CHAPTER-VIII
CHAPTER :- VIII
REFORMS IN TORT LAW IN INDIA.
RECOMMENDATION IN TORT LAW :
A. REPORT OF THE LAW COMMISSION

01. The judicial observations in the following two important cases of Tort Law to show to what extent the Law regulating the liability of Union and the State for tortious acts necessitate its review to determine its extent:

02. In Vidhyawati Case (State of Rajasthan Vs. Mrs. Vidhyawanti, AIR 1962 SC 923)\(^1\). Chief Justice Sinha was able to do justice to the arrived victim. So he did not express his dissatisfaction with the existing position of Law regarding the tortious liability of the State for the wrongs of its employees.

03. But in Kasturilal Case (Kasturilal State of Uttar Pradesh, AIR 1965 SC 1039)\(^2\). Gajendragadkar, C.J. showed his anguish and dis-satisfaction with the then State of Law by observing that "We have ourselves been disturbed by the thought there a citizen whose property was seized by a process of Law has to be told when he seeks a remedy in Court of Law on the ground that his property has not been returned to him, that he make on claim against the State ". (Kasturilal's Case at page 1049).\(^3\) As he thought it "not very satisfactory position in Law "(Same Case at page 1049), he felt compelled to suggest a legislative

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3. Kasturilal's Case at page 1049.
treatment by pungently observing that "the remedy to cure this position however lies in the hands of the Legislature". (same case at 1049). He considered it high time for the legislature in India to consider seriously whether they should not pass Legislative enactments to regulate and control their claim for immunity in cases like this same case at page 1048).

04. Thus it is evident that Law regulating to the liability of the Union and the State for tortious acts was in a state of uncertainty, necessitating its review with a view to determine its extent.

05. The Law commission in India as early as 1955 took up for the consideration the question whether Legislation on the line of the Crown proceedings Act 1947 of the U.K. in respect of claims against the Union and the States based on Tort needed in India and if so to what extent? The subject was initiated in the Commission (it consisted of M.C. Setalvad, Chairman, and M.C. chagla, K.N.Wanehoo, G.N. Das, P.Stayanarayan Rao, NC Sen Gupta, V.K.T. Chary, D.N.Raju, S.M. Sikri, G.S. Pathak and G.N.Joshi, Member(at 42) by Shri Satyanarayan Rao, who prepared proposals. The matter after preliminary discussion was referred to a Committee (its members were P. Satyanarayan Rao, G.S. Pathak and G.N. Joshi). Finally on 11th May, 1956 the Chairman Law Commission of India submitted the first Report of the Commission to C.C.Biswa, the then Minister of Law of Government of India, on the liability of State in Tort vide letter of M.C. Setalwad to C.C.Biswa dated 11th may 1956 forwarding the first report of the Law Commission of India).
State liability in a Welfare State.

01. The Law Commission felt in the context of a Welfare State in India, it is necessary to establish a just relation between the rights of the individual and the responsibilities of the State (Supra note 7 ar p.36). In modern era, the responsibilities of the State have increased leading to a greater impact on the life of a citizen. Major Industries have been nationalized, public utilities have been taken over by the State for the establishment of a just economic and social order, with huge irrigation and flood control schemes, production of electricity and power and establishment of big industries and factories, State has become a big boss in the life of an individual. The doctrine of "Laissez faire" which left every one to look after himself to the best advantage had yielded place to the ideal of Welfare State. This implied that the State takes care of those who are unable to help themselves (Ibid.)

02. The question to what extent the Union and the State Governments should be made liable for the tortious acts of their servants or agents was left for future legislation. (Art.300 of constitution. of India), the Constitution was made. The Commission noted that the question on what lines the legislation should proceed was difficult one, as it involved the question of demarcating the line upto which the State should be made liable for the tortious acts. This involved "a nice balancing of considerations so as not to unduly restrict the sphere of activities of the State and at the same time to afford sufficient protection to the citizen. (Supra note 11).
03. The Law Commission probed into the existing law in India in chapter II of the Report. (Supra note 7 at 1-8). It noted that the liability of the Union and the States was the same as that of the Domain and promises of India before the Constitution came into force (Id at 1) and under the refer back approach, it remained the same as that of the East India Company before the enactment of the Government of India Act 1858. It found no provision in any of the charter Acts extending the immunity which the Crown in England enjoyed in respect of torts to the Company as it was a Corporation, having an independent existence and bearing no relationship of the servant or agent to the Crown. In fact, as no distinction was made between acts committed by the Company in its political capacity and acts done by it in the exercise of its commercial activities before charter Act of 1833. There was justification for drawing a distinction as was done in Later decisions, Between sovereign, and non-sovereign powers of the East India Company. After analyzing various cases it concluded that "the Law was correctly laid down in Haribhaiji's Case (Id at 8).

04. The Commission reviewed the Law in England chapter III of the Report (Supra note 7 at P.8-21) and noted that the Crown by the Crown proceedings Act 1947 under three heads i.e.

i) Liability of the Crown under Common Law.

ii) Liability for breach of statutory duties and powers.

iii) and exceptions under the Act exonerating the Crown from liability.

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Chapter IV of the Report dealt with Law in the U.S.A. and noted that the Federal Tort Claims Act 1946 was for more restricted in its scope than the English Act. It observed that "to adopt the formula of the Federal Tort Claims Act however attracting it may be, is to introduce an uncertainty in the law and is calculated to review the old controversy between "Governmental" and "Non-Governmental" functions.

5. Chapter V of the Report dealt with the Law in Australia. Chapter VI examined the Law in France. The Commission observed that "somewhat curios, that while the French Law started with the absolute immunity Acts, through a process of evolution, it has established absolute liability of the State and partial liability of officers 91d.290. The maxim that "the State is an honest man". According to the report, French Law of Liability was aimed at resorting the equality that had been upset at the expense of a particular, individual and as all public activity was intended to be paid for by the entire community. The State was under an obligation to vindicate the principle of equality" by removing the additional burden that has fallen upon the one injured and by assuming it itself, distributing it among the entire body of citizenry".

**Submissions and proposals by the commission**

1. Chapter VIII of the Report submits following six conclusions:

   i) The Law should be made certain and definite in this regard instead of leaving it to the Courts. The citizen must be in the position of knowing the law definitely.

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ii) The tendency in other countries is towards relaxation of the immunities of the State in favor of the subject, our country must also formulate law suitably having regard to the changed conditions and the provisions of the constitution.

iii) It would not be advisable to adopt the legislation in England, America or Australia in this respect. It argued that in America the liability is very restricted. In Australia, the State liability has been judicially interpreted to exclude the liability of discretionary duties. The Crown Proceedings Act is more liberal than the American Legislation butt in respect of statutory duties and powers the scope is very restricted.

iv) It made a note of caution that old distinction between sovereign and non-sovereign functions or governmental and non-governmental functions should no longer be invoked to determine the liability of the State.

v) It recommended to give Legislative sanction to the rule laid down in “Hari Bhanji’s Case”.

vi) Finally it concluded that there is no convincing reason why the Government should not place itself in the same position as a private employer subject to the same rights and duties as are imposed by statute.

2. The Law commission recommended the following principles on which legislation in relation to the tortious liability of the State should proceed in India:

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i. The State as employer should be liable for the torts committed by its employees and agents while acting within the scope of their employment.

ii. As employer it should be liable in respect of breach of those duties which a person owes to his employees.

iii. It should be liable for torts committed by an independent contractor only in cases where it assumed control as to the manner of performance of the work or where the act is authorized or ratified by it or where the work in itself is unlawful or where the State is under an obligation to do the work itself.

iv. The State should be liable for torts where a Corporation controlled or owned by the Stated would be liable.

v. It should be liable for breach of duties attached to the ownership, occupation, possession or control of immovable property.

vi. It should be subject to the general law liability for injury caused by dangerous things.

vii. The State should not be liable if a statute authorized the doing of an act which is itself injurious.

viii. It should be liable for breach of statutory duty imposed on it.
ix. It should be liable, if in the discharge of statutory duties it acts negligently or maliciously or if it the power it so exercised as to cause nuisance or trespass.

x. It should be subject to the same duties and rights as a private employer under a statute.

xi. If an act limits or negatives the compensation payable to a citizen, the liability of the State should be the same as under that Act.

3. The Commission is undecided on the following exceptions to the State liability in Torts as they are debatable issues:–

i). The defense of Act of State should be made liable to the State for an act, neglect, or default of its servants or agents.

ii). It should not be liable for act done by judicial officers and persons executing warrants and orders.

iii). It should not be liable for acts done in the exercise of political functions of the State.

iv). It should not liable for for combatant activities of armed forces and acts of defense forces.

v). It should be liable to claims arising out of defamation, malicious prosecution, malicious arrest or arising out of operation of quarantive law under the Indian Telegraph Act and Indian Post Office Act.
4. It is evident from the Report that the Law Commission had made some good suggestions. The most important suggestion of the Report is that "the immunity of the State should go as Compared with the ordinary citizen and the State placed in regard to Torts committed by its servants or agents in the same position as private citizen". (M.C. Setalvad in evidence; Joint Committee or Govt. (liability in Tort) Bill 1967 or 126 (Lok Sabha Secretariat, March 1969).

5. The general scheme of the Report is to equate the Government with a private citizen in torts. The Commission after examining the different foreign systems preferred the British Model. The commission appears to be heavily leaving on the Crown Proceedings Act, 1947. In fact, it recommended whole sale adoption of Sec. 3 (liability in respect of damage to patent designs and copy rights), Sec. 4 (indemnity and contribution between Joint Tort feasor's contributory negligence and Sec.10 (injury caused by one member of the Armed Forces to another of the Act.

6. In its opinion American Law was stricter and less in favor of the citizen than the English Law. as regards the Fresh Law, the Commission viewed it as very revolutionary because in many ways it differed from the Anglo India System (note 34 at 127).
39. It took more than nine years for the Government to scrutinize the recommendations of the First Report of the Law Commission and the introduce it in the form of a Bill in the Parliament. On August 31, 1965 the then Dy. Minister of Govt. of India, Mr. Jagannath Rao, introduced the Bill to define and amend the Law in respect of liability of Government in Tort and to provide certain matters connected with it. Much headway could not be made. The Bill lapsed on the dissolution of the Third Lok Sabha. A similar Bill was again introduced on May 22, 1967 by then Minister of Parliamentary affairs with the same object. A motion to refer the Bill to the joint Committee of the Parliament was approved on May 8, 1968 and Rajya Sabha on May 13, 1968. The committee submitted its report on March 7, 1969 which was presented in Lok Sabha on March 25, 1969.

AIMS AND OBJECTS:

The Statement of Reasons and objects of the Bill (published in the gazette of India Extraordinary Part -II Sec. 2 dated 22nd May 1967 (pp 175,77) states that the Law relating to liability of the Government of India for Civil wrongs was in a state of uncertainty accompanied by conflicting Judicial decisions. Therefore, the matter was referred to the Law Commission which recommended that the Legislation should be undertaken defining the liability of Government in Tort and
formulated certain principles based on Crown Proceedings Act 1947. While these recommendations were under consideration, the question of extent of liability of the Government in Tort came up for consideration before the Supreme court. The Supreme Court was not happy with the existing state of Law and urged the matter to be set right without delay by legislation.

The Bill intended to give effect to the suggestion of Supreme court and sought to implement subject to certain modifications in the recommendations of Law Commission, thus :-

i) The Government like any private individual had been made vicariously liable for torts committed by its employees and agents in the course of their employment or torts committed on behalf of the government and subsequently ratified by the Government.

ii) Liability of the Government to Third parties for Torts committed by an independent contractor employed by the Government was specified.

iii) It gave effect to the common Law duties attached to ownership, occupation, possession or control of property.

iv) It provided for the liability of the Government regarding escape of dangerous things.

v) It dealt with liability of the Government towards its own employees and gents.

Other recommendations of the Commission in regard to incidental, ancillary or minor nature were also incorporated in the Bill.

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CONSTITUTIONALITY
OF THE BILL

Some members of the Joint Committee of the Parliament expressed apprehension that the Bill went beyond the scope of Art 300 and was likely to be struck down as being ultra vires. K.C. Joshi in “the Law of Govt. liability in Tort with reference to india P.20 (1985) rightly stated that the Constitution is enacted by the people who have not limited their power to any Law of pre-independence era.

DEFINITION CLAUSE

Clause 2 of the Bill defined the expression based on the Law Commission Report. But its suggestion on agent that he shall have same meaning as under Contract Act was not accepted since the Indian Contract Act includes independent contractor also. There is a basic difference between an agent and Independent contractor under Tort though there is no such difference between an agent and a servant. In relation to Government, therefore, agent means other than employee of the Government. The agent does the work under the order or control of the Govt. The independent contractor contrarily is not under the order or control of the Government.

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Under clause 2 (b) of the Bill employee of the Govt. has been defined as any person who is a member of defense service or Civil service of the Union or of any part of All India service or holds any post connected with defense or civil post under the Union or is a member of a Civil service of a State or holds any Civil post under the State. The definition is similar to recommendations of Law Commission which itself was based on Art. 310 of the Constitution. The proposal to include in the Bill, the employees of public undertakings and corporations was rejected by the Joint Committee of the Parliament as they have their own statutory rights and liabilities.

The Government in relation to any liability imposed means

i) Where Tort is committed by an employee acting in connection with the affairs of the Union or by an agent or independent contractor employed by the Central Govt. it is the Central Government.

ii) Where Tort is committed by an employee acting in connection with the affairs of the Union or by an agent or independent contractor employed by the State, it is the State Government.

The Joint Committee was apprehensive of incompleteness of the definition in 2(c) of the Bill.

On the definition several questions arise thus ;
i. What would be the position if the Union Government employee commits a Tort while acting in connection with the affairs of the State?

ii. Vice versa, if a State employee commits a Tort while acting in connection with the affairs of the Union.

iii. Whether Union or State Government or both would be liable.

iv. Certain departments like Food corporation of India, Railway Protection Force etc. discharge normal functions which are closely connected with the State Governments. Certain functions are performed by them at the command of the other Government. The situations arising out of such Juxta positions of the Government remained in confusion.

**Vicarious Liability of the Government State**

Clause 3(a) of the Bill gave effect to the recommendation of the Law Commission and is modeled on Sec. 2(1)(a) of the Crown Proceedings Act, 1947.

It adopted that a master is vicariously liable to third parties for Torts committed by his servants and agents in the course of
employment or for Torts committed by them for the masters benefit and subsequently ratified by the master. Thus the Government was made liable. The phrase ' in the course of employment ' used in the Bill is not different from "scope of his authority ", "scope of employment "scope of service ", ' share of employment. There expressions indicate the limits of the responsibility of the servant or agent and provides the scope of Judicial compromise in respect of social necessity.

In sub-clause (a) (ii) of Clause 3, the liability of the Government while the employee acting beyond the course of his employment is dealt. The Joint Committee of the Parliament expressed that the there may be situations in which Government should have freedom to ratify an act done by its employee or agent while acting beyond the course of his employment although such act was not done by him on behalf of the Government.

The committee appears to have substituted the word in the above clause rightly.

In clause 3(b) of the Bill, the Government is made liable in respect of Tort Committed by an independent contractor or any of his servants or workmen doing the act for the Government. The liability arises in the following five circumstances:

i. Where the Government assumes control of the act.

ii. Where the Government has authorized or ratified the act alleged to constitute tort.
iii. Where the act is likely to cause personal injury or damage.

iv. Where the Government is under the obligation to do the act itself.

v. Where the Government is under absolute duty to ensure safety and property of the person and failed to do that duty.

The Sub-clause seeks to implement para 66(iii) of the Report read with Appendix Vi-B.

Dealing with the circumstances where the Government “assumes control”, it is the Government act and not the contractor’s act. The term “assumes control” may have various ways in which it is depicted. Under these circumstances, the state may regulate action by a system of license with Rules and Regulations. The Law Commissions, as to the manner of performance’ was better worded ostensibly.

Clause 3 (b) (iii) made the Government liable for any tort committed by independent contractor. The Joint Committee felt that the proviso has the effect of placing the Government in more advantageous position than a private person. Hence the proviso was deleted while reporting to the Parliament.

Where law imposes upon the Government, an absolute duty to ensure safety of persons or property and there has been failure in complying with such duty the Government would be liable under 3 (b)(v). The word absolute has been retained in the clause.

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Clause 4 of the Bill which dealt with the liability of the Government in Tort as owner or occupier of immovable property implemented para 66-1 (v) of the Law Commissions Report. But where any such property vested in the Government by virtue of any rule of Law, the Govt. would not by virtue of this clause be subject to any such liability in Tort.

Clause 5 of the Bill dealt with the liability of the Government in respect of escape of dangerous things.

Clause 6 of the Bill dealt with the liability of the Government in respect of breach of duties to its employees. In this respect the court is free to take into account any amount payable under any other Law to such employee by way of compensation, disablement benefit etc.

Clause 7 of the Bill contains that any enactment which negatived or limited the amount of liability of an employee of the Government or an agent in respect of any Tort, would apply to the Government also in case of any proceeding against it.

Clause 8 of the Bill enable the Government to raise by way of defence the same pleas which a private person would be entitled to raise in similar suit. Clause 9 dealt with immunity and contribution.
Under clause 10 of the Bill, any act done by a member of armed force or Police force, while on duty would not subject either him or Government to liability in Tort for causing death or personal injury to another person if that other person was on duty as a member of these forces or was on any land premises, ship, aircraft, or vehicle used for these force and the Government certified his suffering was attributable to service entitling him to any compensation under the law relating to death or disablement.

This was modeled on Crown Proceedings Act, 1947 but with a difference but in Britain the members of the Police force was not brought within the provisions of this Act, because Police forces are maintained by the Local Act.

EXCEPTIONS TO THE LIABILITY OF THE STATE

Clause 11 of the Bill (it seeks to implement para 66(v) of the Report of the law Commission) saved the Government from liability in respect of large member 17 exceptions to the tortious liability of the State diluting much basic premises of the Bill, which was that “the immunity of the State should be placed in Tort compared with the ordinary citizen. The State should be placed in Tort committed by its servants in the same position as a private citizen “. (MC Setalvad in Evidence, note in 58 at 26). Most of the Joint Committee members were agitated over (205)
the excessive concessions given in the Bill to the Government. The exceptions though far fetched, but sometimes they negated the very object of the Bill.

**1. ACT OF STATE**

Clause 11(a) provided that nothing in the Bill would make the Government liable in respect of any act of State. This immunity was intended against an alien as “there cannot be an act of State against a citizen” (K.L. Mishra in Evidence. Joint Committee on Govt.) (liability in Tort) Bill 1967 at 91. An act of State means act of the sovereign power directed against another sovereign power or the subject of another sovereign power not owning temporary allegiance in pursuance of sovereign rights (Law Commission of India, First Report, 40 (1956).

The Supreme Court in *virendera singh Vs. State of U.P. (AIR 1954 SC 447)* has laid down that there can be no act of State against a citizen. It chose to reverse that decision in *State of Gujrat Vs. Vora Fidali (AIR 1964 SC 1043)*. However, a different note is visible in *Punjab Vs. Balabir Singh (AIR 1977 SC 628)*.
(2) POLITICAL FUNCTIONS

Clause 119(b) placed acts done by the Government in discharge of the political functions of the State in the area of non-liability. Such acts may relate to foreign affairs (Entry 10, List I VII Schedule, Constitutions India), diplomatic consular and trade representation in International Conference, associations and other bodies and implementation of decisions made there at (Entry 13) entering into treaties and agreements with foreign countries and implementing them (Entry 14), war and peace (entry 15), and foreign Jurisdiction (Entry 16).

(3) ACTS OF PRESIDENT AND GOVERNOR

Under Clause 11(c) of the Bill, the Government had been exempted for any act done by the president of India of Parliament, the dissolution of the House of people, the assent or return of any Bill and issue of any proclamation. Similar provision was made in respect of Governor of the State (clause 11(d) of the Bill). Ho doubt the Art. 361 of the Constitution States that the President and Governor shall not be answerable to any Court for the proviso to it admits that “nothing in the clause shall be construed as restricting the right of any person to bring appropriate proceedings against the Government of India or the State Government”.

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In view of the said proviso clause 11(c) and (b) of the Bill seems to be "ultra vires" the Constitution, being in contravention of the Constitutional right provided under it to all persons.

(4) EMERGENCY PROCLAMATION

Clause 11(e) saved the Government from liability for the Act done under a proclamation. Clause 119f) saved any act authorized by or under the Trading with Enemy (continuance of Emergency provision) Act 1947 or the enemy property Act 1968. leading "members’ and witnesses before the Joint Committee of Parliament were apprehensive of Vagueness of clause 9e) of the Bill.

79. Usually when there is an emergency, many acts are done which are not justified in normal times, but after the emergency ceases, the cause of action revives. "If that is so, the question before the Court of Law will be whether the Parliament is competent to condone violations of fundamental rights except to the extent permitted by the Constitution". (K.L. Mishra in Evidence, note 1 at 96). There was some confusion about the applicability of the clause of Art. 19 is suspended and wiped off for the time being. Under Art 359, it is only a question of suspending a remedy and not the substantive right. Accordingly, the clause was not relevant to Art. 358 though it was relevant to Art. 359 (K. Narayan Rao in Evidence Id. ar 120).
In so far as an Act of Indemnity, Art 34 permits indemnity laws to be passed in respect of infringement of Fundamental Rights, that too when Martial Law was in force and no otherwise.

(5) PROTECTION TO ARMED FORCES

Under Clause 11(g) and clause 11(h), any act done in the training or maintaining the efficiency of the armed forces and also for any act done by a member of the armed forces while on active service, the Government would be immune for liability.

This was in consonance with Federal Tort claims Act and Crown Proceedings Act exempting the Govts. from liability in respect of military activities.

83. The terms “maintaining efficiency” and “active service” are vague and are apt to lead to Lawyer’s paradise”.

(6) SPECIAL PROTECTION TO POLICE FORCE:

The Bill exempted the Government in respect of any act done in good faith for the prevention or suppression of breach of peace or a disturbance of the public tranquillity or a riot, or any affray or for prevention of any offense against public servant, whose duty was to preserve peace and order or who was engaged on guard, sentry, watch and ward or other similar duty 9clause 11 (i) of the Government (liability in Tort) Bill 1967.
The clause me with server criticism within the Joint Committee of The Parliament, one of the members remarked that "we are safe-guarding the Governments right and not that of a citizen" (Ibid).

In the recommendation of the Law Commission, the members of the police force were not included, only the members of the armed forces were included who seldom some into conflict with a citizen. According to M.C. Setalvad, it is now necessary to protect the Police Force also.

In appears that clause 11(i) of the Bill was the outcome of prevailing situations in the country like deteriorating Law and order situation, increase in violence and crime, students agitations, trade unionism, communal riots, Naxalite and militant activities, extremist activities, gheraos and Bandhs. There enhanced Police responsibility and consequently it has become operative that the Police must be given special protection. At the same time, there was misapprehension of police mission such power. Neither the Police or the Public servant entrusted with duty of maintaining peace and tranquillity are above the Law. Following the mid-track, the Joint Committee decided "such exemption should be provided for only in respect of acts done in good faith for the aforesaid purposes" and accordingly it reported the Bill in the Parliament.

Clause 11(j) of the Bill laid down that the Govt. would not be liable in respect of any act done or ordered to be done by a Judge or a Magistrate or any other person while discharging
any responsibility of a Judicial nature vested in him. So was
immunity in respect of lawful warrants, under clause 11(k) of
the Bill. The purpose of providing such immunity was to secure
Judicial independence of the Judges and due maintenance of
Judicial administration. This is similar to Sec.2(5) of the Crown
proceedings Act., 1947.

In India, Judicial officers protection Act 1850
provides for personal immunity of all classes of Judicial officers
according to which no "Judge, Magistrate, Justice of Peace,
Collector or other person acting Judicially shall be liable to be
sued in any Civil Court for any done or ordered to be done by
him in discharge of his official duty, whether or not without the
limits of his jurisdiction, provided he at the time believed in
good faith, believed himself that he had jurisdiction". (Sec 1 of
Judicial Officers protection Act 1858).

Federal Tort Claims Act does not mention immunity
of Judicial acts. Whether India can bear such monetary burden
is a question. But it is also difficult to agree with street who
pungently observes that "no one should saddle the trail Judge
with pecuniary liability but that the convicted innocent would
still be remedy-less, is deplorable".
(7) POST AND TELECOMMUNICATION

The Government has been made immune from liability for any act which immunity was granted under the Indian Telegraph Act 1885 or the Indian Post Office Act, 1898. Under the Telegraph Act, the Government is “not responsible for any loss or damage occurred in consequence of any telegraph officer failing in his duty with respect to the receipt, transmission or delivery of any message”. (Sec. 9 of Indian Telegraph Act, 1885). Under the Post office Act, the “Govt. shall not incur any liability by reason of the loss, mis-delivery or delay of or damage to any postal article in the course of transmission by post.” (Sec. 6 of the India Post office Act, 1898). This is subject to the condition “the Central Government shall be liable to pay compensation, not exceeding the amount for which the postal article has been insured, to the sender thereof for the loss or damage caused in the course of transmission. In England, the Crown is liable in Tort for loss or damage to registered Indian postal packets including letter but not telegrams. In England, Postal function is treated as sovereign function, in India it is treated as commercial function by the Government has monopoly in it. So non-liability of State is hardly justified. The Bill as well as 38th Report of law Commission of India both disfavored change in its existing liability. However, Law Commission had suggested some limited liability in respect of registered articles.

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(8) OTHER EXCEPTIONS

The Government had been exempted from any liability in respect of which remedy is provided under the Indian Railways Act 1890 or under any other enactment for the time being (Cl.119m) of the Government. (Liability in Tort) Bill 1967. Other enactments providing alternate remedy are e.g. Fatal Accidents Act 1885, workman compensation act 1912 and Motor Vehicles Act 1888. The mere existence of alternate remedy will oust the heard to deny the aggrieved party to claim damages for injuries suffered in such circumstances. In respect of any injury or damage to property caused by an Act, which by its very nature is likely to cause such injury or damage and which is authorized by any enactment, the State was made immune, From liability. Thus when a Government servant is carrying out has duty in accordance with Law and during the course of it some injury was caused to a citizen or a damage to a property is not actionable because he is carrying out the Law. (M.C. Setalvad in Evidence - note 1 at 69). Clause 11(0) of the Bill protected the Government servant from any claim arising out of defamation, malicious prosecution or malicious arrest. The Government and its officers have duties which if carried out in a bona fide way in the interest of a State none will find fault about their immunity. But there have been instances of grave mis-use of powers and the State machinery had been utilized to arrest, defame or prosecute maliciously for personal vendetta or for political reasons. To give immunity in such cases of malicious prosecution or malicious arrest will be negation of democracy (V.S. Agarwal in Evidence Id. at 3).

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However, there is no justification for a State wedded to Rule of Law guaranteeing Socio-economic justice to claim immunity in respect of acts such as malicious prosecution.

(C) REPORT OF THE JOINT COMMITTEE:

A motion to refer the Government (liability in Tort) Bill, 1967, to the Joint Committee of the Parliament was moved on 8th May 1968 in Lok Sabha, which was adopted on the same day (Lok Sabha debates, 4th Series, 4th Session, Vol.17 No.59, May 8, 1968 col. 2860-62). On May 13, 1968, the motion was adopted in the Rajya Sabha (Parliamentary Debates, Rajya Sabha, official Report Vo. 64. No.12 May 12, 1968 col. 2775-77). The Committee submitted its report on March 7, 1969 which was presented in Lok Sabha on March 25, 1969.

The Principle changes proposed in the Bill by the joint Committee were three-fold. Clause (a) (ii) of the Bill dealt with liability of the Government in respect of any Tort committee by an employee or agent of the Government, while acting beyond the course of employment. The sub-clause proved that Government was liable only if the act was done by the Government servant on behalf of the Government and was ratified by the Government. The Committee felt that the rectification of the act should not be a condition precedent for liability of the State. The Government should have freedom to ratify an act done by its employee or agent while acting beyond the course of the Course of his employment. The Committee accordingly substituted “or” instead of “and “ in sub-clause (a) (ii) of Clause (3).

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Clause (3)(b) (iii) of the Bill made the Government liable for any Tort Committee by an independent contractor, employed by the Government, where the act is lawful but it is such nature that unless reasonable care is taken it is likely to cause personal injury or damage to property and such care has not been taken. The proviso to the sub-clause enabled the Government shift stipulation in the Contract. The Committee opined that it was not correct in Principal to affect by way of stipulate in the contract the rights of the third parties and that the proviso would have the effect of placing the Government in a more advantageous position than a private person. Hence it omitted the proviso.

Clause 11(i) of the Bill provided for exemption to the Government form liability in respect of acts done by the members of Police-force and certain other Public servants for the prevention or the Public tranquillity or a riot or an affray or of the prevention of offense against Public property. The Committee opined that such exemption should be provided for only in respect of acts done in good faith for aforesaid purposes. The Committee amended the Clause accordingly and recommended to pass the amended Bill.
(D) EQUAL TREATMENT OF THE STATE AND CITIZEN:

The Government (Liability in Tort) Bill, in general, was a step in the right direction, but it was aborted before delivery.

The Core suggestion of the Law Commission was that :-

1) The immunity of the State should go as compared with the ordinary citizen and -

2) The State should be placed in respect of torts committed by its servants or agents in the same position as a private citizen.

(M.C.Sitalvad in Evidence : Joint Committee on Govt. (liability in Tort) Bill 1967 at 126).

In democracy, the Government in its action stands on an equal footing with its citizen. The ruler and the ruled have the same rights and obligations. The State is given power as it has to perform certain function on behalf of all its citizens. But when it acts wrongly the citizens have equal rights to take the Government to task through the elected representatives of the people. If the State injures someone, he should be entitled to claim damages from the State except where larger interests of the people demand otherwise. Though the object of the Bill was also the same but an extensive list of exceptions provided in it do not correspond with that. Some of these exceptions do not find mention in the first Report of the Law Commission. For example there, rather “extravagant immunity” provided to

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the members of the Police Force of Public servants entrusted with the duty of preserving Law and Order. The Law Commission has never suggested the Police Force functioning within the Municipal limits of the country should have the kind of exemption which an Armed Force or a combatant Force is endowed with for security reasons.

The Bill has been criticized for taking away the very right that the people had been enjoying even during British days. Instead of giving some rights against the Government, it took away even the existing rights under the guise of immunity provided to the Govt. One member of the Joint Committee of the Parliament dubbed it as Non-liability in Tort Bill, as in his opinion the Bill gave all the advantages to the Govt. The Bill asserts that the Government shall be entitled to raise by way of defense the same pleas as the private person would be entitled under the Law to raise if a similar suit has been instituted against such persons. The Bill accords to the Government various immunities which are not available to the ordinary citizens. The details of the immunities available to the State are mentioned below:

1) acts of the State.
2) acts done under the statutory authority.
3) judicial acts.
4) quasi judicial acts.
5) any claim arising in defamation.
6) malicious prosecution.
7) malicious arrest.
8) acts authorized by an enactment for the time being in force. The immunities 5 to 7 items cited, seem to be not justifiable at all.
The bill does not compare favorably with the Crown Proceedings Act, 1947. The Crown is subject to all the liabilities in tort to which it would be subject if it were a private person of full age and capacity. (Sec. 2(1) Crown Proceedings Act, 1947, like the Indian Bill, the exemption clauses of the Crown Proceedings Act are very limited. The distinction between sovereign and non-sovereign functions is absent in the Crown Proceedings Act of 1947. There is no immunity of discretionary powers in the said Act.

The American Federal Tort Claim Act, 1946 is too restrictive in its operation due to its extensive exceptions for specific administrative functions and for claims arising out of assault, battery, false-imprisonment, false arrest, malicious prosecute, libel, slander, abuse of process, mis-representation, deceit and for acts and omissions of the employees exercising due care in the performance of their discretionary functions.

The French system based essentially on the doctrine of risk and Code of Contribution appears to be more sound as it provides for better humanization of the competing public and private interests.

It is evident that the principle of Government accountability which is one of the basic pillars of a Welfare State has not been given full sanction under the proposed bill. The critical analysis of the bill shows that it has created many exceptions to the State Liability and more often than not the
citizen may find himself even worse off than under the judgment of *Kasturilal Vs. State of U.P.*, *(AIR 1965 SC 1039)*.

It is an irony of democracy that the Parliament which was exhorted to give adequate remedy to the citizens against the state in the above case by enacting law, proposed a bill that created more suffocating situation for a citizen against the state than the already existing one.

Massy I.P. rightly remarked in his Administrative Law, 333 (1985) that the escape clauses are so wide that in many cases a person would find himself without a remedy in cases of injury to his person or property. Justice Krishna Iyer’s observations in this regard are also quite relevant. He observes that the Government must not fight its own citizens like a cantankerous litigant but should settle the matter generously in the best interest of people, acting on the principle of social justice. *(State of Haryana Vs. Darshana Devi AIR 1979 SC 855, 856)*.

To seek cover under the plea of sovereignty just to avoid liability for the tortious acts of its servants or agents should not be states aim, as it is wholly out of place in a democratic welfare state. In this context we have to agree with Aristotle when he says “the state exists for the sake of good life and not for the sake of life only”.

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