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.

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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.