CHAPTER-III
TORTIOUS LIABILITY
OF
INDIA
A COMPARATIVE STUDY

(A) U.K. (CROWN PROCEEDINGS ACT, 1947)
   I) LAW PRIOR TO 1947
   II) LAW AFTER 1947

(B) U.S.A. (FEDERATION TORT CLAIMS ACT, 1946)
   I) PRE 1946 POSITION
   II) POST 1946 POSITION

(C) FRANCE: -

(A) UNITED KINGDOM - Grown Proceedings Act, 1947
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   (i) Law Prior to 1947 -

01. In England, the principle of vicarious liability was not totally learned towards the "Rule of Law". It was still in the process of growth, on the other hand, the english notion of law that "King can do no wrong was in vague based on the divine origin theory of the King and therefore no action could be brought against him. There was hardly any difference between the King as person and the Government as an organ and the Crown as such enjoyed sovereign immunity.

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02. In 19th Century, the ordinary employer’s liability for the act of his servant reckoned on the basis of implied authority given by the master to his servant or for the master’s fault in not choosing the servant carefully. However, the concept that “the king can do no wrong” rendered the Crown immune from any such liability. Which manifestly cut across the root of “Rule of Law”.

03. By the “petition of right” of 1256, an attempt was sought to be made to remedy against the King’s Feudal posers in accordance with the demand made by the Royal Courts. The wrong done under a Royal Commission was not actionable in 1331 (Lord Somervell). The State as defendant 33 AL 148-149 (1959)1

04. The King and his officers could be sued only at his pleasure by waiving the privilege of non-suebility with the commencement of statute of West Minister 1275, with the abolition of Court of Star-Chamber in 1641 and the enactment of Habeuas Corpus Act, 1679, the Kings feudalistic powers suffered a blow. Further with the revolution of 1688, the King’s powers were eroded gradually. With the establishment of constitutional monarchy in England, the King could have brought the difference between his public and private capacity. This could not happen, because the English society was conservative

1. 33 ALJ 148-149 (1959)
to the core and did not relish any drastic change in the monarchy which they loved and respected. As a result, the Crown as personification of the State enjoyed all personal immunities and prerogatives of the King (Maitland; collected papers-III, 243 : EM Borchard: Governmental Responsibility in Tort, 36 Yale L.J. (1926) 799).

05. The "Petition of right" gradually paved the way for a process to hold the King liable for the breach of contract. The petition was made to the Secretary of State for Home Department endorsing thereon "fiat jushtiae" (If the right be done ) by the Crown acting on the advice of the Attorney General. If the petition was rejected, there was on remedy. After the grant of the fiat, the law suit ensued between the petitioner and the Attorney General. But in the case of tort, there could be on remedy against the King. It was already mentioned in the previous Chapter that the system of "petition of right" was introduced in the regime of Edward-I but not earlier. A pleader raised the plea in an argument before the court of common pleas that writ lay against the Crown also is discarded. (Y.B. 33-5 Edn.1, 470 Rolls series per Passley, Harry Street: Governmental Liability-A comparative study, 1953 Pl.).

1. 36 YALE L.J. (1926)799.

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06. IN CONTERBURY VS. ATTORNEY GENERAL, VISCOUNT 1 Conterbury's House along with both the Houses of Parliament were burnt due to negligence of workmen. Viscount conterbury was the Speaker of House of Commons. The Speaker's claim of the value of household goods could not succeed as the negligence of workmen could not be imputed to the Crown directly or indirectly. IN TOBIN VS. QUEEN (1864) 16 CB NS 310) an innocent ship from Liverpool was burnt by British Naval Commander engaged to suppress slave trade of the coat of Africa. The petition of right by the owner was rejected. It was decreed as unfortunate and not at par with ordinary employers iability (H.W.R. WADE: ADMINISTRATIVE LAW 4th Edn.P.664), hence antagonistic to Rule of law.

07. It was denial of Rule of Law that the Crown should not be liable for the torts of its servants. Even the Crown could not be liable trough the system of petition of right as it was available in the cases of contract only. But the modern action relation to "nuisance" and "Detenue" were covered within the claim of infringement (Cliften's Case Y.B. 22 Ed.III 12)2. But the person sustaining an injury from the torts of the servants of the Crown had remedy as he could bring an action against the particular Crown servant for doing the act or against any

1. Conterbury Vs. Attorney General, Viscount
2. Cliften's Case Y.B. 22 Ed. III 12.

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Minister or Superior Officer for ordering him to do the act (Raleigh Vs. Goschen, 1898, 1 Ch. 13 : Roncareth Vs. Puplesis, 1959-16 D.L.R. 2 d 689). But the superior officer could not be liable for the act done by a Crown servant, because the employer was the Crown and not the officer. (1946) 2, All, ER 241, 245). However if he did the wrongful act, he was also liable.

08. The personal liability of the Crown servant providing adequate remedy to the citizens and others sustaining loss had a bearing of the Rule of Law. According to Friedman, it was a vindication of principle of equality before law. According to Wade, it was a great bull-work of rule of Law. In actual practice, the crown used to defend the case on behalf of its servants and pay damages as per court’s orders out of public funds. It became well settled that the process would be issued against as particular individual, committing wrong and the action would be initiated by the Crown against itself though not legally. If any doubt arose about the person against whom action should be taken, the Government Department used to supply the name of the particular person to be sued as defendant. This practice continued for a long time, but broke down due to two flaws in it. Firstly, it was not clear on evidence as to which Crown servant was liable. The representative defendant to be nominated for bringing upon a suit was the only way, but it

2. (1946) 2, All ER 241, 245.

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was condemned by House of Lords. In *Adams Vs. Naylor*, (1946, A.C. 543; 1946 ER. 241)\(^1\) in a verdict in minefield some children were injured. Area incharge Army Officer was nominated as defendant. The case was dismissed as the negligence could not be attributed to the Army Officer. The case remained without redress against the Government or occupier of the mines. The Court found the practice of nominated defendant was misleading and observed that the Legislation on the subject or liability of the Crown for torts of its servants was overdue. Secondly, in certain kinds of torts only employer could be liable and not the servants e.g., failure to maintain safety in Government Factory. In *Royster Vs. Cavey* (1947) K.B. 204; 1946 All ER 642),\(^2\) on a desire by an employee of the Royal Ordinance, factory to bring an action for the name of the Superintendent of the factory was supplied for bringing an action against him. The Court held that it had on jurisdiction to try a case against a defendant whose name was supplied by an agreement between the parties for the trial. Such a practice rendering an non-guilty as guilty was repugnant to Rule of Law, and a welfare State extending protection to every individual frame cradle to grave (*Thomson : England in the twentieth century* P. 173, Ed. 1964).\(^3\)

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09. The Rule of Law to some extent permeated with the separation of Government Departments and converting them into public corporations. The view was that the Corporations may sue and be sued as its very corporate existence carries with it. *(1901) 2 K.B. 781: Justice Phimore’s view in Ministry of Works Vs. Henderson (1947) 1 K.B. 91.*

10. In *Tamlin Vs. Hannaford (1947) K.B. 204; (1946) 2 All ER 642,* it was held that the Rent Restriction Act would apply to the houses owned by the Railway authorities. though the Transport Commission is a public authority yet it was decided that the immunity of the Crown would not apply to it since it was not Government Department. In *Mersey Docks Harbour Board Vs. Gibbs (1950) 1 K.B.*, it was held that the corporations were liable for torts of their servants.

11. Friedman has described two types of corporations:
   1. Industrial and Commercial Public Corporations,
   2. Social Service Corporation.

12. the examples of the former are National Coal Board, Electricity authority, Transport Commission and Airway Corporations. The examples of Social Service Corporations are Regional Hospital Boards, the Central Land Board and the Agricultural Commission. The immunity does not extend to

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3. *Mersey Docks Harbour Board Vs. Gibbs (1950) 1 K.B.*
commercial corporations. They are merely run in the public interest. Similar is the case with Social Service Corporations. There is no master and servant relationship between them and the Government. They too have the right to sue and be sued. They are subject to ordinary law unless they enjoy some statutory immunity. So is the case, the corporations have sufficient degree of independence, neither they nor their servants can be said to be Crown’s servants. The corporation itself in that situation will be responsible for the acts of the servants. In case the master has complete control over the work of the servants, the situations of the Corporations would be different. But that list is not satisfied in respect of public corporations. Justice Denning in Tamkin Vs. Hannaford (1950) 1 K.B.\(^1\) 18 has observed “in the eye of law, the Corporation is its own master and is answerable fully. It is no the Crown and has none of immunities and privileges of the Crown, its servants are not civil servants and its property is not the Crown property. It is re-capped here that in many continental countries, the “Fisk” (ex-chequer or Government Treasury), was employed whereby the State was personified in the matters of private law. This amply proves that on action would lie against the King in the Courts Because they were King’s courts. (J.H. Morgan; Remedies against the Crown. Glesson E. Robinson: Public Authorities and Legal Liability, P. iv (1925), quoted in (1946) 202 Law Times 166,\(^2\)

1. Tamkin Vs. Hannaford (1950) 1 K.B.
2. Supra (1946) 202 Law Times 166.
13. Such was the position of the Crown's immunity or sovereign authority in England before passing of the Crown Proceeding Act, 1947.

14. (ii) LAW AFTER 1947:
The change in socio-economic conditions necessitated the change in the rule of Crown immunity. The laws enacted to bring actions against the Ministers of the Department were not adequate (Air Force Constitution Act, 1917: Ministry of Transport Act, 1919). A draft bill for Government liability was prepared by the Crown Proceedings Committee in 1927, but that was opposed by the Government Departments. The lacunae in the Rule of Law remained in the absence of liability of the Crown. This was emphasised by the Committee on Ministry's Powers (CMD4060, 1932, p.112), However, the reform was brought about only in 1947 with the Crown proceedings Act, 1947. The Rule of Law was projected greatly by this Act making the Crown liable in Tort and Contract in the same way as the private individual. The Act did not abolish personal liability of the Crown servants. The principle of Law corresponded with the master and servant rule. But even without the above Act, the English law protected the liberties of the subjects by not providing shelter to the Crown servants. (C.J.Hanson, Government Liability in Tort in the English and French Legal System, 12 JILI p. 26 (1970) p.28 and that sense the "Rule of Law" found place. The Act with certain exceptions made the Crown liable like a private person of full age and capacity in the following matters:

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(a) in respect of torts committed by its servants or agents.
(b) in respect of any breach of those duties which a per owes to his servants or agents at common law by reason of being their employer.
(c) in respect of any breach of duties attaching at Common Law to the ownership, occupation, possession or control of property.

15. But there is proviso in the Act, which says that no proceeding shall be against the Crown in respect or act or omission of the crown servant or agent unless cause of action arises against him in Tort. The proviso the private employer does not enjoy in occasional cases. Thus, in a case, the driver of a Government vehicle negligently knocked down his wife and she could not sue him because in law the wife could not sue her husband. *(Smith Vs. Moss (1940) K.B. 424).*

By Law Reform (Husband and wife Act, 1962, the non sueability of the spouse, has been done away with). She could have sued the employer if he had been other than the Crown. But the provisions of the Act makes the liability of the Crown strict in respect of dangerous operations of its property and in this way, the rule of *Rylands Vs. Fletcher* is applicable *(1986, L.R. 3 H.L., 330,340).*

Further, if any statue restricts the liability of any Government Department or Office, the liability of the Crown also is restricted according to the above Act, viz., Metal Health

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Act. 1959, and Land Registration Act, 1925. When the Crown is bound by statutory duty, which is binding also upon person other than Crown with the duty, the Crown is liable as per the provisions conferred upon the Officers, in the event of failure to comply of Crown Proceedings Act. In respect of functions conferred upon the Officer of the Crown by any rule of common law or by statute, if that officer commits tort, the Crown is liable. Thus the Law declares liability of the Crown for the wrongs occasioned by the Crown’s servants.

16. But in India, the theory of "respondent superior" does not apply to the acts of the officers, which are done under the statutory powers, viz., Road Traffic Act. 1960, the Factories Act, 1957 and the Occupier’s Liability Act, make the Crown liable like other persons. Thus the liability of the Crown as a general principle stands stands on the same footing as of a private employer. The Crown’s claim of immunity from liability on the ground of public policy is generally rejected by the Courts. (*Dorset Yacht Co. Ltd. Vs. Home Officer (1970) A.C. 1044*)."\1

17. The Crown is liable for the torts of its servants or agents and the agents includes independent contractor (*Crown Proceedings Act., 1947*). That is the general position of the Crown. In certain dangerous matters, as was already discussed supra, liability has been extended to independent contractors

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2. *Balfour Vs. Barty King (1957), Q.B. 496*
also (*Balfour Vs. Barty King* (1957), *Q.B. 496*).\(^1\) In the instant case, a lady was held liable for engaging independent contractor to that frozen pipes by using blow lamps set fire to not only her house but the neighboring houses also. Under these circumstances, "The rule of Law" required Crown liability also. But regarding Crown’s liability for its servants, a special criteria needed to be set up based on the appointment and pay as per the provisions of Crown’s Proceedings Act, 1947. Interestingly, the Crown can not be liable to torts of Police in London as well as in the provinces since they are paid out of local ralis and in the provinces, the police personnel are appointed by local authorities. The law was remedied by the Police Act, 1964 placing representative liability on the Chief Constable which fulfills the requirement of "*Rule of Law*".

18. Crown Proceedings Act, 1947, strengthens the principle of vicarious liability of the Government since no claim against the States by the demise of King and the above Act goes to ensure "*Rule of Law*" to the litigants with the Crown and is in harmony with the maxim "the King is dead, long live the King." According to the maxim, the Crown is perpetual and King never dies.

(B) UNITED STATES OF AMERICA: (FEDERAL TORT CLAIMS ACT,1946)

i) PRE-1946 POSITION:

19. The "*Rule of Law*" in American legal system was absent in respect of liability of Government. The Government is not vicariously liable since the Government could not be

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subjected as defendant in theory. (Kawananakea Vs. Polyblank 204 U.S. 349, 353, 27 S.Ct. 526, 527, 51 L.Ed. 831 (1970))

20. The reason for adopting sovereign immunity principle in legal system in America is not clear. One reason for its survival after revolutionary war may be financial instability of the American states. (H. Street, Governmental Liability (1953) P.8)

21. The Supreme Court’s observance in “Gibbons Vs. United States “ 75 U.S. (8Wall), 269, 275, 19 L.Ed. 453, (1968) is relevant in this connection. “No Government has ever held itself liable for the misfeasance, laches or unauthorized of power by its officers or agent “. The observation is perhaps based on the mistaken view of Prof. Borehard’s remark that “the court overlooked the fact that practically every country of western Europe has long admitted such liability. (Borehard: Governmental Liability in Tort, 34 Yale LJ 2 (1934))

22. The application of sovereign immunity to the United State appears to be anachronistic only because it was once a colony of the British King and it can be perhaps said “Old habits die hard ,” Since human nature is generally apathetic to drastic changes, the strange thing about it is that the doctrine changes, the strange thing about it is that the doctrine should

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1. H. Street, Governmental Liability (1953) P.8
have been introduced into the States where there was no King
And where the Chief of the State was never a sovereign, from
the beginning of American Independence, the sovereign power
rested in the people. It is difficult to comprehend how the
American people accepted the principle of sovereign immunity
of the State and its non-liability for damages inflicted by its
agents. in fact, Americans are very sensitive about their
individual rights against the State. They were particular in
incorporating Bill of Rights in their constituting apart form the
rare provision of cessation of states as their characteristic social
rights with dual citizenship unlike in India.

23. Prof. Massey regarded sovereign principle in U.S.A. as
a “curious fact of history”. He was of the view that the
immigrants sailing in “May Flower to America: carried with them
the doctrine of absolutism (I.P. Massey: Dialectics of sovereign
immunity and Dynamics of welfare society. Need for an
independence public law of Tort 26 JILI P. 145, 149). There is
more probability of this reasoning.

24. Such a position was contrary to “Rule of Law” and
critics pleaded for the abolition of sovereign immunity
(Borechard: State and Municipal Liability in Tort -proposed
Statutory Reform, 20 ABAJ 747, 748, 1934.)¹

25. A Suit against U.S. could be brought only with the
Government’s consent, which could be signified only by a
statute, but an action for contract could be brought against the
State (Chisholm Vs. Georgia, 1973 and Dal. 419; IL Ed. 122)².

¹ Statutory Reform, 20 ABAJ 747, 748, 1934.
² Chisholm Vs. Georgia, 1973 and Dal.419; IL Ed.122.
26. With the sentiments of American people for their personal and individual liberties, a day would come for using American State. For the time, the Constitutional amendment has put a restraint on the sueability of a State. (lord Somervel; the State as defendant 33 ALJ 148,152,159). but the English principle of non-sueability of the sovereign in its own courts was fully applicable. *Field J in the (Siren (1868): 74 U.S. (7 wall) 152, L.Ed. 122)*.  

27. The rule of Law yet considered to be in existence as the public officers were not immuned form the sanctions of law and they were treated not above law on the basis of their status, public official could be held guilty like an ordinary citizen on a suit against him. However, he could save himself if could prove that his act was justified by law. *The case of Miller Vs.Horton (26 NE 100 Mass 1891)* is an illustration on the point.

28. *The case of Republican Vs. sparkhawk is another illustration on the point*. It has a reference to "the Lord Mayor of London, in 1866, when the city caught great fire, he did not give direction for or consent to the pulling down of 40 wooden houses or to removing of the wooden furniture belonging to the Lawyers of the temple. Then on the Circuit he feared that he feared that he should be answerable for a tresspass. In consequence of this conduct half the city was burnt, (26 N.E. : 100 Mass 1891).

2. *Miller Vs. Horton (26 NE 100 Mass 1891).*
3. *Republican Vs. sparkhawk.*

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29. The Rule of Law found some force by certain devices which mitigate the harshness of this principle. These devices are, enacting private laws, granting compensation, administrative settlement of claims, identity by the authority in whose service a person is held liable, an action under the head "taking property not under "Torts", which is subject to just compensation, taking out of liability insurance by public authorities. The terms of all the above exclude sovereign immunity.

30. Regarding the private laws, the congress enacted Private laws wherever it thought fit on the petitions of reliefs. The system was not satisfactory, on one hand the "Rule of Law" permeated congressional settlement of claims, on the other hand, it was denied due to defective procedure.

31. The judicial activism played a vital role in some states in abolition of the sovereign immunity while the courts in other States left the task on the legislature for doing away with the doctrine. Peculiarly, Arkansa State and the State of Lawa and Italy made the law of immunity of sovereignty when the Judiciary refused it. In Muscoupf Vs. Corming Hospitals District (55 cal 2nd 211: cal Reporter 89: 359, P. 2nd 457 (cal 1961), the majority view of the Judges was for doing away with the doctrine and it was not erroneous in so doing since the principle of sovereign immunity itself was a Judge-Made law.

32. The judiciary had devised to mitigate the rigour of sovereign immunity by differentiating the Governmental and proprietary functions of Municipal corporations. The distinction was not working satisfactorily. the decisions of the Courts were full of conflict and confusion. They were disharmonious and irreconcilably conflicting. Thus there was chaos.

33. The Congress and State Legislatures used to pass private legislation for compensating administrative action (Congressional Records, Jan. 14, 1842, P. 313 extracted from 26 law bar Rev. 399.400). The Court of Claims Act 1855 established Government liability in contract. But the liability in tort could not be established till the enactment of Federal Tort Claims Act, 1946. The Act owns its origin to under Hill Bill 1924 and 1925. The Bill of 1928 adopted under Chairmanship of Colorado was vetoed by the President Coolidge. In 1942 and 1925. The Bill of 1928 adopted under Chairmanship of Colorado was vetoed by the President Coolidge. In 1942 President Roosevelt suggested for the Change in law relating to Governmental liability the Change could not be brought about due to second world war, resulting in economic depression.

ii) Post 1946 Position:
34. The law relating to Governmental liability with several exceptions was enacted in 1946 under the title of Federal Tort Claims Act, 1946.
35. The Act made the Government liable in tort for the negligence of wrongful act or omission of any employee of the Government acting within the scope of employment under the circumstances where U.S.A. as a private person would be liable to the claimant for damages, loss, injury or death in accordance with the claimant for damages, loss, injury or death in accordance with the law of the place. As defined in the Act, the employee includes officers or employees of any federal agency, members of Military, naval forces of the U.S.A. and persons acting on behalf of the federal agency in official Capacity, with or without compensation. Further, federal agency includes the executive department and independent establishment of U.S.A. and Corporations, instrumentalities or agencies there of whether or not authorized to sue or be sued. But a "contractor" is not included in federal agency. This is authenticated in Logue Vs. United States, 412 U.S. 521.¹

36. Federal Tort Claims Act, 1946 appears to be revolutionary in legal principles as a projector of "Rule of Law" in Governmental liability, yet it is not that effective due to judicial interpretations to the same extent, as the private individual. The "Rule of Law" is not, therefore, fully projected.

37. The Act contains 13 exceptions and these are classified into 3 by schevartz, and wade (Beruard schevartz and HWR wade in Legal control of Government in P. 194) and these related a administrative functions or agencies and those raising in foreign countries. In the second place relate to intentional torts of

¹ Logue Vs. United States, 412 U.S. 521
assault, battery, false imprisonment, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit or interference with contract. But this amendment made U.S.A. liable in 1974.

38. Thirdly, the exceptions relate to acts or omissions of federal officers exercising due care in carrying out statutes or regulations.

39. The exceptions are so large and extensive that the federal Tort claims Act falls much behind English Crown Proceedings Act, 1947 and fails to ensure full justice to its citizens. The exceptions in otherwords are denial of “Rule of Law”. The officer is set free when he acts with his discretionary power even if it is wrong or abusive and rarely the officer acts without exercising his discretionary power with due car. *(Beruard schevartz: Administrative Law (1984)PP 569 - 570)*.

40 In *Frees Vs. United States (340 U.S. 135)*, the effectiveness of Judicial interpretation is explained. In the above case, a member of armed forces injured through the negligence of another armed personnel brought an action against the U.S. But the Supreme Court held the Government not liable as the act did not recognise any new cause of action not recognised prior to passing of the Act. The interpretation of the Supreme Court was a negation of “Rule of Law “.

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41. The Supreme Court followed and applied the above law in Dalachite Vs. United States (346 U.S. 15). In this case, the fire broke out in Texas City. The fire killed 560 persons and injured 3000 persons and property worth millions of dollars was damaged. The fertilizer which caught fire was manufactured in the Government plants at the direction of the government and was on shipment of foreign aid. The learned Judge in the case relying on the committee's report held that the liability under the Act did not extend to Governmental functions, rather it was limited to ordinary common law torts. He further held that the liability would not extend to authorised activity in respect of the statutory duty. He stressed that the U.S. would be liable to the same extent as a "private individual "under" like circumstances", that made it clear that sovereign immunity was not completely relinquished. The U.S. was also not liable because the case involved discretionary powers as held by him. The Court further held that the suit would not life for discretionary powers not only at the planning level but also for the acts of the subordinates in carrying out the Government operations.

42. The consequence of discretionary function of exception is that neither the U.S. nor the negligent official could be held liable and only way to reduce the grievance was to resort to private legislation for compensating the loss caused by the Government. (Gelhorn and Lawyer : Congressional Settlement of Tort Claims against the U.S. 55 Col. L.Rev. (1955).
43. In *Seigmon Vs. U.S.* (1953) 110 F.R. 906, a claim was laid by a prisoner injured by another prisoner while in prison. It was held that as before the Act, the prisoner in such a situation had no right of action against an individual Gaoler and he had no such right after the Act Federal Tort Act was not intended to create a new cause of action, it was re-iterated.

44. The Federal Tort Claims Act is said to have brought the "Rule of Law" in U.S.A. but the development of law till the Dalehite case restricted it because of the Judicial interpretation and the provisions of Federal Tort claims act itself. *In Indian Towning Co. Vs. United States* (350 U.S. 61,69 (1955)) and as described by Bernard schwartz, Administrative Law 1984, PP. 570,571) adopted a more liberal approach and to some extent dropped the rigour of discretionary power of exception by limiting it to the planning level.

45. In *Reyoiner Vs. United States* (352 U.S. 315 (1957)), U.S. was held liable for the negligent non-feasance in which Forest Service failed to carry out its function of fire fighting. The discretionary exception is limited to planning and policy level.

46. The Judicial interpretation of the law that the discretionary function exception would not apply at the operational level is a little further step towards the "Rule of Law".

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2. *Indian Towning Co. Vs. United States* (350 U.S. 61,69 (1955)).
47. The overall position in U.S.A. of "Rule of Law" is far from satisfactory compared to that of England. Further, the Crown Proceedings Act, 1947 is more liberal than the Federal Torts claims Act, 1946.

(e) FRANCE;

48. In France, the "Rule of Law" flourished in the Governmental field of liability in the case of Vicarious or Non-Vicarious Liability of the Government. France is "Etat de droit" i.e. a state subject law and it ensures the Government responsibility. The French principle "le roi ne peut mal faire" in Juxta position to English maxim "The King can do no wrong" was the law in France also. But in post revolution period, the legislation established administration's liability.

49. The case of Blanco (T.C. Feb. 1983) established administrative liability. In the case Agne Blanco was run over by a wagon crossing the street between the different parts of the State owned tobacco factory. the Tribunal "des conflits" established the three principles of liability.

1. The State is liable for the fault of the servant.
2. The administrative liability should be subject the rules separate from droil civil.
3. The question of administrative liability should be decided by the Administrative Courts.
50. The first two principles represented cautious advance from the doctrine of State Immunity since the Tribunal des conflicts view was "the State shall be liable but shall not be subject to rules of liability as private individuals".

51. The case of "Feutry" (T.C. 20 Feb. 1908) established the general liability of the public authorities which was attributed to State in Blanco. In that case, the Department was held liable for the escape of a lunatic from an asylum maintained by the department and Setting fire to the hayrick.

52. The liability of the Government and other public authority is subject to "Rule of Law" as the law makes the administrative liability if the act done by the official can be linked with the service of the person doing the act. The liability of the administration is based on the "fault" and "risk".

(a) Fault Theory:

53. Fault is based on the basis of a administrative liability. It is of two kinds as shown below:

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\text{Fault} \quad \begin{array}{c}
\text{Faute de service} \\
\text{Faute personnelle}
\end{array}
\]

(Fault linked with service). (Fault not linked with service).

54. The administration becomes liable if there is faute de service, thought it is not possible to attach fault to any particular official as noted in "Feutry" case.
55. Between 1790 and 1870, the official at fault could not be sued in his personal capacity because of constitutional guarantee except where permission was granted by the "Conseild Etate". That was seldom done when the functionare had wholly acted outside the scope of his duties. In 1870, due to liberal opinion, the principle disappeared but in 1873 in Pelletier (T.C. 30 July 1973), the Tribunal disconflicts laid down a distinction between faute de service and faute personnelle. Faute personnelle was not linked with the service of the person but linked with his personal weakness, passions, impudence etc. In such case, the injured person can use the official personally in the ordinary civil courts. But in the faute de service, the action could be brought against the administration only in the Administrative Courts but not against the administration and its official in the ordinary courts. *(Brown and Garner: French Administrative Law, 3rd Ed. P. 116)*.

56. According to Schawrtz, it is difficult to distinguish between faute de service and faute personnelle but it resembles the English distinction of Act done in the course of employment and that not in the course of employment. By the Conseild Etate, the help in this regard has been extended to the victim of faute personnelle, as it is in vain to resort action against an official who is penniless.

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1. *(Brown and Garner: French Administrative Law, 3rd Ed. P. 116).*

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1) **CUMUL:**

57. This is a principle evolved by the Conseild Etate projecting “Rule of Law” in the administrative liability. Cumul means the combination of faute de service and faute personnelle. The damages are awarded if the injury has resulted from “Cumul” of due to personnelle fault which would not have arisen without being linked to the service.

58. In ‘Anguet’ (C.E. 26th July, 1918), the entrance for the public to the post office was pre-maturely closed. A visitor who left by Staff entrance was assaulted by two members of the Post Office in which his leg was broken. The Conseiled Etate held premature closure as faute de service and unwanted violence as faute personnelle and the State was held liable to pay the whole damages since this constituted “Cumul” because the Violence could not have occurred without faute de service.

59. In “Lemonnecer” 9C.E. 26th July, 1918) a shooting competition was organised in Fete held by the country commune the target of which was floating on a river. The victim was hurt by the bullets on the other side of the river. He brought two actions, one in the ordinary civil court and the other in the Conseild Etate. The Court of appeal held the Mayor liable for personal fault in permitting the shooting to continue despite the complaints before this incident that they had been narrowly escaped from the bullets. But the Conseild observed, it was competent to try the case and as such held the Mayor’s negligence as a case falling in “Cumul”.

(73)
60. In "Bernard" (C.e. First Oct. 1954), it was held that the responsibility was attached with the service when a constable on duty outside the bar went inside to drink and in heated argument, injured a customer with his revolver.

(2) Principle of Contribution:

61. In case of "Cumul", the aggrieved party can obtain damages either against the official in the Civil Courts or when the administration has been ordered to pay damages by the state Courts, the State Courts can order contribution either in full or in part on the basis of the fault.

62. In the case of "Delville" (C.E. 23rd June, 1951), the driver Delville had caused an accident by driving Government lorry with defective brakes. The driver was held liable by the Civil Court. He sued the administration in the state Court for 50% contribution, because the breaks were defective and his claim was allowed.

63. In the case of "Larucelle" (C.E. 28th July, 1951) a Soldier named Larucelle took away an army vehicle without any authority and knocked down a pedestrian. The Conseild Estate held it a faute de service and held the administration liable to pay damages because there was inadequate supervision of the garage. then the administration brought a case against the soldier who in turn contested the claim. It was held that the case involved a "Cumul" but the soldier can pot claim as faute de service as his act was deceptive.
64. (b) Risk Theory: (liability without fault)

The risk theory in French law is unique in comparison to the English, American and Indian legal systems. It ensures full justice to the victim on the basis of the risk arising out of the act and not on the basis of fault. It fully comprehends the requirement of "Rule of Law". A Law of 1799 imposed a duty on the administration to compensate any one injured in carrying out of public works and legislation going back to a decree of an IV 1795 had imposed a duty on the public authorities to compensate riot victims. (Brown and Garmer French Administrative law 3rd Ed.P. 120). On the basis of risk theory, the person injured entitled to be compensated even if the act causing damage is lawful because the burden should not fall on only one person sustaining the injury but it should be shouldered by the entire community. The Conseild Etate has imposed liability without fault on the basis of the "risk" as shown below:

1. Assisting in the public service.

2. Dangerous operations.

3. Refusal to execute a judicial decision and

4. Legislation.
65. (1) In Cames (C.E. 21st June, 1895) in State arsenal while at work the had of a workman severed in an accident without anybody’s fault. the damages were allowed on the view that the State was under an obligation to indemnify against the employment risks in the public services. In 1898, France introduced a comprehensive system of workmen’s Compensation (Brown and Garner: French Administrative Law P. 121).

66. (2) The Government is liable to pay for creating abnormal risk in neighborhood:

67. In “Regnault - Derrozieres (C.E. 28th March, 1919) during the First world war, a large quantity of ammunition’s and grenades were dumped by the military authorities at the outskirts of pains. In 1915, the ammunition’s and grenades so dumped burst out causing loss in the neighborhood to the life and property. The Conseild Etate did not accept fault as the basis of liability of State, but held the State liable since it involved an a normal risk for which there was no need to establish fault. This decision is like an English maxim “Res Ipsa Loguitor”.

68. In “Leconte”, the proprietor of a bar was killed by shots of the Police fired at a motorist evading a road block.

69. In “Daramy”, the wife of a complainant was shot dead, when police opened fire pursuing an assailant.

(76)
70. The Conseil Etate in both the above cases held that the Police action must constitute a serious fault before any liability arises because of peculiar difficulty and social importance of Police. But in the above cases, because of abnormal risk, right to liability was held to arise without any proof of fault. The principle of abnormal risk laid down by the Conseil Etate in "Regnault Desorziers " is for wider than that laid down by the House of Lords in Reyland Vs. Fletcher (1868 L.R. 3 HL 330)\(^1\).

71. A novel principle of administrative liability exists in France. The Government’s liability for administrative refusal to enforce a judicial decision is another illustration of prevalence of “Rule of Law” in the French Court.

72. In “Coniteas” (C.E. 30th Nov. 1925), a nomadic tribes men had occupied the extension tracks of land covered by Couiteas. He had obtained a declaration from the Turician Civil Courts of his right over the land. He failed in his efforts. He sought the help was not given for fear of Civil war. The Conseil Etate held Coniteas entitled to damages not on the basis of equality in hearing public burdens. The Court observed that a citizen bearing special sacrifice for the refusal of help by the administration in executing the Judgment must be compensated on the Ground of equality.

\(^1\) Reyland Vs. Fletcher (1868 L.R. 3 HL 330).

(77)
(4) If the act of Legislation is injuring to an individual he is entitled to damages from the State.

73. In "Duchatelet" the Conseild Estate has peculiarly taken the stand in favour of the sovereign immunity. In the said case, manufacture and sale of tobacco was prohibited by the Statute in the interest of State monopoly. A claim for damages by a manufacturer was negatived by the Conseild Estate on the ground of legislation being a sovereign act.

74. However in La Felurette (C.E. 14th Jan. 1938), the Conseild Estate held the State liable in such cases cited. In this case, damages were claimed by a dairy company for the losses sustained by it for discontinuing its brand of artificial cream because the statute prohibited manufacture and sale of any article under the name "Cream" the Conseild Estate allowing the claim, observed that the legislature's intention was not to impose unequal sacrifice and further, the principle of equality in bearing the public burdens enabled the company to recover. On the said principle, the Ministre Des Affairs Estrangeresc Consorts Burgat (C.E. 29th OCT. 1976), presents a case of Government liability where damages were damages were a warded because the statutory immunity of diplomats prevented the enhancement of the rent viz., against the lady occupant of the premises who had married an UNESCO official and was residing with him in the same flats.
75. From the above discussions, it is seen that the liability of the Government in France is based on the fault and risk both. The "Rule of Law" has a lucid picture in France. The administration and private individuals both are under the law and they are liable for their torts. The risk theory in France has gone far ahead English, American and Indian legal systems holding administration accountable even for those acts which cause harm independent of any fault. The Conseild Etate by formulating such legal principles for determining the administrative liability has transcended the other systems of law and done great justice of the victims.

76. Truely speaking, France in this respect represents a welfare state governed by "Rule of Law". in chains "has been totally negatived by modern system of laws in France. Individual citizens welfare is the froremost concern of French State Laws.