CHAPTER-IX
CHAPTER - IX
CONCLUSION AND SUGGESTION

01. Despite a sea change in the functions of the state and the notion of State Accountability, the Law relating to Tortious Liability of the State in India has remained surprisingly static. It is almost the same as it was in 1858 when the sovereignty passed to the Crown Article 300 of the Constitution of India preserves the refer back approach to the Tortious Liability of the State of India and in every case the question that has got to be answered is whether such a suit would be against the East India Company; had the case arisen before 1858? The difficulty is the liability of the East India Company to which the Government of India Act 1858 refers was not laid down anywhere. It has to be gathered and worked out from hirogenous decisions of the courts during 18th and 19th centuries. The rules evolved in 19th century, when the development in science and technology had not taken place. Therefore, they can not afford guidance in evolving any standard of liability consistent with the norms and needs of the present day. This is the rational why the constitution makes the above position subject to law to be enacted by the Parliament or the Legislatures of the States. Thus, the research of the subject contemplates legislative changes to meet the ever-growing needs of the people in the Welfare State. The judiciary has also urged legislative change to regulate the control their claims for immunity.

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COMMON LAW IMMUNITY.

02. The Common Law concept of sovereign immunity as developed in Great Britain never operated in India. Ever since the time of the East India Company, the State has been held liable to be sued in tort. The East India Company had been invested with powers and privileges of two fold nature i.e. as a Trading Corporation it had the power to carry on trade as merchants and as a delegate of the British Crown it had sovereign powers over the occupied Indian territory. The Government of India Act, 1858 which made the Secretary of State liable to the same extent to which East India Company was necessarily implied that the immunity of the British Crown from the liability to be sued did not apply to the Government of India. The transfer of authority from the Company to the British Crown did not make any difference to the rights of the subjects to pursue their remedies against the state. Under the Constitution, there is no scope for immunity based on prerogative or arbitrary right, which alien to our system as "Ours is a Government of Laws and not of Men (State Vs. K. Cherubabu AIR 1978 Ker. 43, 49)". The doctrine is now confined to narrow regions i.e immunity of a foreign state from the jurisdiction of the local courts Viz. acts of state and immunity of a state from the jurisdiction of its own courts in regard to matters relating to military operations.

OUTMODED LAW

01. In a Republican and Democratic form of Government, there is no justification for recognising the archaic theory of sovereign immunity, which was founded on feudalistic notions of justice. It was erroneous to assume on the basis of Peacock C.J. holding that he laid the general principle of exempting all sovereign activities from liability area. In fact, in his illustration he referred only to three types of such activities, i.e. act of state, military operations and judicial activities which were entitled to be exempted from the Tortious Liability. It was unfortunate that, the obiter of Peninsular and Oriental Steam Navigation Company's Case was tightly glued upon by the Indian Judiciary so as to establish immunity of the State for the acts done in the exercise of sovereign powers. The correct reading of that judgment indicates that, it was not the intention of Peacock C.J. to attack such an exception.

02. A suit will be against the Government in regard to acts done in the course of activities of a private nature was settled beyond doubt but as to maintainability of action in regard to acts done in the course of its transactions of sovereign nature, two conflicting judicial views prevailed. One school held the Government subject to a few exceptions, not liable in regard to such acts and placed reliance on the so called distinction between sovereign and non-sovereign activities for the purpose of determining liability of the State. The other school made the state liable in all such cases, except for an act of the State.
03. Lead by “Haribhanji Case”, it suggested a different foundation of the State liability than suggested by “P & O Case” by stating that the State is sueable in all cases in which the act challenged purports to have been done under colour of legal title or under the Municipal Law and does not amount to an act of State. The only test for ousting the Court’s jurisdiction in such cases is whether it is an act of State or not.

04. The liability of East India Company to be sued in its own courts was not limited to cases in which a remedy would have led against the British Crown and an action lay for damages in consequence of the negligence of the Government employee was made clear in “P & O Case”. The act in this case was held to have been done in course of the nature of private undertaking. In that case, then Court was not required to give its verdict regarding the maintainability of an action in respect of an act of sovereign nature. Hence, the dictum of Peacock CJ that, “Where an act is done in exercise of powers called sovereign powers, no action will “ was strictly speaking an obiter “ratio decidendi” being that the State was liable for the negligence of its servants, if the negligence was such as would render an ordinary employer liable.

05. The decision of “Nobin Chunder De Case” was the outcome of mis-interpretation of “O & P Case”. The proposition that no action could be against the state in regard to acts done in exercise of sovereign powers was only the
reverse of the proposition that an action would be in regard to acts done in the course of an undertaking of a private nature.

06. Melnerny Vs. Secretary of State (38 Cal. 797 (1911)) went a step ahead and further restricted the liability for non-sovereign functions by holding that the liability was only where there was some benefit or advantage to the Government. In some cases like, A.M. Ross (ILR 1 Cal. 11, 1875) and Gurucharan Kaur (AIR 1944 PC 41), the element of ratification was considered necessary for making the State liable.

07. The exception that the Government can not be sued for tortious acts done in the exercise of its sovereign powers, was not justified by any legislation in India. It was a judge made adaptation and, therefore, not applied uniformly, undeterred by the logic of “P & O Case”, the C.J. Charles Turner and J. Muttuswami Iyer put the Government liability in its correct perspective in “Haribhanji’s Case” and observed that, where an act complained of is done under the sanction of Municipal Law and does not amount to an act of State, the fact that is done by the sovereign power and is not an act which could possibly be done by a private individual, does not oust the jurisdiction of the Court.

08. The Constitution preserved the refer-back approach to the Tortious Liability in India. At the commencement of the Constitution, two divergent views prevailed about the state

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1. Melnerny Vs. Secretary of State (38 Cal. 797 (1911)).
liability in India. One group divided all the Governmental activities into two categories, sovereign and non-sovereign and held the State liable for the latter type of activities only. The other group discarded the above distinction and held the state liable in all cases in which a suit could be brought against a private individual except where the act in question was an act of state.

09. Thus acts for which an action would lie against the state generally fall into three categories Viz. :

(i) Acts professedly done under the sanction of the Municipal Law for which there was an enforceable statutory obligation.

(ii) Acts of detention of land, goods or chattel belonging to the subject including act of tress pass by the Government officials.

(iii) Acts expressly authorized or ratified by the Government or where the State has profited itself by such actions.

10. Analysis of Post Constitution Judicial Decision, reveals persistence of this confusion. The Socio-economic Welfare activities like medical relief, building of reservoir, postal services, running of railways etc. added new dimension to the contents of State liability.

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11. The first direct case on the subject, *State of Rajasthan Vs. Mrs. Vidyawati (AIR 1962 SC 933)*\(^1\) does not attach much importance to the distinction between sovereign and non-sovereign powers as was laid down in “P & O Case”. The court found no justification either in principle or in public interest for exempting the State from vicarious liability for the tortious act of its servants. The judgment tried to evolve universal principle of liability when it ruled that there should be no difficulty in holding that the State should be as much liable in respect of tortious acts committed by its servant as any other employer. It appeared that the Supreme Court by Vidyawati decision (in appeal) had abolished the “great and clear distinction” between sovereign and non-sovereign functions of the Government. But only three years later, it handed down a retrograde decision in *Kasturilal Vs. State of UP (AIR 1965 SC 1039)*\(^2\). Thereafter, courts have been struggling hard to reassess and re-define the scope of State Liability. Gajendragadkar C.J. expressed his helplessness and anguish with the State of Law. The question arises, whether the Supreme Court was not the ultimate protector of the right of a citizen and whether the protecting arms of the judiciary could be contracted in such an easy manner. The simplest course for him was to follow “Vidyawati Case” and decide in favour of the applicant, Kasturilal. In fact, there was no compulsion of Century old case of “P & O Case” on him to decide the case otherwise. It is beyond logic to term such flagrant violation of police regulation as sovereign function of the state.

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1. *State of Rajasthan Vs. Mrs. Vidyawati (AIR 1962 SC 933)*
2. *Kasturilal Vs. State of UP (AIR 1965 SC 1039).*
12. That, the law in the area of "State Liability" for the tortious acts of its employees, required a re-statement after "Kasturilal case". The liberal approach was adopted in subsequent cases relating to State Liability e.g. "Lala Bishambar Nath Vs. Agra Nagar Mahapalika (AIR 1973 SC 1289), Basava Vs. State of Mysore (AIAR 1977 SC 1749), Shyamsunder Vs. State of Rajasthan (AIR 1974 SC 890), N. Nagendra Rao Vs. State of Andhra Pradesh (AIR 1994 SC 2663), Lucknow Development Authority Vs. M.K. Gupta (1994) 1 SC 243., to mention a few of such decisions. The claim of compensation for excess and negligence on the part of administration is becoming increasingly common in India. Rudul Shah Vs. State of Bihar (AIR 1983 SC 1086) lays down a heartening note in a sordid and disturbing state of affairs. The Supreme Court for the first time used Article 32 of the Constitution to award compensation to the victims of State wrong. The remedy has been made fast and cheap to have a salutary effect on the State. SAHELI, a women's Resources Centre Vs. Commission of Police, Delhi (AIR 1990 SC 513) was another bold decision of the Supreme Court to pay compensation in case of death due to police atrocities. The Bhopal Gas Leak disaster and its aftermath has emphasized the need for laying down certain norms that the State must follow before granting license for running industries dealing with materials which are of dangerous potentialities. Delhi (AIR 1990 SC 513)

7. Saheli, a women's Resources Centre Vs. Commission of Police, AIR 1990 SC 513
13. In the modern perspective, it is necessary to consider whether there is any rational dividing line between the so-called sovereign and non-sovereign functions for determining state liability. In fact, the concept of sovereignty is not a satisfactory test for deciding questions of immunity. The sovereign exercise of power can not be the dividing line between jurisdiction and immunity. During the past Constitutional period also, the judiciary has not been able to evolve a clear cut test of the state liability, so as to rescue it from the State of confusion. The Court's in-ability to transcend the two conflicting approaches has been confounding the confusion.

**THE DOCTRINE OF SOVEREIGN IMMUNITY.**

01. The doctrine of sovereign immunity for tort is an anachronism and perhaps without any judicious basis. None of the arguments advanced in its favour can stand scrutiny. It has been riddled with so many exceptions, operating so illogical that it has become untenable. Almost all the writers, jurists and commentators have unanimously argued for its rejection. How to change the situation is a question. There is virtual unanimity in the belief that the movement away from sovereign immunity is desirable. Disagreement prevails over the forum (judiciary or legislature) which should bring about the change and also over the limits of state liability after the principle of sovereign immunity is scrapped.

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02. The logical basis of sovereign immunity goes against the very thesis of Rule of Law and it can hardly find any sound support in 20th Century Democratic State. It is also argued that the negation of state immunity would drain the public exchequer by constant litigation from the victims of State wrong. However, this fear is un-founded as the experience in France had shown that a system of general state responsibility had been able to function effectively for more than a century. Thus, neither logical reasons behind the sovereign immunity nor the so called practical monetary argument favoring it are valid today.

JUDICIAL OVER RULING VS. LEGISLATIVE ENACTMENT

01. Article 300 of the Indian Constitution contemplates legislative initiative in relation to sue-ability of the Union of India and the Government of a State. This is evidently intended to meet the ever growing needs of the citizens in a Social Welfare State. The Law Commission of India in its first report recommended legislation "nicely balancing considerations" so as not to unduly restrict the sphere of the activities of the state and at the same time to afford sufficient protection to the citizens. (Law Commission India, First Report, 36 (1958).1

02. The Supreme Court in "Kasturilal Case" recommended a legislative treatment of the matter by holding that the remedy

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to cure the present ills lies in the hands of the legislature. This led to the introduction of Government (Liability in Tort) Bill in 1965 and again in 1967. The bill was referred to Joint Committee of Parliament which submitted the report in 1969, but the premature dissolution of the 4th Lok sabha aborted all such attempts.

03. It is argued that it is for the legislature and not for the judiciary to remove the existing state immunities. The logic is that by the force of “Stare-decisis” the doctrine has become so firmly glued to our system that only legislature can change it. A democratic welfare state is expected to attain the objective of socio-economic equality and the journey towards goal has to be assisted by legislation.

04. The judiciary functions under certain inherent limitations. But it cannot be denied that many basic changes particularly in common law systems, the judiciary has its handy-work. In France, ever-widening principle of state liability replacing the doctrine of State irresponsibility has been brought about by the judiciary. It was wholly the work of Conseild “Etat without the aid of legislation”. In England, the Crown Proceedings Act, 1947 and in the U.S.A. the Federal Tort Claims Act, 1946 have not provided a satisfactory solution to the problem of State liability in their respective countries. The doctrine of State immunity is exclusively a judge-made-dogma and when it leads to obvious in-justice, the responsibility to change it lies basically on the judiciary and not on the legislature. The judiciary need
not wait for the legislative initiative to solve the problem. The judiciary has to bring the law in. consonance with the aspirations of a newly born democratic republic. Mere enactment of a law on the subject may not be able to solve the practical difficulties which may arise while balancing the individual claims with social interest in a fair way. The judicial approach must take in to account the felt necessities of the time and philosophy of social justice to which the nation is firmly committed. The judicial policy of passing the task of law reform in the area to the legislature might well be described a an abdication of its responsibility.

THE ANALOGY OF WRONGS BY PRIVATE PERSONS

01. The Anglo-American jurisprudence treats the state for purposes of litigation as nearly as possible in the same way as a private person of full age and capacity and does not all different standards of conduct for the people and public bodies. At the outset, it seems plausible to see that the state is made directly liable just as any private individual. It would a proper test in a large number of state activities but in various other areas no such analogy exists. A number of the functions of the Government have no private counter parts. The State keeps an army and police force, maintains courts, jails and post offices, issues permits, collects various taxes and custom duties which no individual can do. Private individuals do not make laws, do not issue or revoke licenses, do not prosecute violators of law
and do not conduct international relations. It would not be correct to say that the state employs its servants in the same manner in which a private person employs his servants. The private employer is free to chose his servant whereas state employees are appointed by statutory authorities. Again the will of the state alone does not control the conduct of its employees, but a sense of professional duty plays a significant role. Therefore, the private analogy argument always may not always be infallible, to start the argument away from immunity doctrine, the private tort liability analogy may be helpful. But that is also an unsatisfactory guide to determine the liability in respect of functions that have no private counter part. The analogy may become misleading if one reasons that the state must be immune from liability for actions having no counter part. A system of tortious liability based on private analogy does not need a discretionary functions exception but this not true in case of tortious liability of state. To draw inspiration from the private law principle to apply to a domain of public law, a domain for which they are not designed is not a healthy sign.

02. A broad principle of public liability is to be chalked out. The liability of state can be extended much farther than the liability of the private person as it differs in a significant manner from the private individual. The state is supported by Revenue Collections, unlike the private counter part. To make the state liable for the torts of its servants to the same extent as a private individual is liable would an important advancement in law of tort. In this contest, Prof. K.C. Device's observations appear to be pertinent, which are as follows :-

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“...in the long run the demands of justice will compel us to go much further. We shall have to work out principles to govern liability with respect to those activities which are uniquely governmental....The time will come when we shall perceive more clearly that Governmental units should often be liable where private parties would not be and should not be liable.” .... (K.C. Davis: Administrative Law Treatise, Vol. III, 502-03 (1958)).

One need not be cynical about the demands of social justice. Law ill have to change to conform to the demands of justice according to the changing society, otherwise it will become adios.

OUTER LIMIT OF THE STATE LIABILITY

01. Whether the state should be liable for all damages caused by its action to the individual or should it be immune from accountability in some specific cases is another question?

02. Though almost all jurists and commentators have favored the abolition of state immunity, the judges and state legislators have so long resisted the movement. The difference of approach is strikingly wide regarding the outer limits of liability. Judges and legislators do feel the necessity of retaining the immunity doctrine in some specific areas. Most of them do not like to go to the extent of "Férulette Case" (CE 14 January 1938)²

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2. "Férulette Case" (CE 14 January 1938).
where manufacturer of Cream Substitutes, who was thrown out of business due to the enactment of a statute forbidding manufacture and sale of cream substitutes, recovered damages from the *French Government (A comparative study, 7 V and L. Rev. 246 (1954))*. Jacob is of the view that the Felurette Case is an extreme and basic law of France. According to it, in the performance of various welfare activities, police atrocities and collection of taxes etc. the state is generally not liable to pay the damages to the adversely affected person.

03. The Indian Judges like their counter parts in Great Britain and America hold back from adoption of such absolute liability. They probably see the impracticability of making the state liable for all harms to the individual interest.

04. To make the state liable for having made a law prohibiting sale of certain drugs and thereby causing loss to a profitable business or for the negligence in dealing with the problems of international relations or failure to issue passport etc. would not be feasible. Such instances some times are very complex. Borchard’s saying appears to be practicable:

"....The administration can not be held to the obligation of guaranteeing the citizen against all errors and defects, since life in an organized immunity requires a certain number of sacrifices and risks ".....(Borchard. Government liability in Tort, 34 Yale LJ 1 1924).”

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INDIAN MODEL OF STATE LIABILITY

Today, state immunity is no longer accepted without question and is considered to be a mere sophism. Ordinary right of the people has substituted the discarded divine right of the State. State liability had been a night-mare for the Anglo-American Laws. In contrast, the law in France has no such inhibitions. The jurisprudence evolved by Conseil d'Etat admits almost full state liability to the subject though no statute has been enacted. The French Law has developed a complete system of state responsibility beyond anything in common law countries. The private citizens liability is based primarily on fault, but the state has been made liable, fault or no fault, in practically every case where damage has been caused by its activities".......  
(Bermard Schwartzte, American Administrative Law, 234 (1962)1.

In ancient India, the Rule of Dharma, a concept wider than modern Law prevailed. The king under Rule of Dharma never claimed exemption and was liable to punishment as any other individual. Hindu and Muslim systems never regarded sovereign as fountain of Law but treated merely as fountain of Justice. The British Rule, unconcerned with Dharma went ahead

1. (Bermard Schwartzte, American Administrative Law, 234 (1962).
in introducing British Common principles in India. After Independence, now the Constitution provides in other areas, remedies, when State action violates individual’s rights and causes damages.

Every country has evolved procedures and remedies best suited to its tradition and legal system. The French system of State liability is wider in its sweep than the British and American system. Decisions of the administration are set aside there if that causes damage to the individual, which would not be open to scrutiny in common Law countries. The French citizen approaches special Tribunals for quick relief whereas the citizens of U.S.A. and Great Britain are to approach the cumbersome process of ordinary courts. The Law Commission of India after considering pros and cons of the matter concluded that the Indian conditions do not warrant the adoption of French pattern. It also observed that it would not be advisable to adopt the Legislation, in this regard as in England or America, though the tendency of liberalization of Law in these countries must be ignored while framing Law in India (Law Commission of India, First Report, 37 (1956). It was in favour of taking more supplementary steps so that the Rule of Law may be enforced and the citizens may be protected. The problem, in its opinion, was to suggest some additional and effective measures which can conveniently be fitted into the pattern of Constitutional frame-work (Law Commission of India, 14th Report, 688-
91 (1958). It is submitted in this regard that solution offered by the Law Commission of India could at best be a tentative solution of the problem. The Common Law concept of State liability still hinges on the principles of private law of Tort, which was not structured property to solve the problem of public law area. Ultimately, it is imperative to design and develop a public law of Tort, infra-structure of which could be conveniently found in the French system of public liability. Based on fault and risk theory, the French system appears to be more rational and fair. In one respect the State is liable on account of the fault of an employee and in other respect it becomes liable for the inherent risks arising out of employment. It is necessary that this risk theory should be developed in India also and it is an Imperative need in the fast changing society of India. The adoption of french risk doctrine would certainly be conducive to better reconciliation of the competing public interest and individuals claim in the modern society.

**SUGGESTIONS :**

Some measures are suggested at the end of strenuous elaborate research work in order to streamline the concept of State immunity, if not palatable to scrapping it altogether. Albeit, it is my opinion after conclusion that the sound policy would be to abolish it altogether, "fair deal and no favour" being the guiding principle.

I am inclined to offer the following viable suggestions

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1) **SOVEREIGN AND NON SOVEREIGN FUNCTION TEST MUST GO.**

The dichotomy propounded by the Indian Courts between sovereign and non-sovereign functions analogous to the American distinction between governmental functions and proprietary functions must be discarded as arbitrary, unrealistic and unfair. We have to get rid of this archaic conun-drum of sovereign and non-sovereign functions. The distinction has caused confusion not only among various Courts but almost always within each Court. It has not been able to co-relate the liability of the State with its present role in a welfare State. In extreme cases, it is easy to recognize examples of sovereign activities of State such as act of War, defence or military operations. Examples of non-sovereign activities are carrying of goods, sale of commodities etc. But in between these two extremes, it is very difficult draw distinction. There appears to be a variable line which shifts from time to time and Court to Court. The absurdity of the classification increases when the sovereign and non-sovereign characteristics of an activity are mixed up as in the present era. To test otherwise, whether it was necessary for the State, for the proper discharge of its functions, to have the act done through its employees rather than through a private agency? To put it otherwise, would the delegation of such activity to a private party cause material harm to the State interest? If the answer is yes, the State under the circumstances need not be liable for such activities.
2) TO START WITH THE ANALOGY OF WRONGS BY PRIVATE PERSONS MAY BE HELPFUL:

The acceptance of liability by the State in all cases where a private employer would be liable in like circumstances, is probably a good point to start with but it may not be infallible guide in all situations. The Anglo-American concept conceives State for the purpose of litigation in the same way as a private person of full age and capacity. The private Tort liability analogy becomes an unsatisfactory guide to test the liability for the activities which have no private counter-part. We have to work out principles to regulate liability with respect to those activities which are exclusively governmental. But to draw inspiration from private Law principle to a domain of public, Law may not always be right approach. Nevertheless, to start the movement away from immunity doctrine, the private tort analogy may not be totally irrelevant till we reach the stage where State should be made liable in all those cases where a private individual need not be.

3) LEGISLATION WITHOUT DELAY:

The Government (Liability in Tort) Bill, 1967, intended to give effect to the suggestion of Gajendragadkar C.J. and sought to implement the recommendation of Law Commission. But the principle of Government accountability had not been given full sanction under it. The legislation on the pattern of the Government (Liability in Tort) Bill 1967 minus its various
shortcomings as detailed in the earlier chapters must be enacted without further delay. The definition of Govt. in the Bill needs clarification as it fails to tackle the overlapping position of the employees e.g. where a tort is committed by Union Government employee while acting in connection with the affairs of the State and a State employee acting in connection with the affairs of the Union. The definition needs to be modified to include any other person acting on behalf of or under the control and direction of Union or State. Similarly, the responsibilities of the executive head of the Govt. Department i.e. Principal, Secretary and the political head i.e. Minister of the Government, concerned Department should be clearly demarcated for the wrongs committed by their subordinate employees during the course of official functions if they are of non-sovereign in nature.

The judicial immunity which universally recognized principle should remain, but the convicted innocent should not be left without remedy when he suffers from Judicial wrong. Non-liability of State for the tortious activities of the Post and Telegraph Departments is hardly justifiable. A beginning should be made in respect of registered articles at least.

Blanket exemptions provided to the activities of the Police under the Bill is resented by the people. Exemption may be provided for the acts of them done in “good faith” in preserving Law and order. But who should ensure good faith? Let it be subject to scrutiny by the Court. Protecting the Government for any claim arising from defamation, malicious

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prosecution or malicious arrest has no justification particularly in a country which professes to build an edifice of Justice and liberty. Malicious arrest leads to custodial death. The victims claim on all the above issues justifies beyond reasonable doubt. Attempt should be made to give full sanction to the principle of State accountability in future enactments. The State on its own should not seek cover under technicalities to avoid liability. It appears that the political heads and executive and administrative heads in the Govt. do not wish to part away with the power. This probably explains why the proposed Bill in 1967 introducing moderate changes could not take shape of Law. A comprehensive Legislative enactment in this regard is the imperative need of the country to signify that the Government has a will to honor the Constitutional commitment and to show that the State is an honest person.

4) LEAD OF THE COURT

PENDING LEGISLATION:

Pending the enactment of the comprehensive Law on the subject, the Court’s should take a lead in the matter. Actually, mere legislative action in insufficient to clear up the mess. The American and British experiences also bring out the limitations. The Court should take step and lay down appropriate Law of being silent spectators. The doctrine of State immunity is the
creation of Judiciary and the responsibility to alter it lies primarily on it and not any other agency. "Justice is not only done but Justice is seen to be done" is the off-quoted maximum of the Court enunciates correct Law authoritatively standing with the decision in "Haribhanji Case", the balance would be swinging between pillar of State immunity and anchor of its absolute responsibility.

5) COMPENSATION TO VICTIMS:

To provide compensation to the victims of personal injuries attributable to Police violence or to an arrest would be a step in the right direction. Negligence on the part of the administration resulting in negation of freedom are not uncommon to-day. Major industrial accidents occur inspite of safety measures resulting in loss of life and property. Compensation should be revised raising to the level of increased cost of living. People should be awakened in India to their rights for legal compensation. Awareness and guidance in the victims should be brought in by the legal Cells in the Government and Free legal Aid Societies. The Courts should accord adequate compensation to the victims of accidents. The owners of proving innocence should lie with the Tort feasor and the compensation to the victim should depend on the paying capacity of the Enterprise involved. Uniform pattern of compensation could be achieved through the establishment of State level and National level Compensation Tribunals.

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6) COMPENSATION NOT MERELY
A MATTER OF LAW BUT ALSO OF
CONCESSION:

Compensation is sometimes awarded as matter of concession and not of Law. Private laws can be passed irrespective of fault for awarding compensation. In America, tort claims which are not covered by F.T.C.A. or by any other legislation are generally taken care of through the enactment of private Laws as a matter of grace. The petitioners who lost the "Dalchite Case" (Dalchite V United States 346, US 15 (1953) in the American Supreme Court, later won in the Congress which coolly rejected Judicial Verdict, stating that Govt. by introducing into the flow of commerce, an inherently dangerous and hazardous explosive without proper safe guards and warning, committed a wrong and was responsible for it. Through the mechanism of private Law, the State could be made liable irrespective of fault. In India, through parliamentary intervention by way of help for private Bills could be taken in exceptional cases where the Verdict of the Court leads to manifest injustice and there is no other way.

7) DEPARTMENTAL SETTLEMENT OF THE DISPUTE:

The establishment of impartial and independent departmental Settlement Committee, Agency or Tribunal or the Pattern of west Germany or U.S.A., would be step in the right direction to scrutinize the cases tortious liability arising out of
actions and inactions of that Department before contesting the claim in the Courts. Such specific tribunals may be created through the State pending which quasi-Judicial committees may be attached. Time may be stipulated to dispose off the claims. Such Settlement could be made mandatory before sending the claims victim to the Court. The Institution of Director of Public Torts on the pattern of British Director of Public Prosecution may be experimented in this regard.

8) COMPULSORY PUBLIC LIABILITY INSURANCE:

One of the most important development in the area of tortious liability of the State in recent years has been the use of liability insurance, both as a substitute and supplement to the State responsibility. Legislatures are increasingly willing to provide for payment of premiums for liability Insurance and waiving immunity to the extent of Insurance coverage. Insurance to cover the risk of human activity, whoever might be the paymaster is now a proposition which is widely being canvassed. In India, courts should create an atmosphere favorable to the Government and Public authorities taking out Insurance covering all risks of third party injuries. Realizing the uncertainties, various insurance Corporations and their subsidiaries are offering third party public liability insurance cover against sums insured. A compulsory insurance against third party risk needs to be worked out on a National level. If the Government and public Authorities take out insurance to cover all risks of third party injuries resultant of their function it would be very
expedient. Industrial development and hazardous involved therein pose a mandatory need to constitute a "National Insurance Fund" to meet unforeseen contingencies. The contribution to such fund may be made by the Government. It should be permanent in nature. In India, public liability insurance Act 1991 has been passed to provide immediate relief to the victims of Industrial accidents. But the amount of compensation is very meager. The Act needs a good deal of modification to make it really a piece of Legislation.

9) STATE WITH MORE RESOURCES SHOULD BE GIVEN MORE RESPONSIBILITY:

The development of full-fledged system of State responsibility requires something more than only to make the Government liable in the same circumstances, where a private party would be liable. The difficult task is to conceive the situations where the State should be liable in the circumstances, where the private individual would not be. The State is supported by taxation, custom duties and other forms of revenues and is not dependent on trade and business only like private parties. The activities of State even when conducted without fault may constitute creation of risk and if that materializes and the individual suffers injury or loss the duty to indemnify him should be cast on the State. Therefore, the State enjoying more resources should be saddled with more responsibilities.
10) ACCEPTANCE OF LOSS
DISTRIBUTION PRINCIPLE

If the State activity has caused damaged to an individual and thus effected the rights of the citizen, the entire community would be made to pay the damages. The State through taxation distributes the burden on the community as a whole. Damage to a private person arises from State activities taken in the interest of public welfare. So it should be distributed amongst all the members of the Community. Just as no individual should gain preferential treatment from the State, so also he should not suffer special loss from it and if he suffers such special loss, the balance should be restored by equal distribution of the loss among all the members of the Community. Every State functioning creates a risk which must be shared by public equally. The cost of the liability should be distributed over a large section of the community. The principle of loss distribution should provide guidelines in determining the extent of State liability.

11) LIMITS OF STATE LIABILITY:

Judges and Legislators may perhaps better understand the impracticability of making the State liable for all its activities causing harm to the interest of the subjects than the Jurists and the Commentators who with one voice vote for absolute liability.
of the State. Typical State activities in abnormal situations such as war, internal disturbance, insurrection, rebellion, breakdown of Law and order etc. affecting the person or property of the individual could be the exceptional areas where bona fide State action in the interest of general Welfare of public should be given adequate protection. This is the reason why F.T.C.A. contains thirteen explicit exceptions and the India Bill enlisted seventeen such exceptions. Further, the State should not be made liable for the act of State against an alien, acts done by the Judicial Officers and related agencies, political functions such as acts relating to foreign affairs, diplomatic consular, war and peace treaties with foreign countries etc. and activities of armed forces. A limited protection to the activities of the Police Force done in “good faith” may also be experimented. Such exemption list should not be so stretched so as to negate the very right of the individual to bring suits against the State. Whenever, where-ever he suffers from its activities. The theory is that the immunity of the State should go.

12) DEVELOPMENT OF PUBLIC LAW OF STATE:

Admission of full State responsibility to the citizens and evolution of public law of tort was the Jurisprudence evolved by the French “Conseil d’Etat” compared to Anglo-American world. The French had developed a complete system of State
liability. In French, the private individual is still liable for his faults only whereas the State is no longer liable only on the basis of fault. But the State is responsible, there practically in every case where wrong has been caused by the State’s action. French public law liability for torts has moved from the ground of fault to that of risk. But most of the common law countries have not yet attempted to develop any general principle of liability of the Government. They are still fishing in the private law principles to find solutions to relating to it. In French, the State as an person takes full responsibility of its activities and does not take shelter behind any dogma. Though the French system has its own demerits, like the problem of competing Jurisdictions in ensuring execution of Judgment and lack of uniformity etc., it deserves serious consideration because of its great achievements i.e. in the field of basing State liability on risk rather on fault and the subjection of all executive bodies to the same law without any discrimination.

It has been argued that the India Conditions do not permit adoption of the French system. But our problem is only to suggest some supplementary and effective measures which can be conveniently fitted into the pattern of our constitutional and judicial frame work. Evidently, there is much to learn from French model of State liability in order to develop public law in its moderate form, would negate state liability.
From sovereign immunity to the development of full system of state responsibility is a long and un-ending journey often involving the inter-action of many divergent and conflicting interests. The state can not be made liable for all wrongs caused by its faults and wrongs. Some of the harms have to be accepted as part of the necessary price for living in an organized and modern technological society. This is the opinion of K.C. David expressed in his Administrative Law Treaties in Vol. III at 502-3 (1958). His opinion need not be agreed due to changed circumstances due to feudal thinking of bureaucracy and changed spirit of freedom in the country. If the state is at fault in making the choice of policy, millions may be hurt, is not appropriate to correct the wrong policies of the state through damage suits? These loses will have to be born by the state. The state should be liable for the damages which it causes to the subject otherwise. The need of the hour is to work out a satisfactory system of state liability with respect to functions of private counter-part i.e. to perceive the situations in which the private parities would not be liable, but the state would be liable. But the question is who will bell the cat if the executive fails and legislatures influenced by the executive also fails. The courts in the country must come out with their weapon of judicial activism. The need of the hour is to work out the satisfactory system of state liability, since it is a convincing fact that the state should be liable for the damages it causes to its subjects otherwise.

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The state is the best possible loss spreader and hence the basic state liability should be reasonable and equitable loss spreading. However, the ultimate principle may be that the public should bear the loss that results from the state action. But the principle of equality demands that the burden should not rest where it accidentally falls, but it should be re-distributed among all the members of society. The society has created the risk, the society has to bear the burnt, irrespective of fault or negligence as precepts of state liability, instead of allowing to fall exclusively on an unfortunate victim. What is being done for the totality should not be detrimental to only one individual, as the law of the state liability aims at restoring equality that has been upset because of state’s wrong. Thus the foundation of the state liability in tort must be the socialization of risk.

Apart from the suggestion offered in the foregoing pages in favour of tortious liability of the state, it is pertinent to note the present trend of judiciary in the country that has substantially changed against sovereign immunity of state and in favour of state liability not only under law of tort but also under the criminal law. An interesting development to be observed in this regard is compensation is being sought and awarded in writ proceedings also under Article 32 and 226 both in Supreme Court and High Courts respectively. The Division Bench of Delhi High Court in *P.V. Kapur Vs. Delhi Administration (1992)* criminal Law Journal 128 (Delhi) has awarded Rs. 2.5 Lakh and Rs. 50,000/- to one Aditya Narayan and Devender Kumar Sharma, who were killed in the police firing. This was a public interest litigation.
Sometimes, the points decided by the Courts expressly or impliedly as noticed by them escape in the law of torts and apparently they bring the area under constitutional law and award compensation.

In the absence of specific law passed by the parliament, long gap occurred after Kasturilal’s Case of sovereign immunity. The judiciary has decidedly changed their view in favour of state liability in tort. Especially during the last one decade, the Supreme Court has evolved a new kind of relief awarding compensation in writ petitions under Article 32 and the High Courts relying on the decisions of the Supreme Court have rewarded compensation to the victims under Article 226 as discussed in the foregoing pages. There are umpteen number of cases in which both Supreme Court and High Courts have awarded compensation.

In N. Nagendra Rao Vs. State of Andhra Pradesh (AIR 1994 SC 2663), the Supreme Court of India has thrown a lucid light on sovereign and non-sovereign powers of the state which should replenish the state bill on Tortious liability and sovereign functions of the State. The bare facts of the case are, the Government confiscated certain stocks under the essential commodities Act 1955 and failed to release them expeditiously after the orders of the concerned authority. This resulted in the stock getting spoiled. A suit for claim of compensation was contested inter alia on grounds of sovereign immunity. The Supreme Court concluded thus:

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“Sovereign immunity as a defence was... never available where the State was involved in commercial or private undertakings nor it is available where its officers are guilty of interfering with life and liberty of a citizen not warranted by Law. In both the such infringements, the State is vicariously liable and bound constitutionally, legally and morally to compensate and indemnify the wronged person”.

In a Welfare State, the Court further pointed out that only a few functions could be termed sovereign functions because the State was regulating and controlling activities of people in every sphere - social, economic, Commercial. In this scenario, the State cannot claim immunity except for actions relating to Defence of the country, making peace or war, raising of armed forces and acquisition of territory. In the instant case, the Court found the owner entitled to compensation.

The States which are the Units of Federal Govt. i.e. Central Government of India, do not have sovereign powers originating in them as per the Supreme Courts description of sovereign functions mentioned above. The States are only autonomous and not sovereign (State of West Bengal Vs. Union of India, AIR 1974 SC 1510). It is, therefore, not difficult to hold the States tortiously liable whether there is Law or no Law enacted.
So far as Central Government is concerned, tortious liability of the State (Union Government) needs specific enactment of Law by Parliament demarcating distinctly sovereign and non-sovereign functions of the State. In the absence of enactment what Judiciary interprets is sovereign or non-sovereign in regard to tortious liability of State and compensatory Justice. In this aspect in the absence of any enactment, the position in tortious liability of State is comparable with that of Israel. The Supreme Court of Israel intervenes in all kinds of Governmental actions on behalf of basic Civil rights and preservation of Rule of Law working essentially into the basic English Common Law tools of Constitutional and administrative Law and without the aid of Written Bill of rights. The existence of special political and social realistic in that country perhaps warranted, such an extraordinary Judicial Vigilance. For such Judicial actions, the political, social and economic conditions in our country are still not favorable. The Judiciary is not absolutely independent as it appears apparently. Its finances are controlled by the Executive and Legislature. Judges appointments, re-appointments after retirement, transfers, promotions and their impeachments are in the hands of Legislature and executive. People in general are not conscious of their rights. Even if they are so, litigation is costly. People are poor. They cannot afford costly and time consuming process of the Courts. Therefore, these is imperative need of the Bill enacting specific Law on tortious liability of the State to do compensatory Justice to the Victims of tortious acts of the State employees.

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In this connection, it is worth mentioning that India and France have signed an agreement on mutual legal assistance, recognition and enforcement of Judgments in Civil matters on 27.1.1998 at Delhi (Vide "Deccan Chronicle") English Daily, Hyderabad dt. 28.1.1998). The Agreement was signed by Union Law Secretary and French Ambassador in the presence Caretaker Prime Minister of India and French President at Delhi.

On tortious liability of State, the Bill is still in the stage of preparation for introduction in future Parliament. The way of French Rules on tortious liability of State can be advantageously incorporated in the Bill and adopted to do satisfactory compensatory Justice to the victims (i.e. citizens and also non-citizens under certain conditions of agreement, of tortious acts of State employees. The French Rules on tortious liability of State and adequate compensation to the victims of tortious acts of state servants are considered to be very strict even at the cost of sovereign power of the State. They need to be examined and incorporated in the cur Bill under question. This will go a long way to ensure social justice in our Country.