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CONSTITUTIONAL TORT: NEED FOR A NOVEL OUTLOOK

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ABSTRACT

It is observed that in recent years the State has become a major litigant in the Court of law. On the one hand government attitude continues to be conservative and it tries to defend its action or the tortious act 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. In India we do not have any separate act to deal with liability of state in tort. In England Crown Proceeding Act, 1947 deals with the liability of Crown regarding tort committed by its servant. Similarly in USA Federal Tort Claims Act, 1946 deals with the liability of the State for the wrong committed by its servant. However, Article 300 of the Indian Constitution state that Government of India and of State can be sued for their tortious act. As this Article 300 does not enlist the circumstances under which we can sue the State for the Tortious act of its servants.

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

INTRODUCTION

Responsibility is fixed on an individual because he is an intelligent being capable of understanding the duty fixed on him by a norm of law. When we talk about the responsibility of the State, several problems copes up. First of all the State is not an individual though the State can act only through individual. If responsibility is fixed on the State, one has to develop criteria for determining in what context and subject to what condition, the acts of an individual may be attributed to the State. Another problem is that for valid reasons, individuals are sometimes conferred immunity¹. Though they would be held responsible according to the ordinary principles of liability, there are cases of immunity from liability, for State actions. The extent of immunity depends upon the policy of each State. For example Acts of State, Judicial Immunity, Sovereign Immunity in some systems and immunity conferred on public functionaries, for action taken in good faith. Another aspect of the problem of State liability is the relation between the State and the law. In general there are three theories in this area; law is a creation of the State, State is creation of the law and State and law are one and the same thing². Generally adopting the criteria of political theory State can be considered an association of people occupying defined territory, united under a government and possessing and having sovereignty. Sovereignty is considered unrestricted and unlimited. According to Austin's theory of law, law is the command of the sovereign, who can inflict a sanction for disobedience. The sovereign is unrestricted and unlimitable. It would mean that State would be liable only if it willingly accepts liability, a principle of limitation, which can be changed by the State at its pleasure. State is the biggest, strongest and also the greatest most useful but also the most dangerous organization of human societies, ever since human societies organized themselves politically for the last 3 to 4 millenniums³.

The problem of the liability of the State still remains that the sovereign State is bound by the law that it makes. The liability of the State towards the citizens, remain as moral obligation. There is no absolute limitation against the State, which prevents it from changing the law⁴. What is laid

¹ M.D. Vidwans, "Basis of Civil Liability" *AIR Journal* 24 (1962).

² P.L. Mehta & Neena Verma, *Text of Human Rights under the Indian Constitution* 17 (Serials Publications, Ansari Road, New Delhi 110002, 1999).

³ Dr.P.Koteswar Rao, "Criminal Liability of the State for violation of Life, Liberty and Dignity", *IBR* 91 (1992).

⁴ Vinay Reddy, "Constitutional Tort – Compensation for its Violation" 27(1) *IBR* 147 (2000).

down even in the Constitution can be changed according to the principle of amendment⁵. The present scheme of protection of rights for the failure of which liability can be fixed on the State is largely confined to the traditional principles of State liability in tort, contract and under criminal law, a welcome development in our country. The judiciary has extended the scope of writ remedy by awarding compensation in partial recognition of State liability⁶.

SOVEREIGN IMMUNITY OF THE STATE

In various decisions Supreme Court has held that Article 300 must be read to mean that the position with reference to the liability of the State in tort remains the same as that which prevailed before the coming into force of the Constitution and that wherever the State was performing sovereign functions it could not be liable in tort for any injury suffered by its citizens⁷. Therefore, in all probability damages would not have been granted in a civil suit to the petitioner, on the ground that the State was possessed of sovereign immunity. The way of awarding compensation under Article 32 would be the sovereign immunity of the State, which the Supreme Court has inferred from Article 300 of the Constitution⁸. On the basis of general principles of sovereign interpretation it would be unwise to extend the sovereign immunity read into Article 300 by the Courts, to the jurisdiction of the Supreme Court under Article 32. Ever since *Secretary of State for India v. Mask and Co.*⁹, it has been well recognized in India that “the mere fact that a statute provides for certain remedies does not exclude the jurisdiction of civil Courts, but where a new right or liability is

⁵ Here we may recall the basic structure theory unamendability of those principles according to the procedure of amendment provision prescribed in the Constitution propounded by the Indian Supreme Court in *Kesavananda Bharathi v. State of Kerala*, AIR 1973 SC 1461. There is similar unamendable provision in the West German Constitution Article 1 to 20.

⁶ Sunando Mukherjee, “Legal Development in Liability of State in Torts in India” AIR Journal 254 (2004).

⁷ For instances where the Supreme Court has done so, in *Vidyawati v. State of Rajasthan*, AIR 1962 SC 993 and *Kasturilal v. State of U.P.*, AIR 1965 SC 1039. In these cases Art. 300 has been read to mean the liability of the State under the Indian Constitution is the same as that which the State was subject to during the British rule in India. Various statutes passed by the British Parliament had preserved the liability of the East India Company, even after the Crown assumed sovereignty over India, right upto the Indian Independence Act, 1947. Since the Bombay High Court’s decision in *Peninsular & Steam Navigation Company v. Secretary of State for India*, 1861(5) Bom. H.C. Reports, the distinction between the sovereign and non-sovereign functions of the State in India has been well established. So much so that both the decisions of the Supreme Court referred to above have cited it as a precedent.

⁸ Vikram Raghavan, “The Compensating Victims of Constitutional Torts; Learning from the Irish Experience” AIR Journal 105 (1998).

⁹ *Secretary of State for India v. Mask and Co.* AIR 1940 PC 105.

created by a statute which gives a special remedy for enforcing it, the ordinary remedy of approaching the civil Courts is impliedly excluded¹⁰. The implication is obvious, that even if Article 300 does provide for the sovereign immunity of the State, such an immunity cannot be taken as applying to the jurisdiction of the Supreme Court under Article 32 which is a special remedial jurisdiction created to enforce new rights and liabilities. Supreme Court under Article 32 do encompass the award of compensation against the State, that any protection to fetter the superior Courts, in the exercise of their new and special jurisdiction to enforce the fundamental rights¹¹.

Taken in conjunction with the fact that express Constitutional limitations in the form of the fundamental rights have far more sanctity than ordinary common law prohibitions, there is little doubt that no immunity would attach to the State for violations of the fundamental rights of the citizens. In India, in spite of some controversy about its exact location in the Constitution, it is fairly well accepted that the rule of law is implicit in the Constitutional scheme and that it acts as a limitation on the executive¹². One of the fundamental principles of the rule of law is that any executive action which would otherwise be a wrong or which injures an individual's rights must be able to show statutory authority. The executive organ, therefore, cannot be heard to say that it has immunity which is sovereign in character and which has an existence independent of, and over and above that of, the Constitutional limitations. It has been pointed out that even in the United States the doctrine of sovereign immunity may not be applicable in the case of violations of Constitutional limitations¹³. For instance in *Kawananakoa v. Polyblank*¹⁴, Justice Holmes stated that "there can be no legal right against the authority that makes the law on which the right depends. Further, the doctrine of sovereign immunity has an unimpeachable judicial pedigree, for the interpretation that the Supreme Court has given to Article 300 is not completely free of doubt. Some writers are of the opinion that the Article does not define the liability of the State at all but actually provides only for the right to sue the State along with the procedure for doing so¹⁵. Even

¹⁰ *Ramratan v. State of Bihar*, AIR 1965 SC 926.

¹¹ Lubinisha Saha, "Tort v. Torts – The Indian Perspective" AIR Journal 298 (2002).

¹² Bhagwati J. has opined that the rule of law permeates the entire fabric of the Constitution and constitutes one of its basic features. See *Bachan Singh v. State of Punjab* (1982) 3 SCC 24. See also P.K. Tripathi, *Spotlights on Constitutional Interpretation*, p. 117.

¹³ Umesh Kumar, "Liability of Government for Torts of its Servants in India" AIR Journal 14 (1962).

¹⁴ *Kawananakoa v. Polyblank*, 205 U.S. 349 (1907) at 353.

¹⁵ V.N.Shukla's, *Constitution of India* 23(Eastern Book Company, Lucknow, Eleventh Edition, 2011).

if Article 300 is interpreted as providing for the liability of the State, the distinction between the sovereign and non-sovereign functions of the State is still open to question¹⁶. In fact there is a definite rationale on the basis of judicial precedents, for confining the sovereign immunity to ‘acts of State’¹⁷ not in the sense of high governmental acts but in the sense of those actions which depend for their legitimacy on the total sovereignty that the State possesses when the government deals with matters outside the territory that it governs and which it does not seek to justify on the basis of the municipal law. It is submitted that in interpreting Article 300, the Court has been under the mistaken impression that there was only one point of view prevailing judicially in this matter prior to the coming into force of the Constitution, which is not quite correct. In 1976 the Forty-second Amendment to the Constitution changed the preamble so as to make the nation a socialist Republic as well, casting an even greater burden on the State to ensure the welfare of the people¹⁸. Again the Directive Principles of State Policy, enshrined in Part IV of the Constitution, at least in theory seem to express the desire of the founding fathers to establish a welfare State. It is submitted that this is all the reason to make the State liable for all those actions which are detrimental to the welfare of its citizens, since the primary duty of the welfare State is to ensure the health and well being of its citizen, and not to shelter behind theories of sovereign immunity after having injured them. In the civil law countries, it has been realized that the sovereignty of the State does not entitle it to claim immunity for its tortious acts, in view of the broadening social responsibility that it has assumed¹⁹. Now from the foregoing analysis, it is evident that the doctrine of sovereign immunity of the State does not really constitute a bar to awarding compensation under Article 32²⁰.

¹⁶ The First Report of the Law Commission on the “Liability of the State in Tort” pointed out that the decision in the P & O Steam Navigation case supported itself with various decisions, which actually dealt with acts of State.

¹⁷ *Secretary of State v. Hari Bhanji ILR (1882) 5. Mad. 273, Jehangir v. Secretary of State (1904) 6 Bom. L.R.131, Khusaldass v. Province of Bombay, AIR 1949 Bom. 277* all of which disagreed with the P&O case supra note 4, and all of which confined the sovereign immunity of the State to “acts of State”.

¹⁸ S.Kuba, *Law of Torts, cases and materials* 6 (Allahabad Law Agency, Allahabad, 1976).

¹⁹ V. M. Shukla, *Legal Remedies as available under various Enactments in India* 45 (Eastern Book Company, Lucknow 1991).

²⁰ Krishnan Venugopal, “A New Dimension to the Liability of the State under Article 32”, *IBR* 369 (1984).

LIABILITY OF THE STATE

The evolution of the concepts and practices of the government liability provides us three different stages. In the first phase there was no government liability at all. Total immunity was claimed by the government. In the second stage, limited liability was accepted and during the third and the present stage, we can easily perceive the expansion of the government liability in the three dimensions of contractual, tortious and criminal actions of the State officials²¹. The State is established for the good of the people. State is the source of law. State is the maker of law. State executes law and administers justice. King is the protector of citizens. Hence, King can do no wrong because king appoints officials for the implementation of laws and if the officials violate law, they are not acting on behalf of the government²². At best the officials may be personally liable and not the king or the government. Yet another approach is that the State is an abstract entity, it cannot have means rea, hence, it is not liable. State being the authority to punish, it is ridiculous to postulate the State punishing itself. Another impossibility suggested is that if governmental criminal liability is accepted, punishment can not be administered; as government cannot be put in jail nor it can be executed. All these ideas give justification for the government to escape from liability²³.

During the second stage of development, the immunity of State officials was withdrawn step by step though even today it continues in a narrow spheres in the case of the head of the State and few others in the performance of their duties. Ever since the reign of doctrine of rule of law which does not permit unequal treatment of State officials and private citizens; and subjects State officials to law and postulates the exercise of the power by the government subject to law, it is realized that government immunity is inconsistent with the fundamental principal of the Constitution, written or unwritten. Consequently, all violations of law by officials attract liability but limited to the personal liability of the officials on the ground that they are governmental institution the liability was avoided²⁴. Subsequent developments in the legal culture, slowly extended the liability to the government in contractual and tortious actions. Interestingly, even today there is a school of

²¹ V.S. Chauhan, “Sovereign Immunity v. Fundamental Rights : A Gray area of tension in the constitutional law of India”, *AIR Journal* 134 (1992).

²² Dr. Rajeev Joshi, “Sovereign Powers and Liability of State in Tort” *AIR Journal* 201 (2011).

²³ M.Anjaneyulu, “Government Liability in Torts”, *AIR 1994 Journal* 84.

²⁴ Alice Jacob, “Vicarious liability of government in torts”, 251 *JILI* 7 (1965).

through, which apparently is convincing, according to which, government liability encourages State officials to indulge in violations of law harming the individuals, because the officials are not deterred as the loss is that of the government. However, this approach has not affected the development towards increasing government liability²⁵.

On the other hand though judicial interpretations, government liability is extended in the case of violation of criminal law. It is agreed that the government has to pay reparations for the wrongs committed by its officials to alleviate the harm suffered by the citizens. For sometime a peculiar distinction is made between the sovereign functions and non-sovereign functions of the State and the government liability was limited to non-sovereign functions and immunity is continued in the case of sovereign functions²⁶. The content of the concepts of government immunity has undergone a change. The theory of vicarious liability is applied to facilitate the extension of liability to the government treating its officials as agents. Thus, starting from total immunity of the State and later extending liability to the officials of the State and than extending to the government in the performance of non-sovereign functions also and from another aspect starting from the liability of the government. In contractual relations and then extending to civil wrongs and later taking a step further in imposing criminal liability on the government²⁷.

In modern society, interactions between the State and the citizens are large in their number, frequent in their periodicity and important from the point of view of their effect on the lives and fortunes of citizens. Such interactions often raise legal problems, whose solution requires an application of various provisions and doctrines. A large number of the problem so arising fall within the area of the law of torts. This is because, where relief through a civil Court is desired, the tort law figures much more frequently, than any other branch of law. By definition, a tort is a civil wrong for which the remedy is unliquidated damages²⁸.

A PLEA OF SOVEREIGNTY

²⁵ Dr. A. Lakshminath, “Damages in the Law of Torts: Some Reflections” *AIR Journal* 52 (1993).

²⁶ P. Alex, “Constitutional Tort: Need for a Novel outlook” *AIR Journal* 206 (2001).

²⁷ Din Dayal Sharma, “The lack of tort law in India” *AIR Journal* 76 (1966).

²⁸ Dr. Rajeev Joshi, ‘Sovereign power and liability of State in Tort’, *AIR Journal* 201 (2011).

In early English common law the liability of the Crown was determined by the two ancient fundamental rules, which was existed in British Constitutional law. They were substantive law based on “king can do no wrong” and procedural law “king could not be sued in his own courts”. At common law Crown was immune from the jurisdiction of Courts. The immunity of the sovereign was put to an end by enactment of the Crown Proceedings Act 1947. The modern trend in UK is to enlarge liability of the Crown. The Crown immunity was never extended to India²⁹. The Government of India was made liable for the act of its servants in *P & O Steam Navigation Co. v. Secretary of State for India*³⁰. In this case Peacock C.J., held that for the negligence of its servants in doing acts not referable to sovereign powers the East India Company would have been liable and so the Secretary of State for India was equally liable. This observation later on created confusion as to classification of governmental functions into ‘sovereign’ and ‘non-sovereign’ categories. It may be mention that the sovereign functions enumerated were referable to the ‘Act of State’.

However, the Madras³¹ and Bombay³² High Courts expressed the view that the government would also be liable even for torts committed in the exercise of sovereign powers. Thus highlighting the classification of ‘sovereign and non-sovereign’ functions. When the question of liability came up before the Supreme Court in *State of Rajasthan v. Vidyawati*³³, Sinha C.J., observed that there was no justification in principle or on the ground of public interest for not holding the State liable vicariously for tortious acts of its servants. However, in *Kasturilal v. State of U.P.*³⁴, Court held that the State was absolved from liability for torts committed by police officers in the exercise of delegated sovereign powers. Firstly, the power of arrest, search and seizure is not a sovereign power and the State would always be liable except when the act amounted to an act of State, Secondly, even presuming that police power is a sovereign power, the duty to take care for protection of property seized and obligation to return the same were more in the nature of duties of a statutory or contractual bailee and did not fall within the domain of sovereign powers³⁵.

²⁹ Bishnu Prasad Dwivedi, “From Sah to Saheli: A new Dimention to Government Liability”, 36 *JILI* 99 (1994).

³⁰ *Supra* note 4.

³¹ *Secretary of State for India v. Hari Bhanji*, I.L.R. (1882) 5 Mad. 272.

³² *Rao v. Advani*, AIR 1949 Bom. 277. The Supreme Court approved this view in province of *Bombay v. Khushaldas*, AIR 1950 SC 222, *Rup Ram v. Punjab State*, AIR 1961 Punj. 336.

³³ *Supra* note 4.

³⁴ *Supra* note 4.

³⁵ *State of Gujarat v. Memon Mahomed*, AIR 1967 SC 1885, *B.K.D. Patil v. State of Mysore*, AIR 1977 SC 1749.

Thirdly, the sovereign immunity cannot prevail over the claim of damages by the citizens for unlawful acts of government servants³⁶.

It is submitted that the decision in *Kasturilal* is unjust where it provides the mask of sovereign authority for extending immunity to employees of the State for acts which would otherwise be covered by tortious liability. It is regrettable that the decision does not lay down a clear criterion for distinguishing sovereign from non-sovereign functions. As a result the helpless victims are at the mercy of uncertain judicial law making. In a number of cases³⁷ claims of victims could not succeed because the acts were held to be committed in discharge of sovereign function. However, in other cases the Court upheld such claims either rejecting the State immunity or holding the activities of the government as non-sovereign functions³⁸. The distinction drawn by it in some cases between the sovereign and non-sovereign functions is submitted, unjustified. Sovereign immunity is an anachronism which came into existence due to judicial creativity and now results in logical fallacy and practical absurdity. Judicial creativity is necessary to interpret sovereign immunity for limiting its application while determining vicarious liability of the State³⁹.

NEED FOR A NEW COMPENSATORY JURISPRUDENCE OF STATE LIABILITY

The transformation of nature of the State, namely, the police State with the traditional triple function of protection against external danger, internal maintenance of law and order and administration of justice, to that of a welfare State universally even in the case of socialist States guaranteeing economic right of the people almost encompassing every need of the people, the liability of the State for the wrongs committed by its instrumentalities is recognized by legislation judicial interpretation⁴⁰. That for more than 100 years, the “law of vicarious liability” of the State

³⁶ Vinay Reddy, “Constitutional Tort – Compensation for its Violation” 27(1) *IBR* 147 (2000).

³⁷ *State of M.P. v. Devilal*, AIR 1970 M.P. 179, *State of U.P. v. Tulsi Ram*, AIR 1971 All. 162, *State of Orissa v. Padmalochan*, AIR 1975 Ori., 41, *State of M.P. v. Chironjilal*, AIR 1981 M.P. 65.

³⁸ *Satyawati Devi v. Union of India*, AIR 1967 Delhi 98, *Rooplal v. Union of India*, AIR 1972 J&K 22, *State of Punjab v. Lal Chand Sarbharwal*, AIR 1975 P&H. 294, *Nandram Heeralal v. Union of India*, AIR 1978 M.P. 209, *Usha Aggarwal v. Union of India*, AIR 1985 P&H. 279.

³⁹ Faizan Mustafa, “Liability for Government Lawlessness” *AIR Journal* 42 (1997).

⁴⁰ Umesh Kumar, “Liability of Government for Torts of its Servants in India” *AIR Journal* 16 (1962).

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. This change in the legal culture requires rejection of the old doctrines and creation of new doctrines⁴¹. Under new doctrine firstly, no distinction shall be made in the application of law between the private individuals, the government officials and the government as a corporate entity. The State shall provide equal protection to all citizens including officials without any discrimination. In all contractual violations both the State official and the government shall be liable jointly and severally depending on the situation. In all tortious actions, both the government official and the government shall be jointly and severally liable⁴².

Now people are becoming conscious of the fact of government lawlessness and government violence which is on the increase. State officials cannot violate criminal law, commit crimes and go scot free under the cover of the State action and claim immunity and escape liability⁴³. Firstly, all State officials under the system of rule of law are equally liable like private citizens for the violation of criminal law. No immunity of privilege or necessity can be allowed to be pleaded and the criminal law should be applied to them without any discrimination and they are punishable. State is liable to pay compensation to the victims of the wrongful actions of the State officials. The old theory that the government cannot punish itself does not stand in the modern legal environment of rule of law, supremacy of the Constitution, judicial review and human right consciousness⁴⁴.

In the case of *Rabindra Nath Ghosal v. University of Calcutta*⁴⁵, in this case the Hon'ble Supreme Court explained that how Court grants compensation under Arts. 32 and 226 of the Constitution. It stated that having the obligation to satisfy the social aspiration of the citizens, the Court has to apply the tool and grant compensation as damages in public law proceedings. Therefore, the Court moulds the relief in proceedings under Arts. 32 and 226 of the Constitution seeking enforcement or protection of fundamental rights and grants Compensation, it does so under the public law by

⁴¹ Subash Chandra Singh, "Compensation and Restitution to the Victims of Crime: The Centuries old Correctional Aim Modernised – Modernization on the Basis of Public Responsibility Needed" 98 *Cri. L. J* 108 (1992).

⁴² Umesh Kumar, "Liability of Government for Torts of its Servants in India" *AIR Journal* 16 (1962).

⁴³ G.P. Verma, *State Liability in India* 129 (Deep and Deep Publications, New Delhi, 1993).

⁴⁴ A.S. Anand, "Judicial Review Judicial Activism – Need for Caution", *7JILI* 253 (2001).

⁴⁵ *Rabindra Nath Ghosal v. Univeersity of Calcutta*, *AIR 2002 SC 3460*.

way of penalizing the wrongdoer and fixing the liability for the public wrong on the State which has failed in its public duty to protect the fundamental rights of the citizens.

*In Devaki Nandan Prasad v. State of Bihar*⁴⁶, Where the petitioner's claim for pension was delayed for over twelve years. The court awarded Rs 25,000/- as against authorities having found that the harassment was intentional, deliberate and motivated. Liability to compensation for infringement under Art. 21 was successfully raised in *Khatri*⁴⁷ and *Rudal Shah cases*⁴⁸, where in the latter Hon'ble Supreme Court found that the petitioner's prolonged detention in the prison after his acquittal was wholly unjustified and illegal and held that Art. 21 will be deprived of its significance if the power of the Supreme Court was limited to passing orders of release from illegal detention, therefore, the Court ordered payment of monetary compensation. Compensation was also given in the case of *Bhim Singh v. State of J and K*⁴⁹, where an MLA was detained in order to prevent him from attending the assembly. In *Nilabati Behera case*⁵⁰, The Court held that the concept of sovereign immunity is not applicable to the cases of violation of fundamental rights and there can be no question of such a defence being available in the constitutional remedy. It is this principle which justifies 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 servants in the exercise of their powers, and enforcement of the fundamental right is claimed by resort to the remedy in public law under the Constitution by recourse to Arts. 32 and 226 of the Constitution.

In Municipal Corporation of Delhi case, Court summarized that due to the action or inaction of the State or its officers, if the fundamental rights of a citizen are infringed then the liability of the State, its officials and instrumentals is strict. In a case, where life and personal liberty have been violated the absence of any statutory provision for compensation in the Statute is of no consequence. Right to life guaranteed under Art. 21 of the Constitution of India is the most sacred right preserved and protected under the Constitution, violation of which is always actionable and there is no necessity of statutory provision as such for preserving that right as it has to be read into

⁴⁶ *Devaki Nandan Prasad v, State of Bihar, AIR 1983 SC 1134.*

⁴⁷ *(1981) 1 SCC 627.*

⁴⁸ *AIR 1983 SC 1086.*

⁴⁹ *AIR 1986 SC 494.*

⁵⁰ *AIR 1993 SC 1960.*

all public safety statutes, since the prime object of public safety legislation is to protect the individual and to compensate him for the loss suffered.

RIGHT TO COMPENSATION FOR VIOLATION OF HUMAN RIGHT

In *M.C. Mehta v. Union of India*⁵¹, the Hon'ble Supreme Court reiterated that in case of infringement of fundamental right of large number of persons the Court can award remedial relief of compensation in writ petition. However the Court qualified the said as an exceptional measure only when an infringement of fundamental right is gross and patent i.e incontrovertible and ex facie glaring. In *Saheli, a Women's Resources Centre v. Commissioner of Police, Delhi*⁵², a child being dead due to police torture, the Supreme Court awarded compensation of Rs. 75,000/-. The Hon'ble Supreme Court in another case of *Kumari v. State of Tamil Nadu*⁵³ awarded compensation of Rs. 50,000/- because a child of six years died falling into uncovered sewerage tank. The Supreme Court in *State of Maharashtra v. Ravi Kant S. Patel*⁵⁴, awarded compensation for wrongful hand cuffing of a person. Equally the Supreme Court in *Nilabati Behera case*⁵⁵ awarded compensation of Rs. 1.3 lakh to the mother whose son had died during police custody and the same was described as "exemplary damages". In this connection, the Court observed that for doing complete justice and for enforcement fundamental right guaranteed by the Constitution, monetary compensation is the only practicable mode of redress available for their contravention by the State or its servants by taking the recourse to Articles 32 and 226 of the Constitution⁵⁶.

The Supreme Court by virtue of judicial activism emphasized that in Tortious Law the principal of compensation and damages for violation of the Civil Right has effected the status of fundamental right. In *Tamil Nadu Electricity Board v. Sumathi*⁵⁷, the Supreme Court awarded compensation on account of death due to tortious act and held that award of compensation would not be maintainable when disputed questions of fact arise and Tortious Law is not clearly defined.

⁵¹ *M.C. Mehta v. Union of India*, AIR 1987 SC 1086.

⁵² *Saheli, a Women's Resource Centre v. Commissioner of Police, Delhi*, AIR 1990 SC 513.

⁵³ *Kumari v. State of Tamil Nadu*, AIR 1992 SC 2096.

⁵⁴ *State of Maharashtra v. Ravi Kant S. Patel*, (1999) 2 SCC 373.

⁵⁵ *Supra note 9*

⁵⁶ Faizan Mustafa "Liability for Government Lawlessness", AIR Journal 38 (1997).

⁵⁷ *Tamil Nadu Electricity Board v. Sumathi*, AIR 2000 SC 1603.

The Supreme Court in *Chairman, Railway Board v. Chandramma Das*⁵⁸ reiterated that foreign nations also can be granted relief under public law for violation of fundamental right on the ground of domestic jurisprudence based on Constitutional provisions and human rights jurisprudence. This judgment reinforce the judiciary recognized principle that monetary compensation can be granted for violation of fundamental right. The Supreme Court in *Ajab Singh v. State of Uttar Pradesh*⁵⁹ ordered the State Government to pay compensation of five lakh rupees for custodial death of a person. In case where violation of Article 21 results due to the action taken by the police officer compensation is to be awarded against the State because of the vicarious act of the employee which has been specifically reiterated in *Saheli, a Women's Resources Centre v. Commissioner of Police, Delhi*⁶⁰. In *P.N.Thumphy Theva (Dr.) v. Union of India*⁶¹ it is held that while awarding compensation against State, its resource limitation may be required to be borne in mind. It is submitted that undue emphasis on financial burden on the State in compensating the victim is unwarranted and it will indirectly legitimize the atrocious behavior of the people.

ALTERNATIVE TO SOVEREIGN AND NON- SOVEREIGN

U.K. Law Commission in its consultation paper on “Administrative Redress” proposed that judges should apply a ‘principle of modified corrective justice’ when deciding negligence claims against public bodies⁶². The Law Commission consequently proposed the introduction of a new touchstone of liability: ‘serious fault’. The Law Commission suggested ‘the creation of a specific regime for public bodies’ based around a number of common elements such as judge would apply a standard of ‘serious fault’ in both judicial review and negligence proceedings. Looking at the issues from the point of violation of fundamental rights, such as personal liberty, deprivation of life etc., there is unanimity in approach by the Court have a duty to protect those rights and mitigate the damage caused. Violation of such rights often described as Constitutional torts. A very interesting aspect was brought by Harry Street, in his article⁶³, where the issue of, where to stop while extending

⁵⁸ *Chairman, Railway Board v. Chandramma Das*, AIR 2000 SC 988.

⁵⁹ *Ajab Singh v. State of Uttar Pradesh*, AIR 2000 Cri LJ 1809 (SC)

⁶⁰ *Supra note 12*.

⁶¹ *P.N.Thumphy Theva (Dr.) v. Union of India*, AIR 1984 SC 94.

⁶² Law Commission Consultation Paper No. 187 (2008).

⁶³ G.P. Verma, *State Liability in India*129 (Deep and Deep Publications, New Delhi, 1993).

private law into Government acts was addressed. What if fire brigade floods a person's shop while extinguishing fire next door, or prohibition of children into amusement parks during epidemic. Is the Government liable for such losses to shop keeper and amusement park owner. The solution could be by limiting the liability of State if the injuries resulted due to Government policies or operations were foreseeable like the Government can predict a bystander being knocked down by its vehicles. But the issue arises in case of amusement park owner's loss. The author, states that in such cases private interest come into conflict with public interests. But the public interests should be given priority over the other. This answer's the State position in times of war too. Hence, the concept of sovereign immunity and act of State are rendered ineffective and a new test of determining State's liability can be applied⁶⁴.

COMPENSATION UNDER PUBLIC LAW

The purpose of public law is not only to civilize public power but also to assure the citizens that they live under a legal system which aims to protect their interests and preserve their rights⁶⁵. In *P.P.M.Thangaiyah v. The Government of T.N*⁶⁶, survey of the entire judgment of the Supreme Court as well as the other High Court, on the question of award of compensation for violation of the fundamental rights, the following principles were deduced by the Madras High Court:

- (1) The Constitutional mandate enjoins upon the State to protect the person and property of every citizen and if it fails to discharge its duty, the State is liable to pay the damages to the victims.
- (2) The failures or inactions on the part of the State which led to the violation of the fundamental right more especially under Articles 14, 19 and 21 of the Constitution of India should have been direct nexus to the damage caused/suffered.

⁶⁴ Akaant Kumar Mittal, "Crystallising the concept of Vicarious Liability of State in India, Challenges and Suggestions", *AIR Journal* 89 (2014).

⁶⁵ Dr. Prakash Chandra Mishra, "Victim Compensation Scheme: An Aspect of Modern Criminology", *138 Cri.LJ* 2014.

⁶⁶ *P.P.M. Thangaiyah v. The Government of T.N*, *AIR 2007 NOC 954: (2007) 2 MLJ 685 at 701 (Mad)*.

- (3) The State cannot claim defence of sovereign immunity in the guise of the discharge of the sovereign functions in the constitutional remedy. It does not clothe the State with right to violate the fundamental rights guaranteed under part III subject to certain restrictions.
- (4) The State while undertaking commercial activity cannot plead the sovereign immunity, in case of tortuous acts done by the employees of the State. It is only vicariously liable.
- (5) The Supreme Court or the High Court are entitled to render compensatory justice by awarding reasonable monetary compensation under Articles 32 or 226 of the Constitution of India, for the injury – mental, physical, fiscal – suffered by the individual for violation of fundamental rights guaranteed under the Constitution. But, however, it must be conclusively established that the State failed to take any positive action in protecting the fundamental rights of the citizens.
- (6) It is not necessary that the victim should approach the Civil Court by invoking common law remedy for claiming damages for violation of the fundamental rights. The option is left to the victim to claim the damages by invoking either the constitutional remedy or civil remedy. Since the constitutional remedy is a public law remedy, the actual victim need not approach the Court. The relief can also be awarded either by exercise of suo motu power or in a public interest litigation case.
- (7) The quantum of compensation varies from case to case depending upon the nature of loss suffered by the victim. There cannot be any straitjacket formula for awarding the compensation under Article 226 of the Constitution of India.

*In M/s. S. Inderpuri General Store v. Union of India*⁶⁷, a communal riot took place in January 1989 in the city of Jammu and the petitioner belonging to Sikh Community suffered losses and prayed for the issuance of a direction to the respondent to pay compensation to the extent of losses actually suffered by them. It was found that the communal violence broke out due to the alleged active connivance of anti-national and anti-social elements resulting in injuries and deaths of the Hindu and Sikh members. The communal riots were alleged to have been engineered by anti-social elements and forces and members of other communities. The respondent State initiated all measures to curb and prevent anti-national and anti-social activities. The Government granted ex gratia relief in favour of those persons who lost their properties. A committee was constituted to

⁶⁷ *M/s. S. Inderpuri General Store v. Union of India*, AIR 1992 J&K 11.

assess suffered losses of property and were granted ex gratia relief upto a maximum of Rs 25,000/. The respondent State argued that the petitioner had no fundamental legal or statutory rights in seeking compensation from the Government. The Court rejected the argument of the State and held that it was the duty of the State to provide safety and security in which the Government failed. The right to life can be jeopardized by affecting the right to livelihood, the Supreme Court had observed in *Olga Tellis v. Bombay Municipal Corporation*⁶⁸, that the Court while entertaining an application for enforcement of a fundamental right must look at the substance and not form⁶⁹. The High Court passing an order to pay compensation to the extent of loss suffered by the petitioner observed: It cannot be denied that the maintenance of law and order is a duty of a responsible Government who could not abdicate this function and allow the life and liberty of the citizen to jeopardy.

*In Bhajan Kaur v. Delhi Administration*⁷⁰, a writ petition was filed in Delhi High Court for paying compensation to the dependents of those killed in the riots after the assassination of Smt. Indira Gandhi as the State had a duty to protect the life of its citizens. The Delhi High Court held that the expanded meaning attribute to Article 21 of the Constitution, it is the duty of the State to create a climate where members of the society belonging to different faiths, caste and creed live together and therefore the State has a duty to protect their life, liberty, dignity and worth of an individual which should not be endangered. If in any circumstances the State is not able to do so, then it cannot escape the liability to pay compensation to the family of the persons killed during the riots. The High Court directed the State Government to pay a sum of Rs. 2 lakhs with interest and also gave a general direction that the order should apply to similar cases also. In *S.S. Ahluwalia v. Union of India*⁷¹, a writ petition was filed with a view to extend the application of the order passed by the Delhi High Court in *Bhajan Kaur case* to entire country and to redress the victim. The Supreme Court agreed in principle that the Government should pay compensation to the family member of the persons killed in riot but it found difficult to extend the decision of Delhi High Court in *Bhajan Kaur case* to all States without making a detailed examination of the circumstances

⁶⁸ *Olga Tellis v. Bombay Municipal Corporation, AIR 1986 SC 180.*

⁶⁹ *Supra note 10*

⁷⁰ *Bhajan Kaur v. Delhi Administration, 1996 AIHC 5644 (Delhi).*

⁷¹ *S.S Ahluwalia v. Union of India, AIR 2001 SC 1309.*

arising in each case. The Supreme Court directed various High Courts to deal with the matter as if the writ petitions were filed before it and assess the loss suffered in individual cases.

However, the Chattisgarh High Court in *Kehar Singh v. State of Chhatisgarh*⁷², extended the application of the direction issued by the Delhi High Court in *Bhajan Kaur* case and held that it is just and proper that a sum of Rs. 2 lakhs as compensation be awarded from the date of the incident with interest @9% per month adjusting the amount already paid to the dependents. From the above discussion it is quite clear that the maintenance of law and order is the function of the State and the failure on part of State may result into invocation of violation of fundamental rights. The State may be directed to pay compensation for violation of fundamental right to life. In communal violence also such a provision of public law may be invoked and the State may be asked to pay compensation to the riot victims for loss of life and property. Although the Central Government in case of urgency announces ex gratia to victims of crime. In the guidelines issued from time to time as in central scheme for Assistance to Civilian Victims of Terrorist, Communal and Naxal Violence, 2009⁷³ In *Hindustan Paper Corporation Ltd. v. Anata Bhattacharya*⁷⁴, the Court restricted the public law remedy only to Article 21 ignoring the Article 300A as being Constitutional right stated: Public law remedy for the purpose of grant of compensation can be restored to only when the fundamental right of a citizen under Article 21 of the Constitution is violated and not otherwise. It is not every violation of the provisions of the Constitution or statutes, which would enable the court to direct grant of compensation. The power of the Court of judicial review to grant compensation in public law remedy is limited. Thus the traditional distinction between ‘sovereign’ and ‘non-sovereign’ function of the State has gradually eroded.

In *Destruction of Public and Private Properties v. State of A.P.*⁷⁵, there was large scale destruction of public and private property in the name of agitations, bandhs, the Supreme Court approved that under the PDPP Act must be so amended as to incorporate a rebuttable presumption that the accused is guilty of the offence and enabling the police officers to arrange videography of the

⁷² *Kehar Singh v. State of Chhatisgarh*, AIR 2002 Chh. 14.

⁷³ The guideline provides the scale in case of: (1) Death, minimum compensation is Rs. 15 lakh. (2) Permanent Incapacitation, minimum compensation is Rs. 5 lakh (3) Complete damages to house in arson, minimum compensation is Rs. 1 lakh.

⁷⁴ *Hindustan Paper Corporation Ltd. v. Anata Bhattacharya*, AIR 2005 SC 1400.

⁷⁵ *Destruction of Public and Private v. State of A.P.*, AIR 2009 SC 2266.

activities damaging public property. In such cases concerned High Court may *suo motu* action and set up a machinery to investigate the damage caused and to award compensation related thereto⁷⁶.

ROLE OF COURTS IN PROTECTION OF HUMAN RIGHTS

The Supreme Court and various High Courts have taken lead to overcome these problems. The judiciary has taken a lead role in protection of human rights of victims, 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 rights of victims for invoking its compensatory jurisdiction for translating the Declaration of Human Rights into reality. In post independence era the judiciary, being custodian of rights of people, has shown deep concern about protection of human rights of victims⁷⁷. Generally, human rights are those rights which are inherent in every human being. In absence there of human being are not in position to live as human beings. They are entitled for their enjoyment, protection and enforcement. Human Rights are universal equally and also inalienable. It is the need of the day to recognize and respect human rights in social, cultural, economic and political spheres. By nature, the human rights are indivisible, interrelated and interdependent. They are natural rights come by birth as human beings. However, there protection requires efforts and their violation requires to be compensated⁷⁸.

Victims of crime, either direct or indirect, are human beings. They have every right to get compensated. In recent years, compensation to victims of crime has been introduced in several countries, which has its roots in the concept of protection of human rights. The Compensation may be awarded against wrongs committed by individuals, groups or agencies of the State. The idea is not alien to Indian social and legal context. Article 41 of the Constitution provides that, “the State shall, within the limits of its economic capacity and development, make effective provisions for

⁷⁶ Quasi Hussain and Savithanandan, “Victim’s Compensation”, 144 Cri. L.J 1996.

⁷⁷ M. S. Deshpande, “Protection of Human Rights by invoking Compensatory Jurisdiction by Courts”, 49 Cri.LJ 2014.

⁷⁸ Justice Anand, “Protection of Human Rights Judicial Obligation or Judicial Action” (1997) 7 SCC (J) 10.

securing the right to work, to educate and to public assistance in case of unemployment, old age, sickness and disablement and any other cases of undeserved want”. Today Courts cannot, and do not any longer remain passive with a negative attitude and it is no longer in doubt that judgments of today govern the lives of citizens and regulate functions of the State. The law must respond, and be responsive and there should be endeavour of the legislature as well as the Courts to close or considerably narrow the gap between law and morality⁷⁹.

CONCLUSION

In a modern welfare State, it performs several functions and so there may be chances to encroach on the rights of the citizen, when it tends with a case it is not fair to say that the State must be exempted from liability on the ground of sovereign immunity. According to the present legal system, the aggrieved has to approach the civil court for getting the compensation where the principle of sovereign immunity is the rule. There is no rationale in distinguishing the function as sovereign and non-sovereign. There are no guidelines to distinguishing sovereign function from non-sovereign function. Now judiciary is following the traditional method, to categorize the functions. The Court also felt difficulty in deciding the case on the basis of old archaic principle. When the aggrieved approaches the Court on the infringement of their guaranteed right, it is not fair on the part of judiciary to say that it is helpless to give remedy and it is still haunted by the old doctrine⁸⁰. The test of sovereign and non-sovereign cannot be treated as an appropriate one to decide the liability of the government, since it lacks objectivity if a judge is biased in favour of the government he can hold the activity in question as a sovereign function and exclude liability if he wants to help the aggrieved he can characterize the function as non-sovereign. The distinction between the sovereign and non-sovereign brings an unending confusion. 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 tortious liability of the government. The vague principle of sovereign immunity has no place in modern society. Liberty

⁷⁹ Justice Binod Kumar Roy, ‘Role of Judiciary in the present day context’, 17 *AIR Journal* (1998).

⁸⁰ Umesh Kumar, “Liability of Government for Torts of its Servants in India” 18 *AIR Journal* (1962).

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.