. The general principle in tort is that the employer is liable for the misdeeds of his servant or agent done in the course of the employer's business but not for the misdeeds of independent contractors, who bear their own responsibility. Where the employer can control what the employee does and how he does it, the relationship is likely to be that of master and servant, so that they are liable jointly. The same is true when an agent is employed. But an agent has to be distinguished from an independent contractor, for whose tortious acts the employer is not liable at all. For example, a person who takes his care for repair to an apparently competent garage is not liable if, because of careless work by the garage, a wheel comes off and injuries some one[177]. Yet there are some special cases where there is liability even for independent contractors, for example where the work is particularly dangerous. Thus a householder had to share the liability when she called in workmen to thaw out frozen pipes and by using

[176] Section 38(2).
[177] Compare Phillips v Britannia Hygienic Laundry (1923) 2 K.B. 823.

blowlamps they set fire both to her house and her neighbour's[178]. If this had happened on crown land, the crown would have been equally liable under the Act because of its general liability for the torts of its agents.

The crown shall not be liable for the torts of any officer of the crown unless that officer has been directly or indirectly appointed by the crown and was at the material time paid wholly out of money provided by Parliament or out of certain funds, or would normally be so paid. But the principle importance of this provision is that it prevents the crown becoming answerable for the police, in some of their functions the police act as officers of the crown. Since the police, both in London and in the provinces are partly paid out of local rates, and in the provinces are appointed by local authorities, they are all excluded by the Act.

The crown has one general immunity in tort which is a matter of constitutional propriety. Judges and magistrates are appointed by the crown or by ministers. They are paid out of public funds and so may be said to be servants of the crown in a broad sense. But the relationship between the crown and the judges is entirely unlike the relationship of employer and employee on which liability in tort is based. The master can terminate his servant's employment, but the superior judges are protected by legislation. Their independence is sacrosanct, and if they are independence no one else can be vicariously answerable for any wrong that they may do.

[178] Balfour v Barty king (1957) 1 Q.B. 496.

It is virtually impossible for judges of the Supreme Court to commit torts in their official capacity, since they are clothed with absolute privilege, and this privilege has now been extended to lower judges, such as magistrates, if acting bonafide within their jurisdiction. But the Act comprehensively protects the crown in the case of any one discharging or purporting to discharge judicial functions. If there is no personal liability, the crown cannot be liable in the capacity of employer.

Public authorities, including ministers of the crown enjoy no dispensation from the ordinary law of tort and contract, except in so far as statute gives it to them. Unless acting within their powers, they are liable like any other person for trespass, nuisance, negligence and so forth. This is an important aspect of the rule of law. Similarly they are subject to the ordinary law of master and servant, by which the employer is liable for torts committed by the employee in the course of his employment, the employee also being personally liable. In *Cooper v Wandsworth Board of Works*[179], the board was held liable in damages in an ordinary action of trespass, as has been seen, it was acting outside its powers because it caused its workmen to demolish a building without first giving the owner a fair hearing, therefore it had no defence to an action for damages for trespass. The famous cases which centred round John Wilkes in the eighteenth century, and which denied the power of ministers to issue general warrants of arrest and search, took the form of actions for damages against the particular servants

[179] (1863) 14 C.B. (N.S) 180.

who did the deeds, who were sued in trespass just as if they were private individuals. The Governor of Jamaica, who had ordered the seizure of a ship chartered to the plaintiff and could show no legal justification, was held personally liable in damages for trespass. Before 1948 the crown itself was not legally liable for its servants misdeeds, but the crown would be the natural defendant to day. The plaintiff may sue the master or the servant or both, since both are jointly liable, but in most cases he will naturally choose to sue the master. He must be able to show some recognized legal wrong. Thus there is no remedy for tapping of telephones, which is not a tort. There are some situations where an officer of central or local government has an independent statutory liability by virtue of his office, because the statute imposes duties upon him as a designated officer rather than on the public authority which appoints him. In that case the employee only will be liable.

There are varieties of actionable negligence, an account of which belongs to the law of tort. But the courts have extended the principle of liability to certain acts of public authorities which are of a peculiarly governmental character and which require notice. In 1970 the House of Lords held the crown (the Home Office) liable for damage done by escaping Borstal boys. These were boys with criminal records who had been taken out on a training exercise in charge of Borstal officers who had instructions to keep them in custody but, who neglected to do so, they escaped and damaged a yacht, the owner of which was the successful plaintiff. Despite the novel nature of the claim, and the contention that there was no liability

for the acts of persons other than servants or agents, it was held that the custody of these dangerous boys imposed a duty to take reasonable care that they could not injure the public. This was an application of the doctrine of the law of tort that a duty of care arises from a relationship of proximity where the damage done is the natural and probable result of the breach of duty. The required degree of proximity may exist, on the facts of such a case, only in the vicinity of the place of detention, so that liability may be limited to damage done locally in the course of the escape. In this decision the House of Lords has taken a noteworthy step towards spreading over the whole community the price that has to be paid for experimental penal policies, rather than requiring it to be borne by the individual victim. In the same way a local authority was held liable for negligent custody of a boy.

5.5. Remedies available in English Legal System

The English legal system gives effective remedies in private law, in cases of infraction of primary rights. This private law concepts is flexible enough to cope with public law situation and can be used to regulate public law relation by changing the Royal immunities to the Royal responsibilities. The English legal system has had some notable success historically. It has given remedies particularly effective in case of infraction of primary rights especially those relating to torts, flexible enough to cope with the public law situation[180]. The Crown Proceeding Act gives a certainty regarding the area where the crown can enjoy privilege and exception. In the same way it was

[180] C.J Hamson, Government Liability in Tort in the English and French Legal System, 12 JILI 1970 at 31.

clearly explained the conditions when the crown becomes liable for the wrong of his servants or officials. Now the English system is successful in safeguarding the primary rights and in giving the injured subject, an extremely prompt and efficacious remedy by directing its process against the immediately responsible individual. Payment of compensation maintains to restore the equilibrium where the injured cannot go to the original position and thus protects the rights of people in general[181].

The primary function of the judiciary is to determine the dispute either between subjects or between subjects and states. In England the chief constitutional function is to ensure that the administration conforms to law where the supremacy of Parliament is absolute. The Parliament can override the decision of the court if need be with retrospective effect[182]. More recent trend in England is that courts are capable of evolving new principles to meet the changing situation of the modern welfare state and to see whether the administrative agency has acted ultra vires or not. So judicial review is to see, whether the administrative agencies acted according to law. They must not act beyond the power conferred on them. So the function of the court is to see that these authorities whether performing judicial, ministerial, and discretionary do not act in excess of their power. If the act of the Crown is outside the exemption, the ordinary courts possess jurisdiction to decide and the action will lie against the state. In England, no court is competent to

[181] P.Ishwara Bhat, Administrative Liability of Government and Public Servants, Eastern Law House, New Delhi (1983) P. 122.
[182] Manju Saxena and Harish Chandra, Law and Changing Society, Enforcement of Basic Human right in the changing society, Deep and Deep Publications, New Delhi (1999) P. 104.

enquire into the misconduct however gross of an official public duty such as that incumbent upon a borstal officer, for the purpose of giving a remedy in damages to a member of the public, however directly injured. So the aggrieved has to approach the ordinary courts for getting justice.

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 courts. In India, the principle of *Respondeat Superior* is not applied in case of statutory functions by the state.

Chapter VI

Tortious Liability of State and its Remedies in USA

Constitution of every nation guarantees some exclusive rights to its citizens and it is the duty of the democratic nations to protect these rights, the violation of which can be remedied under the respective Constitutions. Although the provisions of the Constitution of the United States of America are relatively different, regard might be had the position in that country in view of the fact that they have a similar Bill of Rights which did to an extent serve as a model of our own. Section 3 of Article III of the U.S Constitution states that "the judicial power shall extend to all cases, in Law and Equity, arising under this Constitution, the Law of the United States……", but traditionally the Constitution has been put to 'defensive use' and has not been made nullification of the effect of constitutional violations, as in *Mapp v. Ohio*[183] where it was held that evidence gained by the State in contravention of the Fourth Amendment could not be used in the courts.

6.1. Law relating to state liability in U.S.A.

In American legal system, the Rule of Law was absent in the field of government liability, as the government could not be vicariously liable, since it could not be subjected as defendant on the theory. There can be no legal right as against the authority that makes the law on which right depends. The reason for adapting the sovereign immunity principle in American legal

[183] 367 U.S. 643 (1961), 6L. Ed. 2d 1081.

system may be financial instability of the American states after the revolutionary war.

Garner in an article seeking to explain Anglo-American approach towards administrative law commented that it is difficult to understand how in a democratic republic the people could have accepted the doctrine of immunity of the state its non-liability for damages inflicted by its agents on private individuals[184].

However, the U.S. Supreme Court for the first time in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*[185] held that they violation of the Fourth Amendment could be made the basis for a civil suit in the Federal District Courts against the erring officers. In Bivens, six agents of the Federal Bureau of Narcotics entered the appellant's residence in the night and arrested, manacled and searched him. He was then taken to the New York Headquarters of the Federal Bureau of Narcotics where he was interrogated, fingerprinted, photographed, booked, stripped and searched again. The court was of the opinion that in the absence of any effective alternative remedies, the Fourth Amendment could directly be made the basis of an affirmative cause of action for damages without waiting for a legislative mandate to do so. The fact that the remedy made available was against the officers concerned and not against the Federal Government, and that it could be availed of only in the Federal District Courts is immaterial to

[184] G.P.Verma, State Liability in India: Retrospect and Prospects, Deep and Deep publications, New Delhi, (1993) p.69.
[185] 403 U.S. 388 (1971), 29 L. Ed. 2d 619.

the point sought to be made: the fact remains that an affirmative remedy based directly on the Constitution was given sanction by the Supreme Court of the United States in this case.

Besides a host of other cases dealing with various other provisions of the Bill of Rights which were terminated at the stage of the various U.S. Circuit Courts of appeals[186], the U.S. Supreme Court itself has extended its decision in Bivens in two other cases dealing with the implication of a cause of action for damages directly from other provisions of the Constitution. In *Davis v. Passman*[187], a lady who had been dismissed from employment by a U.S. Congressman on the ground that she was a woman, was permitted to sue him in the "Federal District Court directly on the basis of the violation of her right to equal protection which has been read into the Fifth Amendment. Again in *Carlson v. Green*[188] the Court extended the facility of a "Bivens' type action" to persons whose rights under the Eighth Amendment had been violated. Here the mother of a man, who it was claimed had been denied proper medical treatment by officials and had, therefore, died in prison, was permitted to sue on the basis of the Eighth Amendment prohibition against cruel and unjust punishment. It is evident from these decisions that the rights guaranteed in "the Bill of Rights" in the American Constitution are limitations on the State powerful enough to be directly

[186] For a list of cases decided by the various U.S. Circuit Courts of Appeal see the Annotation by G.K. Chamberlin, Implication of Private Right of Action from Provision of United States Constitution- Federal Cases, 64 L.Ed. 2nd p. 872.
[187] 442 U.S. 228 (1979), 60 L. Ed. 2nd 846.
[188] 446 U.S. 14 (1980), 64 L.Ed. 2nd 15.

made the basis of a cause of action for damages, without waiting for legislative authorization[189].

In 1791, the fifth Amendment to the Constitution of U.S.A declares- "No person shall be deprived of his life, liberty or property without due process of law". In 1798, the Eleventh Constitutional amendment was passed to restrain state immunity. Judicial activism played a vital role in abolishing the doctrine of sovereign in some stated but in some states this was left in the hands of legislation. In 1821, the first authoritative pronouncement regarding state immunity was made by Marshall C.J. According to him, no suit can be commenced or prosecuted against the United States, that the judiciary does not authorize such suit.

In 1868, the Supreme Court went to the extent of holding that no government has held itself liable to individuals for the misfeasance, laches or unauthorized exercise of power, by its offices or agents. It was thought that if the sovereign immunity principle is restricted, it would endanger the performance of public duties by the sovereign if the sovereign is repeatedly tendered with suits. In the year 1907, Justice Holmes, brought a powerful argument, supporting sovereign immunity. The Sovereign is exempted from suit because there can be no legal right against the authority that makes the law on which right depends and also the sovereign cannot exist in the

[189] Krishnan Venugopal, "A new dimension to the liability of the State under Article 32", Indian Bar Review 1984,Vol. xl. p.376,377.

absence of the government and this would be assumed only if some immunity is granted to it.

By the middle of the nineteenth century, the citizen was not satisfied with the doctrine of sovereign immunity and they preceded action against the government for getting relief. Due to the dissatisfaction by the citizen, the Court of Claims Act was enacted in 1855 and set up a tribunal to investigate on claims against government and to submit a report. It was possible only in compensating a victim of administrative action arising out of contract but not the liability in tort. The result was that talented men were discarded from entering the government service due to the fear of accountability. The officers were not financially sound enough to pay adequate compensation to the aggrieved party.

This struggle was continued by the citizen for the protection of their rights against the state. By the Twentieth century, there was a change in the attitude of people supporting sovereign immunity so that a gradual change was made from state irresponsibility to state responsibility. In 1910, certain claims for infringement of rights were recognized statutorily like compensation for admiralty and marine torts, federal employee's compensation, war, damages, postal claims against the Federal Bureau of investigations. Thus the Bill for securing damages was introduced in 1924 and 1925 and the Bill of 1928 adopted under the chairmanship of the senator which was vetoed by President Coolidge. In 1942 President Franklin Roosevelt in his message suggested a change in the law relating to

governmental liability in Tort. This change could not be brought about due to Second World War resulting in economic depression. Federal Tort Claims Act 1946 came into force. President Lincoln requested that citizen must get prompt justice from the government.

The United States adopted the principle of restricted immunity in 1952, in the so – called Tate Letter[190], although a decision of 1955 limited the practical effect of the principle by refusing the establishment of New York jurisdiction through the seizure of the assets held by the Republic of Korea, the defendant, in a New York bank. But in 1961 the state Department, in another case declared that 'where under international law a foreign government is not immune from suit, attachment of its property for the purpose of obtaining jurisdiction is not prohibited. However, the United States, like a majority of foreign states, still refuses to execute a judgment against the property of a foreign sovereign.

The restriction of government immunity has been rationalized in two different ways. The first approach, now adopted by most continental countries, substitutes for the doctrine of absolute of absolute state immunity that of qualified immunity. Foreign states, under this doctrine may or may not be immune from jurisdiction, according to the kind of activity in which they are engaged. Following the leadership of the Belgian and Italian courts which have since been followed by the courts of France and many other continental countries, a distinction, familiar in continental

[190] 26 Dept. of State Bull, 984 (1952).

administrative law between acts *jure imperii* and acts *jure gestionis* has been applied to this branch of international law. The difficulty is how to find a reasonably precise distinction between acts of the one and the other kind, in view of the many diverse ways in which governments may engage in economic and commercial activities. For this reason neither the functional test (does the state act in its sovereign capacity) nor the test of the form of the transaction is satisfactory. Any government activity may fulfill 'sovereign purposes'. But many government departments obtain their purchases and supplies in the form of commercial contracts.

The second approach, which makes the nature of the transaction the criterion, was adopted in the Brussels Convention of 1926. Under the convention, seagoing ships operated or owned by governments for commercial purposes are in time of peace subject to the same rules as those applicable to private vessels, cargoes and equipment, and do not enjoy the immunities of government property.

While this pragmatic distinction between commercial and non-commercial activities avoids the fallacious criterion of sovereignty, it leaves other doubts and difficulties unsolved. It is implicit in the doctrine that the states will continue to enjoy the traditional immunities in regard to such activities as have traditionally been held to be their proper sphere. This is not because commercial activities should be regarded as 'non-sovereign', but because any distinction between privileged and non-privileged government activities must separate out the hard core of an irreducible

minimum of government activities. While, economic activities may ,in contemporary society, be undertaken by private enterprise, governments or mixed undertakings, certain activities are universally recognized to be necessarily governmental in the practice of nations. These minimum spheres include, undoubtedly, military and foreign affairs, the administration of justice, and the activities inevitably related to them. Here the difficulties of the other tests recur, at least to a limited extent. Military operations may include purchases, service contracts and licence agreements. The conduct of foreign affairs may include broadcasting contracts or the purchase of land. These problems are parallel to the difficulties of distinguishing between *gestion poblique* and *gestion privee*, in the administrative law of France and other countries, as a criterion for the allocation of jurisdiction to either the administrative or the civil courts. But no theoretical test or principle can avoid the complexities of the concrete decision. The distinction between commercial and non-commercial activities of a state is, in contemporary conditions, a sound and necessary one, even if it is difficult to apply in certain individual cases.

The remedy by way of personal liability was futile, where the officials doing the wrong may not be financially sound enough to pay adequate compensation to the aggrieved party. The United States found a solution to this problem by enacting the Federal Tort Claims Act 1946, which set aside sovereign immunity.

6.1.1. 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 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. Borchard, who was in favour of governmental responsibility, stressed the need of limiting the state responsibility. The exceptions in the Act are mainly divided into three categories[191].

[191] The exceptions 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

It was stated that the first part of this section leads to a confusion that should the state always be immune from liability for what is prudently done in carrying out a statute or regulation. The second part of exception says the liability will be in the same manner and to the same extent as a private individual under like circumstances. But in the exercise of discretionary functions, governmental units should be immune from liability for damages on account of negligence, fault, mistake or abuse of discretion. If the discretion is the basis for a decision, revocation of license, denial of zonal permit then the party aggrieved has no cause of action against the government. This part also invites confusion to decide whether particular act of the government is discretionary function. The purpose of including the third category of exception is not clearly mentioned in the Act. By which the state is exempted from liability arising out of specific torts.

Law made the state of U.S liable for tort claim 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 liability. Today, the Federal Tort Claims Act 1946 recognizes governmental liability in principle but subject to three main exceptions with wide ramifications: i) There are exceptions for specific administrative functions or agencies as well as for all claims arising in foreign countries; ii) the Act excepts specific torts, providing that there is to be no liability of the United States for most international torts; the courts are denied jurisdiction

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Tennessee Valley Authority and activities of the Panama Rail Road Company, claims arising out of the Federal land bank a Federal Credit Ban or a bank of cooperatives.

over "any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecutions, abuse of process, libel, slander, misrepresentation, deceit or interference with contact rights",[192] iii) there is a broad exception for acts or omissions of federal officers exercising due care in carrying out statutes or regulations, whether or not they are valid and performance of discretionary functions by government employees, whether or not the discretion is abused.

The third exception has the effect of leaving the United States irresponsible in most cases in which the act causing damage is not committed by a negligent public officer, for it is only the rare situation in which the officer has not acted in the execution of a statute or regulation or in exercise of discretionary powers. "If discretions are involved, recovery against the United States cannot be had even though the act causing the damage was done negligently"[193]. According to the Supreme Court this "lay aside a great portion of the sovereign's ancient and unquestioned immunity from suit"[194]. Thus limiting the tort liability of the United States to "fault" seems unreasonable, in view of the extension of general liability in tort far beyond the "fault" principle.

[192] By the 1974 amendment, the United States is now liable for assault, battery, false imprisonment, false arrest, abuse of process or malicious prosecution committed by law enforcement officers.
[193] Bernard Schwariz, Administrative Law 565 (1976)
[194] United States v. Lillian Spelar, 388 U.S. 217 (1949)

More over there is no liability for intentional torts also. So the aim for state liability became weakened by exemption clause in *Delehite v U.S*[195]. The United States was not held liable because the case involved is concerned with the exercise of discretionary powers. The fault was in the discretion of the officers in deciding not to experiment further with combustibility of the material and in arriving at a decision to proceed with a manufacture and fertilizer. It was also found that fault was not only with the planning level but also with operational level. So neither the United States nor the negligent official may be held liable and the only way to reduce grievance was by private legislation for compensating the loss by the government. So the Supreme Court held that the wrong was done in the exercise of discretionary power neither the government nor the officials were liable for the tort committed in the exercise of discretionary power.

In *Hargrove v Town of Cocoa Beach*[196] where a suit was brought against the municipality for wrongful death of an inmate of a jail who was suffocated by smoke, majority held that municipality was liable though the function was governmental. In this case the court said that the court should be alive with the demands of justice.

[195] 346 U.S. 15.(1953) In this case large cargo of ammonium nitrate fertilizer exploded on board a ship docked at Texas City in 1947 as a result of it more than 560 persons were killed and 3000 injured and property worth hundreds of millions dollars damaged. When the suit brought against the government lower court found the negligence in production and transportation. But the act fell within the exceptional clause like discretionary power of the government.

[196] G.P Verma, State liability in India : Retrospect and prospect, Deep and Deep publication, New Delhi (1993) p.92.

In *Muskopf v Corning Hospital District*[197] the Californian court expressed:

'The rule of governmental immunity in tort is an anachronism, without rational basis and the exception operate illogically so as to cause inequality'.

The doctrine of immunity was mistaken and unjust and as an anachronism without any rational basis.

In *Monroe v Pape*[198], the police officers who broke the petitioners house, without warrant, roused them from sleep and ransacked everything in the house subjected them to torture under police custody and so the Supreme Court held that the police officers were to be held liable under section 1983. Now along with the expansion of the concept of state, the scope of this section is also enlarged. The important factors like the essence of the rule of law, corrective justice and elemental principles of justice, equal rights etc are incorporated in section 1983. Thus section 1983 compensates the wronged and at the same it condemns the wrongdoer.

Without it the action in *Elizabeth H. Dalehite*[199] would probably have succeeded. The position in State jurisdictions is better. The State of New York has completely abolished immunity in tort, thus going far beyond the federal legislation. Twelve other States established governmental liability in

[197] 55 Cal 2d 211.
[198] *Monroe v Pape* 365 US 167 (1961).
[199] Supra note 6. This combined over 300 suits brought against the United States under the Federal Tort Claims Act based on negligent handling of the ammonium nitrate fertilizer by the government which exploded gutting the entire dock area, killing more than 560 persons and injuring about 3,000. The Supreme Court held that the government was not liable because discretionary authority was involved in which "fault" was irrelevant.

most cases. In the remaining states the tort claims are granted only occasionally, seldom, or not at all[200].

It is gratifying to note that by separating planning from operation, an inevitable limitation on *Dalehite* rule has been placed, and thus the court has developed a principle of public law of tort which will go a long way in protecting against the negligent acts of the government. In *Indian Towing Co. v. United States*[201], the court ruled: "The Coast Guard need not undertake lighthouse service. But once it exercised its discretion to operate a light and engendered reliance on the guidance afforded by the light, it was obligated to use care to make certain that the light was kept in good working order[202]. The judicial behavior, however, still remains residual and variegated because "negligence" or "fault" still plays a dominant role in determining State liability.

The severity of "fault" doctrine has further been mitigated by introducing a distinction between governmental and proprietary functions. The liability has been limited to the proprietary functions alone. This distinction has been a source of unending confusion not only in the United States but in other countries also where such a distinction is followed. Needless to say that the distinction between governmental and proprietary functions is based on logical fallacy and practical absurdity and derives its justification, if any exists, from extra-legal considerations of protecting the

[200] Robert A. Leflar and Benjamin K. Kantrowitz, "Tort Liability of the States", 29 NYU.L.Rev. 1363 (1954).
[201] 350 U.S. 61 (1955). Government was held responsible for the damage caused to a ship because of the negligent maintenance of lighthouse by the coast guard.
[202] Kenneth Culp Davis, Administrative Law Text 475 (3rd ed. 1972).

impecunious small authority from liability. However, it is only desirable and equitable that an attempt to protect an impecunious state from liability should be through budgetary reorganization and not through shifting the burden to helpless victims[203]. The harshness of the "immunity" principle is further mitigated by a number of legislative and administrative measures: i) In many cases private laws are passed for granting compensation, often irrespective of fault; ii) claims are also settled by administrative machinery such as the departments for the army, interior and the postmaster-general; iii) employees who are held personally liable are often indemnified by the authority in whose service they are; iv) it is sometimes possible to bring claim for wrongful injury not under the heading of "tort", but under "taking property" which is subject to just compensation; v) many public authorities take out liability insurance, the terms of which often exclude the defence of sovereign immunity[204].

Hence all these concessions, though not in anyway less important but only mild palliatives, do not provide a cure to the deep rooted malady because they still remain concessions at the discretion of legislative and administrative authorities making the question of compensation not a matter of law but a matter of concession. Moreover, the feudalistic, authoritarian doctrine of sovereign immunity is still perpetuated, obscuring

[203] In view of the multitudinous business operations which are conducted for general welfare, the test artificially divides and truncates the ubiquitous function of a state.
[204] Walter Gellhorn and Louis Lauer,"Congressional Settlement of Tort Claims against the United States", 55 Col. L.R.1 (1955).

the proper understanding of the role and function of government in a democratic society.

It is amazing that the courts in the United States, which have developed a rich wealth of new principles in almost every field, are still groping in the dark in this area of high social visibility. Dalehite is dead but still rules from the grave. In *Melvin Laird, Secretary of Defense v. Jim Nick Nelms,*[205] the Supreme Court reaffirmed Delehite by holding that the State is not responsible for the damage caused from sonic booms by military planes under the provisions of the Federal Tort Claims Act unless negligence is proved. Therefore, the liability in tort does not arise by virtue either of State ownership of an inherently dangerous commodity or property or of engaging in an extra-hazardous activity[206]. Hence the doctrine of sovereign immunity, which is an anachronism without any rational basis, is still persisting in the United States especially in federal jurisdiction perhaps by the force of inertia[207].

6.2. Remedies available in U.S.A legal system

In U.S.A there is a written Constitution which cannot be overridden by the ordinary process of litigation, the judiciary is in a special sense, the guardian of the Constitution and so they declare a statute to be unconstitutional and invalid if it violates the rights of the citizen. But there is

[205] 405 U.S. 797 (1972).
[206] The movement generated by Rylands v. Fletcher, (1868) L.R. 3 H.L. 330, now extended to all activities that pose an undue risk to the community, has not affected the development of law in the United States.
[207] I.P. Massey, "Dialectics of Sovereign Immunity and Dynamics of Welfare Society: Need for an Independent public law of Tort" JILI 1984 at 151.

a special provision for judicial review and there the judiciary is famous for judicial activism. Section 10 of the Administrative Procedure Act 1946 is for the purpose of judicial review. In 1976, the Administrative Conference drafted a legislation by which the congress amended Sections 702 and 703 of Administrative Procedure Act to allow review of administrative action in suits against the government for relief other than money.

The study conducted by the California Law Review Commission reported that absence of malice in the torts of state's employees, the public entity has to bear the loss so that the recent trend is that of increasing liability of governmental units and decreasing liability of public officers and employees. The Supreme Court in the U.S.A. is the highest in guarding the interest of the people. Remedies are also provided by the Federal Tort Claims Act. Thus today in the words of renowned judges of the Supreme Court J. Frank further that U.S.A is famous for, review of administrative action and their Constitution is the largest and the category of court's work. Comprising one third of the total cases decided on the merits. Even then the Federal Tort Claims Act needs to be amended; otherwise it would affect the human rights and dignity of the citizen.

6.3. State Liability in French Legal System

France is a welfare state governed by the rule of law[208] and the state is subject to law and as far as liability is concerned, it ensures the

[208] S.S. Sreevastava, *Rule of Law and Vicarious Liability of government*, Eastern Law House Private Ltd. Calcutta,(1995) p.38.

governmental liability. The maxim 'king can do no wrong has been superseded by the maxim that the state can do no wrong and as a honest man it will seek to repair damages caused by its wrongful acts. The French administrative court which is adopted as a model by a number of countries, have the jurisdiction to annual illegal administrative acts, when the citizens are injured by the acts of government employee.

6.3.1. French doctrine of liability of the State

The French doctrine of the liability of the state is based on the theory that the state is an honest man and will not try to avoid responsibility to its citizens for damage done by wrongful or improper acts by raising the shield of immunity of the state[209].

The *Conseil d' Etat* which is not bound by any code or civil law and the two principles of state liability evolved from *legalite* and *responsibilities.* According to the former the administration must act in accordance with the law and in the latter the administration will be responsible for the injury to the citizen due to its unlawful act. There are two principles to deal with the administrative torts; they are *faute de service* and *faute personelie*.

In faute personelie, where there is some personal fault the official can be sued personally in the ordinary courts. In faute de service one which is linked with the service of the official, the injured party can sue the administration before the administrative courts.

[209] Durga Das Basu, Administrative law, Kamal Law House Kolkata, 2004. P 378.

In some case *faute de service* and *feute personelie* may be difficult to distinguish and a combination of the service fault and the personal fault is called a *cumul.* Then the victim can sue both in civil court and in administrative courts but that does not mean that the aggrieved party can claim from both sides. The *Conseil d 'Etat* has applied the principle of joint tort-feasor and it has the final words in apportioning the liability by contribution. The Conseil indicated that once the commune had paid the damages to the complainant, it could require to be subrogated to the latter right against the mayor for his personal fault. But this was recognized to be an imperfect and clumsy device. As a result the most injured party decided to sue only the administration in cases of cumul having regard to its bigger pocket so that the negligent officer escaped from liability. In practice these irresponsible officers were encouraged to repeat the same acts in future. Prompted from this policy consideration, the *Counsel d' Etat* decided to have a direct action for contribution or indemnity against the official. The action would lie in the administrative courts to apportion the ultimate share of responsibility between the official and the administration in cases of cumul. When an official has been ordered to pay the damages by the civil courts or when the administration has been ordered to pay damages by the state courts, the state courts can order contribution either in full or in part on the basis of fault. In such cases damages are contributed by joint tort feasors.

In *Delvilla*[210], when the liability of the defendant was fixed, he claimed 50% contribution from the administration on the ground that the accident was due to the defective breaks of the vehicle. The *Conseil d' Etat* upheld his claim so where there is a personal fault combined with service fault the victim can sue either the official or the administration in the appropriate courts. The official can be made to contribute appropriately according to his damage.

In France, even if the administrators are not at fault they can be made liable by applying the risk theory, the liability without fault. According to this theory when the administrators engaged in the public work involving risk, duty cast upon them to bear the damage by compensating the injured. In France liability of the state for Administrative torts[211] is seen, like the injury caused by the fault of the public officials due to some defect in the machinery provided by the administration or if the operation involved special risk of the citizens. It ensures full justice to the victim on the basis of the risk arising out of the act and not on the basis of fault. In such cases French administrative law makes the state liable as an insurer against social risk. This is applied in riot cases, police while chasing the offenders and a lunatic escaping from asylum, military munitions etc. In risk theory, liability is assessed in four categories.

[210] CE28 July 1951. In this case, a government lorry was involved in an accident partly because of the drunken state of the driver, Delville and partly because of the defective breaks. Delville was sued in the ordinary courts by the other party to the accident and held liable for the damage caused.
[211] L.Neville Brown, J.F.Garner French Administrative Law (1983) p.115.

1) Person assisting in public service sustaining injury example injury occurs while engaged in fire extinguishing operation.
2) Injury or abnormal risk while engaged in dangerous operations loss of life and property due to blasting up of large quantity of ammunitions and grenades.
3) Refusal to execute judicial decisions.

   In *Couiteas*[212], the *Conseil d'Etat* held the Couiteas were entitled to damages not on the basis of fault of the government but on the basis of equality in bearing public opinion. A citizen bearing special sacrifice for refusal of help by administration in executing the judgment must be compensated on the ground of equality.

   1) Legislation

      If the effect of the legislation is injury to an individual he is entitled to damages from the state.

In the *Ministre Des Affaires Etrangers C.Consorts Burgat*[213] a case of government liability where the damages were awarded against the state because of the statutory immunity of diplomats prevented the enhancement of the rent against the lady occupant of the premises. Now the right to indemnify or assurance arises only if it is proved that it was not

[212] CE 30 November 1923. In this case, the nomadic tribesman had occupied the extension tracts of land covered by Couiteas. Couteas had obtained a declaration from the civil courts of his right over the land. His own efforts in evicting the land having failed he sought the help of public authorities and the government but the help was not given to him due to government's fear of civil war.

[213] CE29 October 1976. Here the lady who occupied the premises of the Land lord subsequently married a UNESCO official who was living in the same flat when the landlord asked the tenant the payment of increased rent, the landlord had to meet with the plea of diplomatic immunity. The complainant successfully argued that the state had enacted the immunity statute which had deprived them of normal life.

the intention of the legislature to make the victim to bear the loss. Moreover the victim should not have engaged in the act which is injurious to public health, public order and good morals. It is the only company which was affected by the statute etc.

The state will be liable for ultra vires acts, error of law, abuse of power, if it violates the procedural law and natural justice.

The state is immune from liability only if the act was done by the officials wholly unconnected with the official function. But the state would not be liable where the impugned act is not administrative but political. Acts relating to international or diplomatic relation, parliamentary proceedings relating with executive and the legislature, reason of state or Act of State.

Conclusion

In England the law relating to state liability defines the area where the state can enjoy privileges. So there is certainty of law in this area whereas in USA exceptional clause is a great flaw and the state is exempted from liability. In England there is no other courts except the ordinary courts where aggrieved has to file suit against the public officer. When comparing these three system the French system is the most suitable one and it defines the area where the sovereign can enjoy privilege and state would be liable like that an ordinary person in most of the negligent acts. In England, no court is competent to enquire into the allegation against the officials of the state. In USA the Federal Torts Claims Acts 1946 consists of exception clause

which exempts the state from liability. The defects of English system is that the application of 'Act of state' is limited whereas in USA more exemption clause is a real flaw. This exemption clause exempted the state from liability even for negligence acts. In India while determining the liability of the state, application of sovereign and non-sovereign would affect the right of the citizen guaranteed by the Constitution. So the French system is more adaptable to the modern conditions making the country more responsible towards the citizens rights and justice. The French administrative law succeeded in developing a new machinery and evolved a new technique in determining the liability of the state. The French legal system is a notable one and it is a well developed and balanced system of state liability and it can be used as a model for equipping and shaping the law of state liability.

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 judges 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

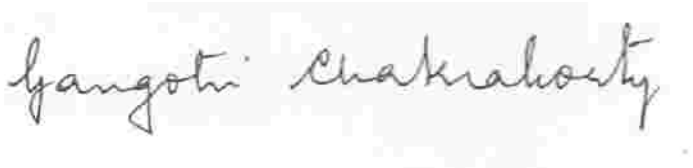
petition before the Supreme Court and High Court. Now the judiciary use Article 21 to promote compensatory jurisprudence to enforce rights guaranteed to the people and began to grant compensation in case of violation of human rights and it also clarified in a number of cases that sovereign immunity is 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[214].



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Contents

10

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

Sharita Sharma[1]

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

1. Research Sholar, 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 courts[8]. 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 servants[9].

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 Crown[10]. 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 Act[11]. 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 duty[12]. 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

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 categories[13]. 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 liability[14]

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

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 65 of Contract Act

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 *Vidhyawat*[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 state[34]. 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 Constitution[37]. 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 Constitution[38]. The question was considered by the court, for the first time, involving an in human act by the police. In the case of *Khatri 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)Not withstanding 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.

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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 detenue. 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 it 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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