TORTIOUS LIABILITY OF THE STATE: A FRESH LOOK

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I Introduction

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. 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[2]. According to Dr. Justice Anand 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[3]. From this it can be said that the courts are bound 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.

II Unsatisfactory state of the law

In India, the only provision, which deals with the liability of the State is in Article 300 of the Constitution. It deals with the extent of liability of the Union of India and the Government of the States. 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 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 the like cases as the Dominion of India and the corresponding provinces or the

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2 Vikram Raghavan, "The Compensating victim's of Constitutional Torts," AIR 1998 Journal 104.

3 Dr. Justice Anand : Protection of Human Right's- Judicial obligation of Judicial Activism (1997) 7 SCC (J) 10, p 24.

corresponding Indian States might have sued or been sued if this Constitution had not been enacted[4]. This Article 300 does not specify or provide for the liability in clear terms and this Article 300 refers back to the pre-constitutional laws like Government of India Act 1935, under Section 176, and it in turn refers to the Section 32 of the Government of India Act 1915, which Section 32 again refers Section 65 of the Government of India Act 1858[5]. Hence Article 300 of the Constitution of India is to be interpreted in the lines of provisions contained in Section 65 of the Government of India Act 1858. Accordingly, it is to be stated that Article 300 gets its roots from Government of India Act, 1935, 1915 and the Act of 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. The provisions of the Constitution does not mention in clear term on what basis Government would be held liable. 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 sovereign and non-sovereign functions or government and non-government functions should be no longer invoked to determine the liability of the State[6]. 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[7], 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

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4 M.P Jain; Constitutional Law, Wadwa and Company, New Delhi, 2003.

5 Section 65 of the Government of India Act 1858 lays down that on the assumption of Government of India by British Crown, the Secretary of State for India-in-Council would be liable to the same extent as the East India Company is liable.

6 First Report of the Law Commission of India "Liability of the State in Tort" (1956).

7 The Government (Liability in Tort) Bill 1967.

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 eight 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.

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.

This is evident from various case laws. In *State of Rajasthan v. Vidyawati*[8] is the first post-Constitution case which laid down case laws on this subject. In this case a broad based approach was taken. 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 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 point for consideration was whether, the jeep car, which was being driven back down the repair shop to the Collector's place when the accident took place, it was doing anything in connection with the exercise of sovereign powers of the State? The Supreme Court came to conclusion that, the injuries resulting in the death of Jogdishlal were not caused while the jeep car was being used in connection with sovereign powers of the State. Thus the question regarding availability or otherwise of remedy, if any, in tortious activity connected with the 'true' Sovereign Functions was not decided at all. The grant of relief to family of victim was no doubt in spirit of Welfare State, but still, it can be argued that repair and movement back to Head Quarters was an integral part of sovereign function. The relief was awarded because the activity was classified as non-sovereign and it is not a case that relief was given in spite of it being a sovereign function.

The distinction between sovereign and non sovereign functions had disappeared for some time but the same distinction again came to be recognized by Gajendragadkar C.J of Supreme Court in *Kasturilai v. State of*

[8] AIR 1962 SC 933.

U.P[9]*,* wherein there is a clear finding regarding the gross negligence on the part of the police authorities in the matter of safe custody of gold as could be seen in the records. The Court observed, "…….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. 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 categorized as sovereign powers, and so, there is no difficulty in holding that the act which gave rise to the present claim for damages has been committed by the employee of the respondent during the course of its employment: but the employment in question being of the category which can claim the special characteristic of sovereign power, the claim cannot be sustained". Though the claim of damages and cost was rejected, the Court did express dissatisfaction over prevailing conditions where, a citizen is left no remedy against negligence of the officers of the State. "In dealing with the present appeal, we have ourselves been disturbed by the thought that a citizen whose property was seized by process of law has to be told when he seeks a remedy in a Court of law on the ground 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". With due respect it is stated that, the Court desired that remedy ought to be provided against any negligence of the officers of the state, even where act of negligence is committed by the employee of the State during the course of its employment belonging to category which can claim the special characteristic of sovereign power, but felt helpless.

The finding by the trial Courts that, the police officers had failed to take the requisite care of the gold seized from the plaintiff, as provided by the UP Police Regulations, with due respect it is stated that, was not appreciated in proper spirit. Regulations do not give powers but cast a duty. There can be sovereign powers but not sovereign duties. In fact the term "sovereign duty" is contradictory in view of almighty and all powerful concept of sovereign. Power is a function or action, which places the holder in superior position with respect to some other persons. Duty means obligation. It is operation of law against the employee under this obligation, and duty must be discharged. The trial Court had rightly did not treat all parts of acts by officers of state as a homogeneous. Inseparable, and unified activity or transaction. It is not that every part of series of actions, including those following seizure in exercise of their statutory powers, has same character and certainly each and every part of it did not have special character. With due respect it is mentioned that separation or classification between various actions by trial Court was not appreciated in proper spirit.

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[9] AIR 1965 SC 1039.

III Role of the State in implementing Law of Tort

Tortiousliability of State arises from the breach of a duty primarily fixed by the law. The failure to obey the legal duty to protect the right constitute tort. In most of the cases liability of State are due to abuse of power, excesses of power, negligence and breach of duty by the officers or agencies of the State. To what extent the government would be liable for torts committed by its servants is a complex problem, especially in democracy, the State perform numerous function 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 violated. Such a situation calls for an adequate mechanism for determining the State liability and compensating the victims. It is however, strange that the Government itself has not bothered to enact a law for determining the citizens claims against it. The legal position in this respect is the same as existed before the commencement of the Constitution[10]. 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 hand 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. That for more than 100 years, the law of vicarious liability of the Government for negligence of its officers has been swing 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 courts. The court shall be failing in its duty if it is not brought to the attention of the appropriate authority. Even after Independence the citizen of the Independent nation who are governed by its own people and Constitution are still faced the problem. There is no objective guideline laid down fort. An enactment delineating the boundaries of tortious liability of the State is need of the hour. The law being the civilizing machinery of the people, it is necessary to make law as a predictable working system[11].

III Article 21 and the Role of Judiciary

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

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[10] Alice Jacob, Vicarious liability of Government in torts, JILI 7 1965 at 247.

[11] Abhinav Ashwin, "Government Liability in Torts in the 21st century" AIR 2003 Journal 31.

the State in not preserving the life or liberty of the citizen[12]. 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. Since the Courts and the law are for the people they are expected to respond to their aspirations[13]. 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 wrong doer 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 evolved the constitutional remedy by way of compulsion of judicial conscience. This is the only effective remedy to apply as balm to the wounds and give much solace to the family members of the aggrieved or victim. It is the only practical mode of enforcement of the fundamental rights with a view to preserve and protect the rule of law[14].

It was in *Radul Sah v. State of Bihar*[15], the petitioner was detained illegally in Ranchi Jail of Bihar for 14 years after his acquittal by a competent Court. Chief Justice Chandra Chud said that, if 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. He 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 catena of cases[16] awarded monetary compensation as and

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[12] Dr. A.Raghunadha Reddy, "Liability of the Government Hospitals and Breach of Right to Life," AIR 1998 Journal 153.

[13] D.K.Basu v. State of West Bengal, AIR 1997 SC 610.

[14] Nilabati Behera v, State of Orissa, AIR 1993 SC 1960.

[15] AIR 1983 SC 1086

[16] Sebastian M.Hongray v. Union of India, AIR 1984 SC 1026,Bhim Sing v. State of J & K, AIR 1986 SC 494,Saheli, A Women's Resources Centre v. Commissioner of Police, Delhi, AIR 1990 SC 513, State of Maharashtra v. Ravikant S.Patil, 1991 AIR SCW 871,Mrs. Sudha Rasheed v. Union of India, (1995)(1)Scale 77, Smt. Kewal Patil v. State of U.P, 1995 AIR SCW 2236, Peoples Union for Civil Liberties v. Union of India, AIR 1997 SC 1203.

when the conscience of the Court was shocked. However, the Court in Saheli came to the rescue of the State Government by showing a way to recover the compensation so paid from the recalcitrant officials without recourse to vicarious liability. The Court in Nilabati made it very clear that the doctrine of sovereign immunity has no application to the constitutional system and is no defence to the constitutional remedy under Articles 32 and 226 of the Constitution. The Court further, fixed strict liability as the basis in public law for the award of relief when right to life is violated. Influenced by these judicial trends, several High Courts[17] too echoed the same sentiment when faced with similar situations. It is to be noted that a similar approach has been adopted by the Courts of Ireland and[18] Privy Council[19] while interpreting the Constitution of Trinidad and Tobago. The Court of Appeal in New Zealand in Baigent[20] case relied upon the judgments of the Irish Courts and the Privy Council and referred to the law laid down in Nilabati Behera of the Supreme Court in India.

In *Delhi Judicial Service Association v. State of Gujarat*[21], the Apex Court held as follows:-

"Advent of freedom, and promulgation of Constitution have made drastic changes in the administration of justice necessitating new judicial approach. The Constitution has assigned a new role to the constitutional courts to ensure rule of law in the country. These changes have brought new perceptions. In interpreting the Constitution, regard must be had to the social, economic and political changes, need of the community and the independence of judiciary. The court cannot be helpless spectator bound by precedents of colonial days, which have lost relevance. Time has come to have a fresh look at the old precedents.

In *Rattan Chand Hira Chand v. Askar Nawaz Jung*[22], the Apex Court laid down that "the court should interpret in the context of changing social needs and values and fill the lacuna in the legislation, if any, in consonance with social goal and public good" though it cautioned in *Union of India v. Deoki Nandan Agrawal*[23] "to invoke judicial activism to see at naught the legislative judgment is subversive of the constitutional harmony

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17 R.Gandhi v. Union of India, AIR 1989 205, C.Ramakonda Reddy v. State of A.P, AIR 1989 Andhra Pradesh 235, Kerala State Electricity v. Theressia, (1987) 2 KLT 934,Rajasthan Kisan Sangathan v. State, AIR 1989 Raj 10.

18 Byrne v. Ireland, (1972) 113 IR 241 at 264.

19 Maharaj v. Attorney General of Trinidad and Tobago (N.O.2),(1978) 2 All ER 670.

20 Simpson v. Attorney General, 1994 NZIR 667.

21 AIR 1991 SC 2176.

22 AIR SCW 496.

23 AIR 1992 SC 96.

and comity of the instrumentalities". Our Constitution recognizes judicial review as one of its basic features[24].

IV Evolution of Compensatory Jurisprudence

In the absence of specific provisions of law, the Supreme Court invokes its original jurisdiction for protecting human rights and by compensating for their disregard. The Supreme Court and various High Courts have taken lead role in protection of human rights of victims to overcome these problems, especially by granting compensation and also by laying down various guiding principles for subordinate judiciary for dealing with such cases. The judicial attitude is changing on this point in good direction and becoming more favourable for granting compensation to victims. Even in few cases an interim compensation is also granted. Provisions of Articles 14,21,32 and 226 are considered by the Supreme Court for invoking its compensatory jurisdiction for translating the Declaration of Human Rights into reality. 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[25]. In *Radul Sah v. Union of India*[26], the Court gave us the right to compensation. Compensation and rehabilitation for victims deprived of their fundamental rights now constitute a constitutional right[27]. Chief Justice Bhagawati explained in *M.C. Mehta v. Union of India*[28] , the circumstances in which the Court would give remedial relief which includes award of compensation under Article 32 to prevent breaches of fundamental rights in "appropriate cases". In *Smt. Neelabati Behera v. Union of India*[29], the Court ordained that a claim in public law for compensation is the practical mode of redress for contravention of human rights and fundamental rights under Constitution by recourse to Articles 32 and 226 of the Constitution.

The Court ruled that a person whose right to life and liberty has been violated by the State is entitled to compensation both in a Habeas Corpus petition and a civil suit for damages. Three years later the Court

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[24] Keshwanand Bharati v. State of Kerala, AIR 1973 SC 1461, L.Chandra Kumar v. Union of India, 1997 AIR SCW 1345 and S.R.Bommai v. Union of India, AIR 1994 SC 1918.

[25] M.S.Deshpande, "Protection of Human Rights by invoking Compensatory Jurisdiction by Courts", 2014 Cr.L.J 50.

[26] AIR 1983 SC 1086, 1983 Cri LJ 1644.

[27] Upehdra Boxi, Judicial Discourse : Dialectics of the fact and the Mask, 35 JILI 1, at 2 (1993).

[28] AIR 1986 SC 1086.

[29] AIR 1993 SC 1960 : 1993 Cri LJ 2899.

awarded Rs. 50,000/- as compensation to *Mr. Bhim Singh*[30] a member of the Jammu and Kashmir State's Legislative Assembly who was arrested and illegally detained for delivering an inflammatory speech in September 1985. The Court passed severe structures on the police and said: Thus the State has a legal duty of not only protecting rights of citizens, but also the social duty to compensate for illegal arrest or torture. The compensation is seen as a 'tangible expression' of State's sympathy and concern for those who through no fault of their own suffer unjustifiable invasion on their personal integrity[31]. A comparison of the fact situation in Rudul Sah and Bhimsingh seem to suggest that for the award of compensation by the Court unconstitutional detention has to be prolonged, while mala fide detention need not be prolonged. In either case the Court will determine on case by case basis the exact duration of detention that calls for award of compensation. In fact the court has awarded monetary compensation by way of exemplary costs in "appropriate cases"[32]. In Mehta while explaining the phrase "appropriate cases" Bhagawati, C.J. pointed out that "the infringement of fundamental right must be gross and patent that is incontrovertible and ex facie glaring".

In *Challa Ramkonda Reddy v. State of Andhra Pradesh*[33], the Andhra Pradesh High Court found that police negligence if not complicity was responsible for the death of the petitioner-father in a bomb attack while he was lodged in a sub-jail in Andhra Pradesh. The respondent plea was that the prisoner was put in jail in exercise of sovereign function and therefore the State was under no obligation to pay compensation. Justice B.P. Reddy rejected the States plea of sovereign function and consequent plea of inapplicability of Rudul Sah, Bhimsingh, and said that the defence was advisedly not put forward in those cases. The Court said where a citizen has been deprived of his life or liberty otherwise than in accordance with the procedure established by law, it is no answer to say that the said deprivation was brought about while the officials of the State were acting in the discharge of the sovereign power of the State. The Court held that the concept of sovereign power is not an exception to the right to freedom of life and constitutional guarantee of right to live overrides the theory of immunity of State action. The Court said that the archaic defence of sovereign function could not deal the right to life in Article 21. The Court was fully aware that it was opening up a new vista for individual claims for damages against the State and adding to present day difficult financial position of the State. The Court was, however, convinced that such a remedy is not only salutary but

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30 Bhim Singh v. State of Jammu and Kashmir AIR 1986 SC 494 : 1986 Cri LJ 192.

31 Veith, E. and Miers, D, Assault on the law of Torts, 38 Mod L Rev 139 (1975).

32 Supra note 16.

33 AIR 1989 Andhra Pradesh 235.

essential for good Government for ensuring "rule of law". The Court allowed the appeal and awarded Rs. 144000/- as damages, although a Session Court in the instant case had dismissed a civil claim for damages on ground of sovereign immunity.

Following Rudul Sah the Supreme Court in *People's Union for Democratic Rights v. State of Bihar*[34], awarded compensation to the victim of police firing while disposing with a petition under Article 32 of the Constitution. The decision used the term "compensation" to quantify the payments. In the same vain the Court awarded Rs. 50000/- a Compensation to the family of one Swarup who was beaten to death by Police, when he along with other poor people demanded wages for the work they were forced to do in a police station by the police. It is now well settled that for violation of human rights the State should pay the compensation.

In 1991, in *State of Maharashtra v. Ravikanth S. Patil*[35] the Court held that delinquent police officer cannot be made personally liable. The inspector of police has acted only as an official and even assuming that he has exceeded his limits and thus erred in taking the under-trial prisoner hand-cuffed, still we do not think that he can be made personally liable. But the real question unanswered by the Court was what is official duty? If a citizen ids deprived of his life and liberty by the police not in accordance with procedure established by law it cannot it cannot be said the act of deprivation is in is in discharge of his official duty. It is wrongful and unlawful act committed in his individual capacity but not as a representative of police while discharging his official duty. If police commits an unlawful act in individual capacity, then there is no reason why he should not be made personally liable. If it is proved beyond doubt that the police is responsible for committing an unconstitutional act, then why should he escape from personal liability? In fact, the personal liability of policemen to compensate for their misconduct will be a step in the light direction for prevention of increasing police lawlessness in India. The Supreme Court decision in the instant case in absolving the Inspector of police from personal liability erroneous and a retrogressive step in compensatory jurisprudence. In 1993, the Supreme Court of India has been deeply disturbed over the abuse of power by police and reviewed the law relating to compensation to the victims of lock-up deaths.

In the majority of the cases the Supreme Court had shown a greater degree of judicial consciousness towards protection of individual rights and liberties by containing administrative lawlessness and providing compensative justice to the victims. The Court seems to realize to a greater degree than before the need to compensate monetarily the victims of

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[34] AIR 1987 SC 355; 1987 Cri LJ 528.

[35] (1991) 2 SCC 373.

atrocities committed by those invested with sovereign power to protect the victim instead of victimizing them[36]. All the cases relating to police lawlessness convey a lot about the character of contemporary Indian State[37]. In perusal of the Supreme Court decisions relating to compensatory justice amounts to judicial recognition to the recommendation of the Law Commission of India that the distinction between sovereign and non-sovereign functions do not away with, to determine the liability of the State and the State should not be exempted from liability unless contrary intention is expressly mentioned in law. The approach of the Supreme Court implicitly suggests that Article 300 of the Constitution is not applicable to cases of violation of fundamental rights, and fundamental rights which are guaranteed against the State are in the form of limitations over State action. It is to be noted that the Apex Courts ruling on compensatory justice have been clearly written, persuasively argued, are apparently final and more likely respected by the society. Further, the Government should strengthen safeguards against torture, inform detainees of their rights and access to legal advice train the police and security forces to uphold human rights, motivate them to bring reformation[38].

V The present State of the law

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. One would have thought, that if the State exists for the people, this ought not to be the position in law. 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"[39]. It is not that judiciary and jurists feel it reasonable, rational or inevitable that a citizen has no remedy against negligence of the officers of the State and its officers committed while using sovereign powers. But, there is sense of helpleness or despair. It appears that, the liability of the State to compensate for negligence of officers is not analyzed to its logical end. The dilemma remains unresolved and unanswered.

Firstly, one of the function of the State is to give security to citizen, this is more so in respect of a welfare State like ours. Whenever any disaster takes place, be it earthquake, tsunami, liquor intoxication, house collapse,

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[36] S.N.Singh, Administrative Law, Vol. XXVI, A.S.I.L, p. 343 (1990).

[37] R.Deb Death in Police Custody, 1985 Cri LJ 3-6 (Journal Section).

[38] B.Hydervali, "Compensation to victims of lock-up of deaths-A Judicial study", Cri LJ 1994 at 135.

[39] Dr. Rajeev Joshi, Sovereign powers and liability of state in tort, AIR 2011 Journal 206.

flood or other mishap or tragedy, the Government announces relief, ex-gratia payments to injured, relatives of dead or for loss of property. In a number of such incidents, there may not be any allegation of any negligence. When the State pays relief for act (of negligence/mistake) of nature, builder or liquor baron or others, why such relief should not be given when there is a mistake on part of its own officials? It might be inadvertent mistake or inevitable event, but somebody else suffers. Therefore relief must be given even where injury occurs during discharge of truly sovereign function. Society and its members draw and retain benefits arising out of sovereign functions of the State. It is morally, ethically and even legally wrong to say that, injury caused due to discharge of sovereign functions, should never be compensated[40]. 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 and undeniable so far as the subject under consideration is concerned, the legal maxim *Ubi jus incertum, ibi jus nullum* (where the law is uncertain, there is no law), can be applied, with great force.

VI Lack of popularity of tort law in India

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, entrenched itself as a significant branch of their jurisprudence. During the last one hundred years this branch of law has witnessed a growth in volume an importance. Its expansion potential does not appear to be a spent force still. 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 wrong and prevention of unsocial conduct has endeared itself most to the social conscience in several countries of the world today[41]. The doctrine of sovereign immunity of the State from liability for torts committed by its servants has its roots as is well known in the feudal period of English history when England was ruled by absolute monarchs. The king could not be sued in his own courts and because the king was the fountain head of justice, he could not do any wrong. It was from England that the doctrine travelled to its colonies and other legal systems[42]. Therefore, the birth of this doctrine lies in the feudal conception of the State wherein the monarch who is also the sovereign is accorded protection even for acts which were detrimental to the interests of his subjects.

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[40] V.S. Chauhan, Sovereign Immunity v. Fundamental Rights : A Gray area of tension in the constitutional law of India, AIR 1992 Journal 134.

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

[42] S.Das, Government Liability in Tort, LQ 1970, p. 192-207.

In England the law relating to State liability defines the area where the State can enjoy privilege so there is certainty of law in this area where as in U.S.A exceptional clause is a great flaw and the State is exempted from liability[43]. In England there is no other courts except the ordinary courts where the aggrieved has to file suit against the public officer. When comprising these three systems, 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 of an ordinary person in most of the negligent acts. In England, no court is competent to enquire into the allegation against officials of the state. In U.S.A the Federal Tort Claims Act 1946 consists of exemption clause which exempts the state from liability. The defect of English system is that the application of 'Act of state' is limited whereas in U.S.A, more exemption clause is a real flaw. In India while determining the liability of the state, application of sovereign and non-sovereign would affect the rights of the citizen guaranteed by the Constitution. 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. 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. So there is an urgent need to develop public law of torts for governmental liability in India. The French system is recognized as the best system in the world. In a modern welfare state it discharges more functions of social responsibility, it should not be over burdened with tortious liability. The citizen must be able to get redress for the damages he suffers as a result of official action[44]. So the government and public authorities take out insurance to cover all risk of injuries to third parties as a result of action.

VII Exemplary Damages

In keeping with the new approach the courts have granted exemplary damages in certain cases to highlight the abuse of power and holding that the duty of the State was greater and admits no exception as well as to set an example. A new remedy was created by the Supreme Court for meeting the situation caused by the abuse of public power. The wrong doer is accountable and the State responsible if the person in the custody of the police is deprived of his life and liberty except by the procedure established by law. The defence of sovereign immunity is not available to the State in such cases. The Court have granted exemplary damages under Articles 32 and 226 of the Constitution. The Supreme Court has observed

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[43] Dr.A.Lakshminath, "Damages in the law of torts : Some reflections", AIR 1993 Journal 55.

[44] C.J.Hamson, Government liability in tort in the English and French legal systems, JILI 1970 at 27-38.

that 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 interest and preserve their rights. By this remedy the Court penalized the wrong doer and fixed liability for the public wrong on the State which has failed in its public duty to protect the fundamental rights of their citizens. This remedy is not in derogation of any other remedy under private law or criminal law. Lastly, the State has the right to be indemnified and take such action as may be available to it against the wrong doer in accordance with law.

The first principle of law in this regard was laid down by the Supreme Court in the case of *Rudul Shah*[45] in this case a person was kept in illegal detention for nearly 14 after the order of acquittal was passed. The petitioner contended that his detention was unlawful and demanded relief like rehabilitation, reimbursement of expenses which he was incur on medical treatment, and compensation for illegal incarceration. The Supreme Court, in a proceeding under Article 32 awarded compensation amounting to Rs, 30,000/- as interim measure without precluding the petitioner from bringing a suit to recover further damages under private law. The Supreme Court made a beginning to compensation the aggrieved person under public law in this case. While fixing liability, it did not bother itself with the question whether the act in question was in exercise of sovereign power or not. The decision in this case confirms the rule that under public law, civil liability of the State is possible and the Court can also award exemplary damages. It has been observed by the court that the object of public law is not only 'to civilize public power', but also to assure citizens that they live under a legal system which aims to protect their rights and interests. This remedy is not in derogation of any other remedy under private law or criminal law. It also shown that the emphasis is on the injury and not on the character of power by which it is caused.

In a recent case the court has gone to the extent of providing relief for negligence of Public Health Officials[46], a poor lady having a member of children got herself operated at a government hospital for complete sterilization but she gave birth to a child later. The court awarded damages to the lady equal to the cost of bringing up the unwanted child upto the age of eighteen. This establishes the principle of vicarious liability of the State for negligence of the medical officials. The court regards running of hospital as a non-sovereign function.

It is crystal clear 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. Right from the time of the East India Company, the

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[45] Supra note 27.

[46] State of Haryana v. Santra AIR 2000 SC 1888.

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 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 Courts have tried to delimit this liability of the State by treating more and more acts as non-sovereign functions and confining sovereign immunity to traditional functions of the State but even this limit is very vague. In a Welfare State, the State should not hesitate in owning responsibility for the wrongs of its servants. The Law Commission in its first report rightly observed that there is no convincing reason as to why the Government should not place itself in the same position as a private employer, subject to the same rights and duties as imposed by the statute[47].

VIII Conclusion

It is submitted that the legislatures should become 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 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 against the State atrocities. Due to the lack of legislation, the court 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. The doctrine of sovereign immunity is outdated. The Law 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. In United States of America also the Federal Tort Claims Act, 1946 has been enacted to defines the liability of the State for tortious acts. In India, a bill entitled the Government Liability in Tort Bill drafted on the lines of the Law Commission of India, with certain modifications suggested in 1969 by the Joint Committee of the Parliament but it still remains to be enacted as a law.

The present liability of the government in tort is not only unsatisfactory but also not in tune with the modern jurisprudential thinking, immediate measures are required in this field. The impractical distinction of sovereign and non-sovereign functions created the lacuna in the field of tortuous liability of the Government. The vague principle of sovereign

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[47] Abhinav Ashwin, "Government Liability in Torts in the 21st century" AIR 2003 Journal 31-32.

immunity has no place in modern society. Liberty and equality are the demands of the modern times, where Human and Fundamental Rights are given transcendental position. The State was under an obligation to protect the life, liberty and property of its citizens. It held that it is the duty of the State to protect the citizens and also to compensate them. However justice requires a Governmental accountability, the Government being in a fit position to pay damages. The court repeatedly stated through the decisions that the remedy lies in the hands of legislature and it is necessary to make the law as a predictable working system.