

## 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<sup>35</sup>. 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<sup>36</sup>. 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<sup>37</sup>.

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<sup>35</sup> Surendra Yadav, State Liability : A new dimension from Rudul Sah, 43 JILI 2001 at 559.

<sup>36</sup> Bishnu Prasad Dwivedi, From Sah to Saheli : A new dimension to Government liability, 36 JILI 1994 at 99.

<sup>37</sup> 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<sup>38</sup>. 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 monarchical 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<sup>39</sup>.

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

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<sup>38</sup> Alice Jacob, "Vicarious Liability of Government in Torts", 7 JILI 1965 at 247.

<sup>39</sup> 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<sup>40</sup>. 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<sup>41</sup>, 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.

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<sup>40</sup> First Report of the Law Commission of India "Liability of the State in Tort" (1956).

<sup>41</sup>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*<sup>42</sup>, 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<sup>43</sup>. This Act transferred the power to rule the country to her Majesty and also made the Secretary of State in council liable for

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<sup>42</sup> (1831)1 Begnell's Report 87-181.

<sup>43</sup> 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<sup>44</sup> and 73<sup>45</sup> 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*<sup>46</sup>, 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

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<sup>44</sup> 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 subordinate to him in accordance with the Constitution.

<sup>45</sup> 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.

<sup>46</sup> 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*<sup>47</sup>, 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

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<sup>47</sup> 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<sup>48</sup>.

In *Nagandra Rao & Co v State of A.P.*<sup>49</sup>, 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 29<sup>th</sup> 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

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<sup>48</sup> A. R. Blackshield, 'Tortious liability of government: a jurisprudential case note,' Vol. 8 1966 JILI p.646.

<sup>49</sup> 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<sup>50</sup>. 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<sup>51</sup>. 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

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<sup>50</sup> H. R. Khanna, "Human Rights – Dimensions and Challenges", AIR 1998 Journal 50.

<sup>51</sup> 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<sup>52</sup>. 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<sup>53</sup>. Let us now trace the developments in this new area.

Rudul Shah v State of Bihar<sup>54</sup>, 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

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<sup>52</sup> Public Interest Litigation, Mamta Rao, Eastern Book co. Lucknow second Edition 2004.

<sup>53</sup> 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.

<sup>54</sup> 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*<sup>55</sup>, the petitioner a student of political science in Jawaharlal Nehru University and a

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<sup>55</sup> AIR 1984 SC 1026.

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 personnel on March 10<sup>th</sup>, 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 9<sup>th</sup>, 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 11<sup>th</sup>, 1982. Widows of these persons had last seen them on March 15<sup>th</sup>, 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<sup>56</sup>, 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 10<sup>th</sup> September to 14<sup>th</sup> 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.

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<sup>56</sup> AIR 1986 SC 494.

In *Peoples Union for Democratic Rights v Police Commissioner, Delhi*<sup>57</sup>, was another case where in exercise of its jurisdiction under Article 32 of the Constitution, compensation was awarded to victims for police atrocities against 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*<sup>58</sup>, laid down broad parameter for assisting the victims of rape. In this case the six

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<sup>57</sup> AIR 1990 SC 513.

<sup>58</sup> (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*<sup>59</sup>, 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

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<sup>59</sup> 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*<sup>60</sup>, 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

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<sup>60</sup> AIR 1971 SC 337.

to life and so state is under an obligation to protect 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*<sup>61</sup>, 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

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<sup>61</sup> 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 is 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*<sup>62</sup>, 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

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<sup>62</sup> 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 feudalistic 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<sup>63</sup>, 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.

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<sup>63</sup> 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 *Bahlan Balmuchu v State of Bihar*<sup>64</sup>, 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

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<sup>64</sup> 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.