Chapter V

REMEDY AVAILABLE FROM CIVIL COURTS

Generally liability arises from breach of duty but in the primitive period, liability was based more on a desire on the part of the aggrieved, in taking revenge on the wrong doer. Later this jurisprudence based on taking revenge, upon the wrongdoer was changed to the idea of refinement\(^{206}\). That is reparation for the wrong or for the prevention of crime, which helped the peace and progress of the society. Most of the civilized systems accepted this but reparation or satisfaction had to be proportionate to the injury inflicted.

(i) Remedy in Private law for the breach of duty

In private law, the plaintiff can seek any of the remedies like injunction, declaration of rights, or ordinary action for the non-performance of duties. In case any of the above remedies is not available to the victim, it is necessary to protect the rights of the aggrieved with monetary compensation. Generally the wrongdoer alone will be liable for the act but in certain circumstances a person will be liable for the wrong of another, termed as vicarious liability.

At present if a wrong is committed by the state, the aggrieved party can institute suit against the state in the civil court. Similarly civil suit may be resorted to in case of violation of fundamental rights. This trial starts in the lowest courts so the aggrieved can approach the court without spending much

money, it is not expensive. Elaborate trial is conducted to find out the truth. After taking evidence if the damage or wrong is established money compensation for the damage suffered by the plaintiff is ordered. The compensation will be equivalent to the harm suffered by the injured party. It will be decided by the court and is left to the discretion of the court. This procedure is followed in the private remedy under the law of torts.

(ii) **Remedy available in Public law for breach of duty**

The State is also liable for breach of duty. The State being an artificial person, can act only through its agents and servants. Question may arise as to whether the act of the servant or agent should be treated as that of the state, for the purpose of liability.

Liability of the state, arising out of the wrong of its agents and servants is a type of vicarious liability, in which one person can be held liable for the recognized tort committed by another. In a welfare state, the function of the state is multifarious and it enters into several activities and so it is difficult to define its duties. State may not be fully aware about the nature of the act and the state may not benefit from the act committed by the agencies of the state. Procedure followed in the private law remedy as has been noted earlier, is followed in the case of human rights violation committed by the agencies of the state. If the wrong is committed by the officers of the state, the

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aggrieved can file a suit against the wrong doer for getting compensation from him.

Now we may examine the development and the present position of the law governing the liability of the state in tort in India, enforced through civil court procedures and compare it with that seen in U.K, U.S.A, and France. The first portion of this chapter deals with the development and present position of law governing the liability of the state in India and the second portion deals with comparative study regarding law of state liability followed in U.K, U.S.A, and France.

2. Development of the liability of the state in India

History reveals that compensatory jurisprudence was accepted and followed by the Hindus, the Mohammedans and the British during their rule in India.

(i). The Vedic Period

During the Vedic period, Dharma was an indispensable part and the whole machinery of the king operated by the law of Dharma. The Duty of the king was interpreted in the light of the Vedas, the Smritis and the Dharma Shasthras. Even though vicarious liability was not so developed as today even then the duties of the king and liability arising out of the breach was dealt with in the Hindu Dharma shasthras. Duties of the king included the protection of his subjects and their property. If this failed, the king had to compensate the
subject from the treasury and if the officers failed to do it, the king was bound to protect the people against such officers.208

(ii). The Mughal Period.

Similar jurisprudence was followed during the Mughal period also. The Remedial rights followed by them included retaliation, compensation, restitution and money compensation in case of death.209 The responsibility of the state and the accountability of it were recorded, that when one of the grandees of India alleged that Sultan Mohd. Bin Tuglaq, had executed his brother without just cause and cited the Sultan before the Kazi, the Sultan went on foot to the court without arms, and stood before the Kazi who gave the decision that the sovereign was bound to satisfy the plaintiff, for the blood money of his brother and the decision was so obeyed.210 In 1490, in *widow v. King Ghyas* the king negligently hurt the son of a widow, who made a complaint against him in the court of Kazi. The king was summoned and after hearing both sides held the king guilty and asked him to pay damages and the same way in *Shiqahdar v. King* a police officer was personally held responsible for the arrest of a citizen in a wrongful manner and was asked to pay compensation to the victim.211 It was believed that King and the state being

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210 *Supra note.24* p 131.
the trustee of the people were answerable for their wrongs and this was followed during the period of Akbar.

(iii). The British Period

With the advent of the British rule, the principles of common law came to be followed in India; the applicability of the prerogative of the king also came up. The Crown was not liable in tort even though there was social necessity for a remedy against the crown as employer. So the Crown enjoyed certain privileges. As far as personal liability is concerned, the crown’s immunity in tort never extended to its servants personally. The liability of the state in India relating to tort claims is governed by public law principles inherited from British Common law and the provisions of the Constitution of India. However during the period when the governance of India was being carried on by East India Company, doubts were raised as to how far, it could claim immunities, enjoyed by the Crown in England.

a) Liability of the East India Company in 1831

During the reign of the East India Company in 1831, the Supreme Court of Calcutta was bold enough to reject the plea of exemption from suit raised by the company, on the ground of sovereignty. In Bank of Bengal v. United Co\(^{213}\), the suit was filed by the Bank of Bengal to recover the interest due on the promissory notes written by the East India Company, to borrow money for the


\(^{213}\) (1831) I Bignell’s, Report.87-181.
prosecution of war. Sir Charles Grey and Justice Franks of the Supreme Court of Bengal, clearly held that the East India Company had no sovereign character to prevent it from being sued for the recovery of interest on three promissory notes on the basis of which the company borrowed money for the efficient prosecution of war for defending and extending the territories of the Crown in India.

In the beginning, the East India Company was engaged only in trading activities and after that by various charters, it acquired certain legislative and judicial powers.

The Charter Act 1833, vide section 10 provided that so long as the possession and Government of the Territories were continued to the said company all persons and bodies politic would and might have and take same suits, remedies and proceedings legal and equitable, against the said company, in respect of such debt and liabilities as aforesaid and the property vested in the said company in trust as aforesaid would be subject to the same judgments and executions, in the same manner and form respectively as if the said property were hereby continued to the said company to their own use.

Purpose of this Act was to lay down the company’s liability and it concluded that the company would be liable in an action against it.

The British government took over the administrative control of India from the East India Company in 1858. This Act transferred the power to rule

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214 The Government of India Act, 1858.
the country to her Majesty and also made the Secretary of state in council liable for tortious acts of their servants committed in the course of employment. So this provision was first applied by Justice Peacock in Peninsular Orientation & Steam Navigation case. It is a landmark decision of the Calcutta High Court, in which whether the company enjoyed the immunity of the crown was considered by the Judge. Actually there was no dispute regarding the maintainability of the suit of private nature against the state. The doubt was regarding the maintainability of the suit when the company appeared to have sovereign nature in British India, and there was some influence of common law over Indian legal system. This can be seen through the complicity of case laws where the judiciary applied sovereign immunity and exempted the state from liability but at the same time certain courts in India were reluctant to apply the principle of sovereign immunity.

b) P&O Steam Navigation case and Government of India Act 1858

When the Government of India Act 1858 passed, the company was taken over by the British Crown by providing a Secretary of state in council for the administration. So the responsibility for administering India was vested in the Secretary of state for India. Section 65 of the Act provided as follows:

“All persons and body politic shall and may have and take the same suits remedies and proceedings, legal and equitable against the secretary of
state for India, no substantial change was made on the question of suability of the state.

So the liability of the Secretary of state came to be assimilated to that of the East India Company before the take over. In 1861 the important case of East India company came up in which liability of the state had to be determined by applying section 65 of the Government of India Act 1858.

In *Penninsular and Orientation Steam Navigation Company v. The Secretary of State for India*[^115^] the plaintiff sought action to recover Rs. 350/-, the damages sustained by them by reason of injuries caused to the horses of the plaintiff through the negligence of certain servants of the defendant. A servant of the plaintiff was proceeding to Calcutta in a carriage drawn by the pair of horses belonging to the Plaintiff and the driver, a coachman in their employ. This accident occurred while passing through the Government dockyard headed by the superintendent of Marine and it was wholly managed by the government. The dockyard's work was partially on the sides of the road. On that particular day; the workmen of the government were carrying a piece of iron funnel from the docks through the public road to the steamer. This funnel was slung on a pole four men bearing this in front and four men bearing it behind. They were walking on the very centre of the road even though there was considerable vacant space at the sides of the road. The coachman called out before they came up to warn the men, who were carrying iron funnel, the

[^115^]: (1861)5 Bom H.C.R.App,A.
coachman went slowly and had his horses in hand though he did not stop. The men standing in front and behind attempted to move in opposite directions, then the carriage became very close to them so they got alarmed at the proximity of the carriage and suddenly dropped the iron funnel and ran away. It fell with a great noise, the plaintiff’s horses were startled and rushed forward violently and one of them sustained injuries falling on the road.

No accident would have occurred if the coachman had stopped the carriage. But he had the right to pass through the road. At the same time if the workmen had used the sides of the road, the accident would not have occurred but they walked along the centre of the public road. There was none to guide them while carrying this funnel along the road. The defendant’s servants were the wrongdoers in carrying the iron in the centre of the road and they did drop their load and they were liable for the consequence of what occurred, although they did drop the load in consequence of being pressed more than was absolutely necessary by the plaintiff’s coachman, so the Small Cause Court held that in these circumstance the Secretary of State for India was not liable. But the question of law was referred to the Calcutta High Court.

The question of fact was that the superintendent of Marine or some officer of the government was lawfully authorized, to repair the river steamer, to hire workmen to rivet the piece of iron funnel, to carry it from the dockyard to the steamer. So the workmen were lawfully employed on behalf of government being an act of private nature and not in the exercise of sovereign
power, or not in the performance of Act of State. So incurred a liability by their negligence and that the revenues of India were chargeable with the damage and that the action lay against the Secretary of State in Council as the nominated defendant.

To determine the liability of the state, under section 65 of the Government of India Act 1858, it was necessary to understand the liability of the East India Company. This in turn depended upon the legal position of the company at that time. Chief Justice Peacock had to decide if the East India Company would have been held liable in a situation of the present type as the Act of 1858 had not been passed. He referred to earlier charter Act 1833 by which company had been allowed to retain sovereignty as well as its trading privileges. Since sovereign and trading rights were combined in the company, there was no force in the argument that the principle of immunity enjoyed by the Crown in England under the maxim 'King Can do no wrong ' would apply to East India Company. The opinion expressed by Chief Justice Gray in the case of Bank of Bengal v. East India Company\(^{216}\) referred to above, in which it was held that 'East India Company having been vested with powers called sovereign powers but did not constitute as sovereign . There is a clear distinction between acts done in the exercise of what are called as sovereign powers and acts done in the context of undertaking which might be carried on.

\(^{216}\) Supra , note.29
by private individuals without such powers delegated to them. Instances were then cited where the company had been held not liable, thus an instance, a property seized under the supposition that it was the property of an enemy nor for any act done by a military or navel officer or by any soldier or sailor whilst engaged in military or naval duty nor for any act of its officers or servants in the exercise of judicial functions.

Having found that East India Company did not enjoy immunity in respect of acts done in non-sovereign capacity, the court found that the company would have been held liable if the facts of P&O case had happened before 1858. This case is subjected to several comments. Did the court consider the company would have enjoyed immunity only in respect of Act of State though illustrative examples cited suggested that, Immunity of the judicial officers would seem to suggest that the court had in its mind an area of immunity enjoyed by a sovereign in the domestic sphere and not necessarily the one arising from Act of State. The fact was that the Common Law Immunity enjoyed by the state under the principle of King can do no wrong had been whittled down by the Petition of Right procedure (finally put on a statutory enactment of Crown Proceedings Act 1948) The whole problem is whether it was necessary for the court to determine the liability of the company in respect of non-sovereign function to refer to immunity in respect of alleged
sovereign function as pointed out by A.R. Blackshield\textsuperscript{217} cited in strict ratio of P&O’s case is that there was liability for the company in respect of non-sovereign function.

The reference in the judgment to an alleged immunity for sovereign function and illustrations of such immunity is confined to what is usually called ‘Act of state”. It has given rise to a question as to the extent of immunity. Two different interpretations have been adopted in subsequent cases. There is also the question whether any immunity should be conceded for the so called sovereign function and if so, what are the criteria to be adopted in deciding whether the function would be classified as sovereign. This question is considered in the succeeding paragraph.

In this case there was no need to say about the sovereign function because the question of law before the court was regarding the liability of the state with respect to non-sovereign function. He observed that if a tort was committed by a public servant in discharge of sovereign functions no action would lie against the government. However the court had given certain instances where the company was saddled with the liability. In the case of East India Company its commercial activities should be subjected to the same liabilities as individuals\textsuperscript{218} in fact as noted earlier it was decided in 1831 itself, that the company could not enjoy sovereign immunity of the English Crown.

\textsuperscript{218} Supra note 29.
and if otherwise it would be inconsistent with justice and common sense. If the accidents like this were caused due to the negligence of the servants employed by the East India Company, it would have been liable and so the same liabilities attached to the Secretary of State in Council.

This observation about the nature of sovereign function was considered in later decision even if it was not the ratio decidendi of the case. The general rule of exception cited was not based on any rational basis and no guidelines were provided to distinguish the function as sovereign and non-sovereign. This illustration and the explanation led to confusion whether these were given with the intent to limit the application to acts of state or it was meant also to apply to sovereign function. The judge could not give an exhaustive or clear exception, as the question of law arising in this case was relating to non-sovereign function.

c) Two Divergent Views from P&O’s Case

This decision in P&O’s case as stated above was interpreted as one, that the government was not liable for sovereign function and according to the other, except for the defence of ‘Act of State’, action would lie against the government.

The doctrine of immunity for acts done in the exercise of “sovereign functions”, enunciated in the P & O case, was applied by the Calcutta High Court in Nobin Chander Dey v Secretary of State\(^{219}\). In this case, plaintiff was

\(^{219}\) (1873) ILR 1 Cal 1.
a licensed retail dealer in ganja and sidhi in Calcutta and this license had to be renewed every year. But the superintendent of Excise, Calcutta put the right to sell ganja and sidhi for the year 1874-75 to public auction which was the usual way of distributing the yearly license. The plaintiff was the highest bidder and his bids were recorded. He paid the deposit due in respect of license. Subsequently the excise authorities refused his license and a suit was brought by the plaintiff against the Secretary of the State. He contended that a breach of contract was committed by the state by not granting license to the plaintiff and also for not returning the deposits made thereof by the plaintiff. On appeal against the dismissal of suit on the ground of non-maintainability, the High Court held that on evidence, no breach of contract had been proved, even if there was a contract, the act was done in the exercise of sovereign power and therefore it was not actionable.

It also clarified that the taxation and imposition of custom duties can be enforced in the exercise of sovereign powers. It was held that granting license by the state for selling ganja was in the exercise of sovereign function hence was not actionable.

Application of P&O case raises certain difficulties. First of all, correction of classifying the cancellation of license issued in connecting with trade activity on the basis of P&O holding would arise. There is also the question whether an immunity would have been conceded to such activity on
the basis of P&O ruling. It is submitted that the court did not adduce this issue in a superficial way conceding immunity.

The Madras and Bombay High Courts did not accept the reservation made by Peacock C.J. that the Government was not liable if the tort was committed in the exercise of sovereign powers.

In *Secretary of State v Hari Bhanji*²²⁰, during the transit of salt from Bombay to Madras port, due to enhancement of duty, the plaintiff had to pay excess duty at Madras. In an action, to recover the excess duty, paid by him two questions regarding the maintainability of the suit were considered. Whether the state could be sued in his own court. It was answered that the immunity principle never extended to the East India Company. The second issue was regarding the nature of the act, since it was a sovereign act no action would lie against it. In this case the court compared sovereign act with the ‘Act of state’. Therefore the suit was maintainable before the municipal courts. The court referred the illustration given for the term “Act of State”.

The court confined P&O immunity to the Act of State there by making it clear that there is no immunity for the acts done within the domestic sphere which can be conceded as sovereign immunity.

The ‘Act of state’ is an act of a political sovereign against another political sovereign or against the subject of another political sovereign and not against its own citizen. The court also referred the adhoc committee report, in

²²⁰ (1882) ILR Mad 273.
which it was stated that traditional functions were the making of laws, administration of justice, maintenance of order, repression of crime, carrying of war, making of treaties and peace and other consequential functions. There are certain functions like making of war, annexation of native state, commandeering of goods during war, use of land as a practice of bombing ground by the army,

If this was followed in the previous decisions, the rule of law would have been maintained in the relationship between the state and its subject.

It is submitted that the view taken in this case was correct and this principle of law followed in the subsequent cases in the relationship between state and its subject, rule would have been maintained. Unfortunately in subsequent cases the distinction between sovereign and non-sovereign functions of the company was drawn while determining the liability of the state.

In subsequent cases, two views came to be held and one view was that the government was not liable for the damage caused in the exercise of sovereign function and the other the immunity extended only to cases of what are called ‘acts of state’. So the government could not claim immunity when it acts under the colour of Municipal laws.

The interpretation based on former, distinguishing the act as sovereign and non-sovereign conferred wide discretionary powers on the judges, to decide whether the particular function was sovereign or non-sovereign. If he
was not interested to give justice in particular case he could decide a particular act as sovereign and in some cases he could treat it as non-sovereign according to his will and pleasure. This procedure caused injustice to the aggrieved persons.

In *Shiva Bajan v Secretary of state for India* 221 the police officer seized a large number of bundles of hay under statutory authority believing that it was stolen property but actually was the victim's own property. After his acquittal, he served a notice on the District Superintendent of Police for the delivery of the possession of hay. A small quantity of hay was delivered back to him as the remaining hay was lost. Then he sued the Secretary of the state on the ground that he had acted as the employee of the government and therefore the government was liable for his act. It was not in obedience to an order of the government that the goods were seized by the police but it was in exercise of statutory function so it was held that the secretary was not liable for the negligence of a police officer for the seizure of hay while he was exercising statutory duty, as the statute was an expressly granted privilege to the sovereign. In this the court applied the theory of benefit to see whether the state was benefited out of the act committed by the employee. This principle helped the court more in protecting the state than protecting the citizens.

The claim for immunity based on statutory duty may be tenable, however if there is negligence, in carrying out the statutory duty, the doubtful,

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221 ILR 28 Bom 314 (1904).
if claim for non-liability can be the principle. However the propriety of applying the theory of benefit to relieve the state of liability is questionable that the state benefited would be appearing all the more reasonable or saddling the state with liability.

In 1911, in *McInerny v Secretary of state*\(^{222}\), Fletcher J. held that the state liability in case of non-sovereign function could extend only where there was some benefit or profit to the government out of tortious act of the government employee. On this basis, it was held by the court that the suit was not maintainable against the state, claiming damages for negligence, in respect of the accident which had happened to the plaintiff on the public high way.

In this case, while the plaintiff was walking along the road, he got injured due to the negligently fixed post by the government employee. Even if it was a clear case of negligence, in the instant case, there could not be any benefit by maintaining public path on the highway as it was not a commercial function. This case reveals that the sovereign immunity principle continued to determine the maintainability of the suit against the state.

d) Government of India Act 1915 and the Liability of the state

When the Government of India Act was consolidated in 1915, the provision was made in section 32 (2) of the Act as follows

\(^{222}\) ILR 38 Cal 797 (1911).
“Every person shall have the same remedies against the Secretary of state in council as he might have had against the East India Company if the Government of India Act 1858 had; this Act had not been passed.”

After the Government of India Act 1915, an important decision was taken in the Secretary of state v Cockcraft. When a driver of the military vehicle met with an accident, due to carelessly stocked gravel on the side of the military road by the public works department, he claimed compensation for the injury suffered by him. The department failed to give any visible warning with light or danger signal to avoid the accident.

Relying on P&O’s case and Nobin Chander Dey, the court dismissed the suit on the ground of sovereign immunity. Wallis C.J. clarified that the state was exempted from the liability to be sued in municipal courts, as maintenance of the road carried on the exercise of public function, and that the negligence in relation to it would not be actionable.

Here the maintainability of the suit was determined on the ground of sovereign immunity of the state, and the theory of benefit, even if this case was brought even after the enactment of Government of India Act 1915, no change was made in this area of maintaining action against the state.

*Kesoram Podar & Co v Secretary of state* is the best example to show that the liability of the state was determined by applying sovereign and non-sovereign principle. In this case, great injustice was shown to the individual.

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223 ILR Mad 351 (1916).
224 (1927) 54 ILR 909.
company to bear loss, by denying action for damages against the state, on the
ground of sovereign immunity, when the secretary of state failed to take
delivery of and to pay for war goods brought due to commandeering orders.

It would have been proper for the court to insist on the government to
comply with their orders and to pay for the value of the goods. Here the
Plaintiff had to bear the loss only because of the customer being the state, was
entitled to the privilege of sovereign immunity. The Act of 1915 could not
serve any purpose so as to avoid the divergent views given by different courts
to the decision of P&O and the different interpretation applied in Nobin
Chander Dey and Hari Banji.

The judicial interpretation had been responsible for exempting the state
from liability.

e) The Government of India Act 1935 and the state liability

In the Government of India Act 1935 a similar provision appeared in
section 176 (1), which is abstracted below.

"The Federation may sue or be sued by the name of the Federation of
India and a Provincial Government may sue or be sued by the name of the
province and without prejudice to the subsequent provisions of this chapter
may, subject to any provisions which may or made by the Act of the Federal or
a Provincial Legislature enacted by virtue of power conferred on that
legislature by this Act, had not been passed".
This effort of enacting the Government of India Act 1935 was made during the pre-independence period with the intent to provide justice to the victims of state’s unlawful actions.

In *Etti v The Secretary of state*\(^{223}\), when the plaintiff claimed compensation for the refusal to discharge his son after treatment on the ground that his son had been taken away by some other person, the court exempted the state from liability by stating that maintaining hospital from the revenue fund is for the benefit of the public.

Actually the loss of the child was due to the negligence of the hospital authorities, amounting to breach of contract and there was no justification in applying the theory of benefit. There is also *no rationale* in telling the plaintiff that the state is exempted from the liability because the maintenance of the hospital is from the revenue fund. Here the court failed to note that liabilities attached to the state can be satisfied out of the revenues of India as stated in *P&O*\(^{226}\) and so this fund can be used for compensating the aggrieved.

In *Gurucharan Kaur v Province of Madras*\(^{227}\), it was clarified that the police officer who honestly exercised his statutory duty, has to be protected from personal liability. The instructions to the police from the Deputy Superintendent of Police were to go over to the station and to prevent certain Maharaja from leaving the station. It was not the Maharaja but his wife the

\(^{223}\) AIR 1939Mad. 663.
\(^{226}\) Supra note 31, at page 13
\(^{227}\) AIR 1944 F.C. 41.
Maharani who had reserved the first class compartment at the station to board the express which was due to arrive. The Maharani was awaiting the arrival of train in her own car which was placed in the railway compound. Misunderstanding the instructions he not only detained the Maharani but prevented her from boarding the train. He had closed the gate of the railway compound by posting two constables there. It was only after some time the gate was opened and she was allowed to go. The sub-inspector through his erroneous belief detained the Maharani of Naba and he not only prevented her from boarding the train but also closed the iron fencing to prevent her from boarding the train. In this case the Federal Court confirmed the decision of the Madras Court on the ground that the state cannot be held liable for misconduct of the government servant because these acts were not ratified by the government. It was clarified that the police officer who honestly exercised his statutory duty, had to be protected from personal liability. The wrong was committed by the employee in the course of exercising statutory duty hence the suit against the state was not maintainable.

Here the Court erroneously identified the statutory power as sovereign power and failed to appreciate that sovereign immunity was available only if they act in good faith and not in cases of abuse or misuse of power. Even if he had acted mistakenly in good faith, for the suffering of the plaintiff due to the act of the employee, is it reasonable to extend the privilege in case of the mistaken act of its employee on the ground of statutory power. Actually the
power to arrest and search and to seize property is conferred on the specific officers by statute and there was no logic in claiming this function as sovereign. If we had a system like that of Counsel d'Etat followed in France the court could have fixed the liability on the state and could have realized the amount from the negligent servant.

**f) Constitutional provision for fixing - State liability**

The cases that came before the court, with this prevailing confusion, i.e. the provisions for governing liability of state in torts made the Constitution to include the following provision - Article 300\(^{228}\). It replaced section 176(1) of government of India Act 1935. This provision deals with filing of suits against the juristic persons, the Union of India and the states of India.

Article 300 deals with suits and proceedings-(1) ' The Government of India may sue or be sued by the name of the Union of India and the Government of the state may sue or be sued by the name of the state and may, subject to any provision which may be made by the Act of Parliament or of the Legislature of such State enacted by virtue of powers conferred by this Constitution , sue or be sued in relation to their respective affairs in like cases as the Dominion of India and the corresponding Province or the corresponding Indian States might have sued or been sued if this Constitution had not been enacted, if at the commencement of this constitution -a) any legal proceedings are pending to which the Dominion of India is a party , the Union of India shall

\(^{228}\) Article 300 of the Constitution of India
be deemed to be substituted for the Dominion in those proceedings and b) any legal proceedings pending to which a province or an Indian state is a party, the corresponding state shall be deemed to be substituted for the province or the Indian state in those proceedings.

**g) Article 300 and its interpretation**

In India, the only provision which deals with the liability of the state is in Article 300 of the Constitution. This Article refers back to the pre-constitutional laws like Government of India Act 1935, and it in turn refers to the Section 32 of the Government of India Act 1915, and Section 65 of the Government of India Act 1858. So the law relating to state liability of India, today deals with pre constitutional laws in which it is stated that the liability of the state will be like that of the liability of the East India Company or it imposes the same liability on the centre and the states as that of the liability of the Dominion and the provinces before the commencement of the constitution. So the old archaic Principle of sovereign immunity could be invoked.

Even after the commencement of constitution, in order to determine the state liability in torts today we have to refer back to the state liability of East India Company followed during the period of 1858.

The democratic principles came to be highlighted in the post independence period. The courts began to discard common law principle of sovereign immunity. After independence, the Supreme Court of India
considered the liability of the state in *State of Rajasthan v Vidhywathi* 229, the question which arose was whether the state could be held liable for the negligence of the driver of a jeep owned and maintained by the state. The jeep which was allotted for the collector’s official purpose was being taken from the workshop to the collector’s residence, due to the negligent act of the driver, he knocked down, Vidhyawati’s husband, a pedestrian, who subsequently died.

In the suit claiming damages by Vidhyawati against the state of Rajasthan, the state took the stand that the car was being maintained for the discharge of official duties of the collector. That is to say for the purpose of discharging the sovereign powers of the state. Though the accident occurred, while the car was returning from the workshop, the fact that it was being maintained in the discharge of sovereign function entitled the state to claim immunity from liability. The trial court accepted this argument and held that “the constitution and control of collector’s office at Udaipur is an instance of exercise of sovereign powers” and held that state was not liable. Non liability was therefore clearly based on sovereign and non-sovereign distinction laid down in the P&O’s case.

However an appeal was taken to Rajasthan High Court and it took a different view. It held that the state was in no better position in so far as it supplied cars and keeps drivers for its civil service. It however clarified that “we are not here considering the case of drivers employed by the state for

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229 AIR 1962 SC 933.
driving vehicles which are utilized for military or public service”. The High Court would seem to have taken its stand by the old distinction developed in P&O that there is a category of cases where no liability could be fixed on the state for the acts of its servants. Whether this immunity was confined to the Act of State category or whether it is also extended to sovereign function category was not at all gone into. The old distinction continued that the High Court would seem to have held that maintaining a car for a civil servant would belong to non-sovereign category attracting liability according to the principles laid down in the P&O’s case.

When appeal was taken to the Supreme Court the judgment of Sinha C.J.(for a constitutional Bench comprised of himself and J.L.Kapur, M.Hidayatullah, J.C. Shah and J.R.Mudholkar JJ) accepted the judgment of the High Court and dismissed the state appeal. The Supreme Court did not clarify the precise basis on which the appeal was dismissed. It referred to the republican democratic Constitution of India in which there was no place for an immunity based on the King Can do no wrong. The scope of immunity in the English system was practically abolished by the Crown Proceedings Act 1947 also a plea of sovereign immunity was never accepted in India in the East India Company days when the company had both sovereign and non-sovereign (trading) functions. As a result, it is possible to hold that the Supreme Court upheld the liability of the state in one or both of the following grounds.
1. Under the democratic Republican Constitution of India, there is no scope for making any claim based on sovereign immunity and therefore the state of Rajasthan must be liable for the Vidhyawati’s husband’s death.

2. Maintaining a car for the collector’s use and it causing damage while returning from the workshop is not referable to sovereign power (as was held by the High Court) therefore the state was liable.

It is unfortunate that the Supreme Court did not clarify the principle number one above, namely non-applicability of the English doctrine that the King can do no wrong in a Republican India, on the correct basis of the decision. This lack of clarity has given uneasy lease of life to the older doctrine based on sovereign and non-sovereign doctrine which was thought to have been abolished by the Vidhyawati’s decision. This ambiguity can be seen from subsequent cases that came up before the Indian Courts.

The decision made in State of Rajasthan v Vidhyawati made an impression that the distinction between sovereign and non-sovereign for the purpose of liability was abolished and the government would be liable in all cases except act of state. But it received a set back due to the decision of Kasturilal v State of U.P., Ralia Ram one of the partners of the firm of jewellery was taken into custody on suspicion of being in possession of contraband gold and his gold was seized from him. On release, he made

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230 Supra note 45
231 Dr. A.T. Markose and Dr. V.D. Sebastian, Liability of the State in Civil Law, p341.
232 AIR 1965 SC 1039.
several requests for return of the gold. Later on a search by the officers revealed that the gold and silver, he had been carrying and seized by Police was later kept in the custody of the police station. The head constable, who was in charge of the government Malkhana where the gold was deposited, misappropriated it and he fled to Pakistan. The plaintiff thereupon brought a suit against the State of UP for the return of the gold for damages for the loss caused to him. It was found by the courts below, that the concerned police officers had failed to take the requisite care of the gold seized from the plaintiff, as provided by the UP Police Regulations.

The trial court found that

1. Government servants who seized and handled the gold were negligent.

2. The state was liable to compensate the plaintiff for the damage caused and decreed the suit for compensation of Rs. 11075/- to be paid.

On appeal Allahabad High Court found the plaintiff liable on both the grounds. Therefore the matter was taken to the Supreme Court on a certificate granted from the High Court. The appeal was heard by a Constitution Bench (P.B. Gajendragadkar C.J. K.N. Vanchoo, M. Hidayatullah, Raghubar Dayal and J.R. Mudholkar JJ) In the judgement delivered by Gajendragadkar C.J. referring to Vidhyawati’s case, the court observed that it must be conceded that there are certain observation made in the case of state of Rajasthan which support Mr Sastri’s argument and make it prima facia attractive. But as we shall presently point out, the facts in the case of the state of Rajasthan fall in a
category of claims which is distinct and separate from the category in which the facts in the present case fall and that makes it necessary to examine what the true legal position is in regard to a claim for damages against the respondent for loss caused to a citizen by the tortuous acts of the respondent’s servants.

Then the court reverted to the distinction between sovereign and non-sovereign function developed in *Peninsular and Orientation Steam Navigation* case and held that the principle developed there in still held the field. Reverting to Vidyawati’s case, it was stated ‘it would be recalled that the negligent act which gave rise to the claim for damages against the state of Rajasthan in that case, was committed by the employee of the state of Rajasthan while he was driving the jeep from the repair shop to the collectors residence and the question which arose for decision was: did the negligent act committed by the government employee during the journey of the jeep car from the workshop to the collectors residence for the collectors use give rise to a valid claim for damages against the state of Rajasthan or not. With respect the court pointed out that this aspect of the matter had not been clearly or emphatically brought out in discussing the point of law which was decided by this court in that case. But when considering the principal facts on which the claim for damages was based, it is obvious that when the government employee was driving the jeep from the workshop to the collectors residence for the collectors use, he was employed on a task or an undertaking which could not be said to be referable
to or ultimately based on the delegation of sovereign or governmental powers of the state. In dealing with such cases it must be borne in mind that when the state pleads immunity against claims for damages resulting from injury caused by negligent acts of its servants the area of employment referable to sovereign powers must be strictly determined. Before such a plea is upheld the court must always find that the impugned act was committed in the course of an undertaking or employment which is referable in the exercise of sovereign power or to the exercise of delegated sovereign power and in the case of the state of Rajasthan the court took the view that the negligent act in driving the jeep from the workshop to the collectors bungalow for the collectors use could not claim such a status. In fact the employment of a driver to drive the jeep for the use of a civil servant is itself an activity which is not connected in any manner with the sovereign power of the state at all. That is the basis on which the decision to have been founded and it is this basis which is absent in the case before us.

There after it was held that while the employment of the driver in the Rajasthan's case was not connected with the sovereign, the appointment of police who negligently dealt with gold in the present case was in connection with a sovereign power. In the result, the appeal was dismissed. After referring to development of law in England the following observation was made regarding the need of reforms: "In dealing with the present appeal we have ourselves been described by the thought that a citizen whose property was
seized by process of law, has to be told when he seeks a remedy in the court of law on the ground that his property has not been returned to him, that he can make no claim against the state. That we think, is not a very satisfactory position in law. The remedy to cure the position however lies in the hands of the legislature.”

It is submitted that the above judgement is not correct. It is not in keeping with the republican spirit of the constitution. Supreme Court was not bound to follow the old distinction laid down in *Peninsular and Steam Navigation case* and the law developed thereon in

Pre-constitutional days. The Supreme Court itself had laid sown (in *Vidhaywati’s case*) as it noted earlier, the immunity enjoyed by the English Crown is not applicable after the constitution came into force instead of following this the court has interpreted narrowly *Vidyawati’s case* and held that the question of liability arose in connection with a non-sovereign function. Distinction thought to have been abolished by *Vidhyawati’s case* was sought to be resurrected. If you look up the case through the modern spectacles of judicial activism, the decision can be characterised as one where the judicial activism is in reverse gear. The preceding confusion in the law governing the liability of the state in torts in India could have been avoided had the decision in *Kasturilal* had been otherwise. A brief review of the case law subsequent to *Kasturilal* is attempted below to focus on the unsatisfactory state of law.
Actually the privilege is given to protect the public servant from liability and not to protect the state from liability whenever a public servant is engaged in statutory duty he has to comply with it so this privilege is extended to the consequence of the act also. But there is no need of extending this privilege in the case of state if the citizen suffers by the act. This privilege can be extended, provided he has committed the act without any negligence.

Above two cases decided after the post Independence period proved that the conflicting principles of old archaic principle and the ideals of republican form of government continued after independence. Now the present position in India relating to liability of the state is based on the old distinction between sovereign and non-sovereign functions enunciated in the days during the East India Company.

3. Present method of determining the liability of the state

The present method of determining, liability of the state in tort is by distinguishing the function of the state as sovereign and non-sovereign. The first portion of this study deals, with the liability of the state with respect to non-sovereign function and the second portion deals with the exemption from liability on the ground of sovereign function.
(i). Liability of the state on the ground of non-sovereign function

Even before the decision of *Peninsular and Orientation Steam Navigation Case*\(^\text{233}\) the liability of the state was determined in *Bank of Bengal v. Union Co*\(^\text{234}\), rejecting the plea of sovereign immunity raised by the company. In *Peninsular and Steam Navigation case*, while determining the liability of the state, under section 65 of the Government of India Act 1858, with respect to non-sovereign function, the court clarified that state would be liable in case of non-sovereign function. So there was no doubt regarding the liability of the state in case of non-sovereign function. But an observation and illustration cited by Justice Pea Cock in *Peninsular Orientation and Steam Navigation case* regarding sovereign functions of the state made confusion and had been interpreted differently by different courts in *Nobin Chander Dey* and in *Hari Banji*, as stated earlier.

According to the interpretation given in *Nobin Chander Dey*, the liability of the state can be determined on the basis of the function of the state as sovereign and non-sovereign. In the case of sovereign function, state would not be liable but in the case of non-sovereign, state would be liable.

According to the decision in *Hari Banji* the immunity of the state should be limited to the ‘Act of state’. Thus in *Hari Banji*, the court compared the sovereign act with ‘Act of state’ and the suit filed against the state for the

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\(^\text{233}\) *Supra* note\(31\)

\(^\text{234}\) *Supra* note\(29\)
imposition of excess duty for the transit of salt was maintainable before the court.

In *Rup Ram v The Punjab state*\(^{235}\) Rup Ram, a motor cyclist was seriously injured, when a truck belonging to the public works department struck him. The driver was employed by the department. When the plaintiff brought an action for compensation against the state for the rash and negligent driving, it pleaded the defence of immunity but the court refused to allow this plea supporting the decision followed in *Hari Banji* limiting immunity of the state only for the ‘Act of state’.

The state is not immune from liability merely because the act complained of may have been done in the exercise of governmental power. The state is liable for tortious acts of its servants in the circumstances that make the relation between the state and that of particular servant, identical with the circumstances of private employment”. The mere fact that the act may be or may not have been done in the course of governmental activity is not conclusive.

In *Prem Lal v U.P. government*\(^{236}\) the district collector, purporting to act under the U.P. Requisition of Motor Vehicles Act, illegally and maliciously requisitioned the motor truck and a car of the plaintiff, Prem Lal. This was done to teach a lesson to the plaintiff, a Jana Sangh sympathizer. This political organization was considered by the government as undesirable to them.

\(^{235}\) AIR 1961 Punj 336.
\(^{236}\) AIR 1962 All 233.
The Plaintiff alleged that his car was kept uncovered during the period of requisition with the result that the paint was damaged and some parts became rusty and so he had to repaint it.

When the plaintiff filed a suit against the state it raised the plea of immunity which was rejected as it was out of any governmental need. So it was held that the requisition order of the vehicle by the government as illegal and held the government liable to pay compensation because the act was malafide and abuse of power, although under the statutory power for which the government cannot claim immunity.

In this case the court took a bold step to protect the rights of a citizen against the arbitrary acts of the state. The magistrate misguided by his zeal, abused the powers delegated to him by the government and took away the vehicle of the appellant not because the government needed them but he wanted to take revenge on him. In the above case, the defence of sovereign immunity was rejected by taking in to account, the illegal and the arbitrary acts of the employees of Union of India. If the officers of the state exceeded the power in the course of employment, immunity is not a defence. Thus the court began to limit the application of sovereign immunity in cases of abuse of power.

In State of Rajasthan v. Vidhyawati, the court took a bold step to promote justice to the widow for the death of her husband due to the negligent

\[^{237}\text{AIR 1962 SC 933.}\]
act of the employee of the state. According to Justice Sinha C.J, in a Democratic republican form of constitutional government, it is not justifiable to allow the defence of sovereign immunity for the negligent acts of its employees. Therefore the state was held liable for causing injury by the car which was maintained for the collector's use.

In *state of Gujarat v Memon Mohd* 238 the court clarified that one reason sounds good that the taking care of the property seized and the duty to return the same is just like the duty of a statutory or duty arising out of bailment and cannot fall within the sovereign powers.

In this case, the state under the Sea Customs Act seized certain Motor vehicles and other articles of the plaintiff but the articles while in the custody of the authorities remained totally uncared for. In an action for damages by the owner, the state pleaded that they were not bailee and so not liable. The state failed to raise the defence of sovereign immunity before the trial court.

When this defence of sovereign immunity was raised before the High Court, it was refused on technical grounds. The Supreme Court observed that bailment is dealt within contract Act only but it was not correct to say that there could not be a bailment. Before deciding the case as seizure of vehicle and other goods by the state was held illegal, the vehicle was sold as unclaimed and could not be returned to the respondent, which he was entitled to. The court held that the articles seized under the Customs Act belonged to the owner.

238 *AIR*1967 SC 1885.
till the decision became final and the government was under a duty implicit in the statutory provision to take proper care of the goods and its position was that of a bailee to take care of goods to keep and preserve it and to return it in case where the order of confiscation could not become final. The government was not absolved from responsibility merely because an order had been passed by the magistrate for disposal of the articles as unclaimed property. So the government was vicariously held liable for the negligence of its servants in the course of bailment, for which there was no need of considering, whether the responsibility of taking care of goods confiscated was arisen out of contract.

The very good decision taken by the judiciary in this case, would help to remind the state to become more responsible, while selecting the officers for the purpose of exercising statutory duty.

In *Satyavati v Union of India*[^239^], the mishap was caused by an air force vehicle used for carrying the hockey team to IAF station to play a match. The driver of the military vehicle was dazed by the glare of the head lights suddenly put by the motor cyclist coming from the opposite direction while he was on the way to park the vehicle after the match was over.

In an action by the plaintiff, the Union of India contended that keeping army in a proper shape, giving physical exercise of its hockey team for the proper maintenance of the force is a sovereign function and so exempted from the liability.

[^239^]: AIR 1967 Del. 98.
The court observed that even if the driver was dazed, he should have stopped the vehicle rather than attempting to turn it. It is the nature of act that has to be taken into consideration to determine whether the particular function was sovereign or not. In this incident the act was not of sovereign character so the government was held liable for the mishap.

In *Rooplal v Union of India*[^240], the jawans found some firewood lying by the riverside it being unmarked they honestly thought that they had every right to use it as camp fire and fuel. They carried away this in a military vehicle and used it as camp fire.

When the plaintiff filed a suit against the Union of India, they raised the defence of immunity and the act was done outside the course of employment. As far as the first point was concerned the jawans used this as camp fire and fuel so it was not a sovereign function and the second point was also rejected on the ground that for twenty-four hours, the jawans were under the control and direction of the Union of India so they were supposed to be in the course of employment. So the Union of India was held liable for the act. Determination of a case relating to state liability on the basis of distinction of the sovereign and non-sovereign is restricted to the cases of harmful acts done by the employee of the state.

In this case, the ordinary principle of vicarious liability of the master for the torts of its servants in the course of employment was applied. The court

[^240]: AIR 1972 J&K 22
would have imposed the liability according to the responsibility for the damage committed by each person by making the jawans also liable for the act.

In *Shyam Sunder v State of Rajasthan* the driver of the truck was negligent and the truck which was not roadworthy was put on the road and the state was liable for negligence of its employee under the Fatal Accident Act 1855. The trial court found the driver negligent and held the state liable but the High Court reversed the decision.

The Supreme Court (Bench consisting of K.K.Mathew and A.Alagiri Swami J) inferred that the cause of the accident was due to the negligence of the driver. It was made clear that the radiator was getting heated frequently and water was being poured in the radiator after every six or seven miles of the journey. The main point for consideration in this appeal was whether the truck caught fire due to the negligence of the driver in the course of employment.

Usually *Res Ipsa loquitur* is used in imparting strict liability to the cases of

negligence. Here also the driver was in the management of the vehicle, the accident was such that it would not have happened in the ordinary course. Because the driver had the knowledge about the condition of the vehicle and if he had taken sufficient care, he would have avoided the accident. Circumstances of the case, proved that negligence of the driver was the only cause for the accident and there was no need to prove the case with evidence. So the court could apply Res ipsa loquitur even if it was not possible for the plaintiff to give any evidence. Here there was no justification in applying the principle of sovereign immunity. The relief work could be done by any private persons so in this case the Supreme Court by allowing the appeal set aside the decree of High Court and resorted to the decree and the judgment passed by the District Judge. The court held that the famine relief work was not a sovereign function.

In this case, the court considered the negligence of the employees and fixed liability on the state still lingered the archaic principle of sovereign and non-sovereign without saying any criteria of determining what is sovereign and non-sovereign. In Shyam Sunder case the court even stated that the famine relief work was not a sovereign function as it had traditionally understood and the determination of the function as sovereign and non-sovereign was mainly depended on the traditional custom followed in a country. There was no authoritative principle behind it to categorize the function as sovereign and non-sovereign. This case is an illustration to show
that the court is unhappy with the traditional distinction between sovereign and non-sovereign function as a basis for liability. While it would be difficult to say the famine relief is not a sovereign function, saddled liability for negligence in connection with famine relief operation, is tantamount to saying that the sovereign and non-sovereign distinction is of doubtful validity.

In *Thangarajan. v union of India*²⁴², the driver of the lorry, defence personnel while driving the lorry for taking carbon dioxide from the factory to the ship, the accident occurred. A small boy of 10 year old was knocked down, making him permanently incapacitated. This was due to the rash and negligent driving and there was no fault on the part of the child. The Court held that the accident occurred while the lorry was being driven in the exercise of sovereign function so as to exclude the liability of Union of India. But the Court felt it as injustice to deny compensation for the injury caused to the boy on the ground of sovereign function so the court strongly recommended to the government to make an ex-gratia payment of Rs. 10,000/- to the boy as it would be cruel to tell the boy suffering from grievous injuries and permanently incapacitated that he was not entitled to any relief as the vehicle was being driven in the exercise of the sovereign function of the state. The Court itself began to feel that it was not justifiable to decide a case on the ground of sovereign immunity, in cases of causing damage by the employee of the state.

²⁴² AIR1975 Mad 32.
In Smt Basava Kom Dymogonda Patil v State of Mysore\textsuperscript{243} plaintiff's stolen articles including large number of ornaments and cash worth more than Rupees ten thousand were recovered and produced by the police before the magistrate, who directed the sub-inspector to keep them with him in safe custody to get them verified and valued by a gold smith. After the trial was concluded the plaintiff submitted a request to return the articles or for the value of the goods. But they were stolen from the Malkhana, the police guard room. This request for the claim of goods was disallowed by the court on the ground that the articles were not in the custody of the court. Her appeal to the Sessions court and then to the High court failed, then she filed an appeal before the Supreme Court (the bench consisting of P.N. Bhagawathi, R.S. Sakkaria and S.Murtaza Fazal Ali JJ).

In a proceeding taken under section 517 of the Code of Criminal Procedure 1898, the Supreme Court observed that

"Seizure of the property by the police amounts to a clear entrustment of the property to a government servant, the idea is that the property should be restored to the original owner, after the necessity to retain it ceases'.

It was also held that

'property is stolen, lost or destroyed and there is no prima facie defence made out that the state or officers had taken due care and caution to protect the

\textsuperscript{243} AIR 1977 SC 1749.
property, the magistrate may in appropriate cases, where the ends of justice so require, order payment of the value of the property”.

Thus the appellant was held to be entitled to receive the compensation equivalent of the property lost in the state custody.

This clarification given by the Supreme court regarding the seizure of the property by the police amounts to a clear entrustment of the property to a Government servant and the idea of returning the restored property to the original owner after the necessity to retain it ceases, is a best example to show that the Supreme Court began to take a step forward to determine the governmental accountability for the negligent acts committed by the officials of the state. Here the court had adopted a liberal approach in interpreting the area of state liability without considering the decision taken in P&O and Kasthurilal. Even then the judiciary was unable to lay down a clear cut test to determine state liability. In a modern perspective it is not necessary to consider the so called distinction of sovereign and non-sovereign for the determination of state liability.

In Iqbal Kaur v Chief of Army\textsuperscript{244} the damages claimed under s.110 B of Motor Vehicles Act 1939 against the driver of the military truck and the Union of India for negligent and rash driving in which the deceased was killed. The claim was opposed on the ground that the accident was caused due to the negligence of the deceased and not due to the negligence of the driver of the

\textsuperscript{244} AIR 1978 All 417.
vehicle. The Contention on behalf of the Army Chief was that the vehicle did not belong to them. The vehicle was used for training recruits and the driver was engaged in the performance of statutory duty.

The claims tribunal held that the claim was not sustainable since the driver of the vehicle was not driving rashly and negligently and the military officers were not liable since the vehicle did not belong to them and the Union of India will not be liable since the driver was engaged in his statutory duty at the time of accident.

But the Allahabad High Court held that the accident occurred due to the rash and negligent driving of vehicle and the driver as well as the Union of India were liable and rejected the plea that the act resulted in the exercise of statutory sovereign power because the truck was engaged in imparting training to the new recruits.

Even if the military officers were engaged in the statutory sovereign duty at the time of accident, it was due to the rash and negligent driving so there is no need to distinguish the function as sovereign and non-sovereign. After causing death what is the justification in claiming privilege on the ground of statutory sovereign function. Here the trial court failed to consider these points and the High court also decided the case on the ground that at the time of accident they were imparting training so not engaged in sovereign function.
In *Lucknow Development Authority v M.K. Gupta*[^245] Lucknow Development authority undertook certain plots of land for the construction of dwelling housing units. After the construction was complete, the authority invited applications from the desired persons for purchasing the flats. Since the number of applicants were more, the authority decided to draw it on lots, and so a flat was allotted to the respondent. He deposited the entire amount in July 1988 and the flat was registered in his name. Thereafter he approached the authority to hand over the possession of the flat to the respondent that could not be done because the construction was not complete.

The respondent approached the authority but no steps were taken to hand over the flat to him. Consequently he filed a complaint before the District Forum that even after the payment of the entire amount by the respondent possession was not handed over according to their terms and conditions. The State Commission by its order on Feb 15, 1990 directed the appellant to pay 12% annual interest upon the deposit made by the respondent and to hand over the possession after the completion of work within June 1990. In case of failure of construction of flat within the time allotted, to handover the flat to the respondent, by determining the deficiency in the work and estimate the amount required for the completion of work and directed to refund the same amount to the respondent.

Instead of complying with the order of the court, the State authority approached the National Commission challenging the jurisdiction of the courts in issuing such an order. The Lucknow Development Authority constituted under the state Act to carry on planned development of the cities in the state were amenable to Consumer Protection Act 1986 for the act or omission relating to housing authority such as delay in delivering the possession of house to the allottees, non-completion of the flat within the stipulated time or defective or faulty construction.

Dismissing the appeal the Court held that it is not necessary to consider whether there is any rationale or dividing line to determine whether the act was sovereign or non-sovereign for determining the liability of the state. By the Sovereignty vested in the hands of the machinery, it was obliged to comply with its duties. In case of failure to do the duty by the public functionaries or any capricious or malicious act by the authorities, the complainant was entitled to compensation and the state could not claim the privilege.

The cross appeal filed by the respondent was allowed and it was further directed the appellant to pay the estimated amount of Rs 44,615 for the completion of work to the respondent. The Commission held that the action of the appellant amounted to harassment, mental torture and agony to the respondent and it directed the appellant to pay Rs 10,000 as compensation.

The judiciary itself felt the difficulty in applying the principle of sovereign and non-sovereign without any rationality and guidelines. The court
also expressed that the constitutional machinery is obliged to be people oriented. It is better to fix the liability of the state without giving privilege in case of negligence and abuse of power. There must be accountability or social responsibility for the wrong of its servants.

In *Jay Laxmi Salt Works (p) Ltd. v State of Gujarat*[^246] the State of Gujarat made a plan to erect reclamation bund to prevent the flow of sea water in to certain areas and accordingly the construction was completed in 1955. Before constructing the bund, the appellant approached the concerned authority to abandon the idea of construction of bund or to change the location of it otherwise it would cause destruction to his factory. They did not accede to it. When there was heavy rainfall, the water level in this bund increased to a higher level, he approached the concerned authority to limit the water level in this river. Due to the negligence of the concerned authority the water level rose to such an extent it burst the bund and the water overflowed into the premises of the appellant’s factory. Aggrieved by this, he claimed compensation of Rs. 4 lakhs from the respondents. Then the committee was appointed to assess the loss suffered by the appellant and it was estimated as Rs. 1,58,735/- since this amount was not paid he filed this suit for compensation.

The Defence of the state was that the suit was not maintainable because of time barred and there was no negligence on the part of the state in

[^246]: (1994)4 SCC 1.
constructing the bund; besides the estimate made by the committee could not be accepted by the state.

The trial court dismissed the suit accepting the contentions of the state and concluded that the damage occurred because of the Act of God.

On appeal before the Division Bench of High Court the single judge found that the construction of bund was for non-natural use of land. There was negligence in the act of planning and the construction by the officers concerned. The Learned judge set aside the finding of the trial court that damage was caused due to the Act of God yet dismissed that the suit was time barred.

Due to the difference of opinion regarding the decision this was referred to a third bench. They considered that liability arising out of tort was due to breach of duty and that is towards the people generally. What is fundamental is the injury and not the manner in which it had been caused. Strict liability, absolute liability, fault liability are all for the benefit of the society. In order to get redress from court it was necessary to claim by the aggrieved in a particular category of wrong so the appellant challenged it under the head negligence.

Rule in *Rylands v. Fletcher* is that strict liability arises, from the presence and absence of mental element. A breach of legal duty wilfully or deliberately or even maliciously done is negligence, emanating from fault liability but injury or damage resulting without any intention yet due to lack of foresight is strict liability. What is fundamental is that there must be injury and
not the manner in which it has been caused. No one has the right to cause harm upon others intentionally or innocently. In this, the court preferred the rule of fault liability and took decision in favour of the appellant. Negligence in the performance of duty was only a step to determine, if the action of the government resulting in loss or injury to common man should not go uncompensated. If the construction of bund was for common man or public duty then any loss or damage arising out of it gave rise to tortious liability. In the modern developing sense, the common man could not go unredressed because the wrongdoer was the state. The suit of appellant for Rs. 1,58,735/- as the amount of damage determined by the trial court was decreed with costs and also directed to pay the interest also as fixed by the court.

In this case, the court said that if any loss or damage is caused due to the act of the state, it is bound to compensate the aggrieved. The problem seen in all these cases is that even if judiciary faces difficulty with the principle of sovereign immunity which is one of judicial creation, and was introduced while deciding P&O, they could not abrogate it by their creativity. According to them remedy lies in the hands of the legislature and not in the hands of the judiciary. Any way these cases reveal that there is an urgent need to modify the existing law so as to meet the ends of justice.

In *Nagandra Rao & Co v State of A.P.*\(^{247}\) the appellant was carrying business in fertilizers and food grains legally. His premises were inspected and

\(^{247}\) AIR1994 SC 2663.
goods were seized under the Essential Commodities Act. On 29-6-76 proceeding was terminated in his favour and the confiscation order was quashed. Collector directed the release of the goods but subordinates delayed it so that the goods were spoiled and decayed in quality and quantity.

The Appellant then asked for compensation which was denied and therefore he filed a suit and then the state claimed sovereign immunity. The trial court decreed the suit in his favour and the state filed an appeal before the High court which set aside the decree relying on the decision of Kasturilal.

In this civil appeal, the main issue was regarding the liability of the state in case of negligence of the officers of the state while discharging their statutory duty. This was answered in the negative by the High Court of Andhra Pradesh on the rationale laid down in Kasturilal, while reviewing the decision for payment of Rs. 1,06,125.72/- towards the value of the damaged stock with an interest. There was an interest at the rate of 6% granted by the trial court for the loss suffered by the appellant due to non-disposal of the goods seized under the various contract order issued under Essential Commodities Act 1955. The Claim of the appellant was negative on the ground of sovereign power of the state. Whether the seizure of the goods was in exercise of statutory powers under the Act or immunized the state from any loss or damage suffered by the owner.

In this case the court clarified that in modern sense, the old and archaic concept of sovereign immunity does not survive and Sovereignty now vests
with the people. The distinction between sovereign and non-sovereign does not exist. It depended upon the nature of power and the manner of the exercise of legislative supremacy under the constitution arising out of constitutional provision. The Executive was free to implement and administer law. The defence available to the state were for raising armed forces, making peace or war, foreign affairs, power to acquire and retain territory were the factors which were indicative of external sovereignty and were political in nature. So they were answerable to the jurisdiction of the civil court. The necessity to accept a new law in keeping with the dignity of the country and to remove the uncertainty etc was considered and then the appeal was allowed.

The court distinguished Kasturilal from this case, in Kasturilal the function of the police like search and seizure is an inalienable sovereign function of the state while in Nagendra Rao the state engaged in commercial activities and committed negligence where sovereign immunity is not a defence. Even if similar power is conferred under the Essential Commodities Act who exercised statutory power while searching inspecting and seizing the property or goods, no constitutional system can condone the negligent functioning of the state and its officers. When a citizen suffered any damage due to the negligence of the employee of the state the latter was liable to pay damages and the defence of sovereign immunity would not absolve it from this liability. Now the application of sovereign immunity is limited and sovereign
and non-sovereign based on any of the rationality, is no longer allowed to exist.

The Court stated that no civilized legal system could allow an executive to play with the people of its own country. Uncertainty of law results in the abuse of judicial power. According to Justice Holms certain justice is better than uncertain justice. The State and the laws are for the benefit of the people so there is no need of hesitation in making law in this line. In this case the court admitted the need of the state to have an extraordinary power but at the same time the state cannot claim sovereign immunity for the suffering caused to the common man by its officers acting illegally or negligently.

In this case, the court determined the liability of the state with intent to compensate the plaintiff for the damage or loss suffered by the victim due to the act of government employee, the court could have overruled Kasthurilal's decision at that time. Any way the court expressed its difficulty in deciding the case due to uncertainty of law. Though the decision of the Supreme Court in this case, restricted the decision of Kasthurilal to a considerable extent it failed to provide a satisfactory solution. So even after this decision, if a tort is committed by the state while repressing crime, maintenance of public order, the plea of sovereign immunity absolve the state from liability. There are areas where human rights violation are on the increase

sovereign immunity of the state still stands and this has to be rectified by the state as early as possible.

In the *State of Haryana and others v Santra (Smt)*\(^{249}\) the respondent underwent a sterilization operation at the general hospital, Gurgaon as she had already seven children and there was the advantage of the scheme of sterilization launched by the state government of Haryana. She was then issued a certificate that her operation was successful. Even though she was assured that she would not conceive a child in future, she conceived and gave birth to a female child, so she sued for compensation for Rs 2 lakhs as damage for medical negligence. The explanation given by the medical officers was rejected by the trial court. The Trial court as well as the lower court recorded the concurrent findings that the sterilization operation performed upon Santra was not complete as the operation was conducted on the right tube but left the other tube untouched. The courts expressed that there was exhibited negligence on the part of the medical officers. In spite of the unsuccessful operation, she was informed that she would not conceive any child in future. The High court also dismissed the second appeal. Before the Supreme Court one of the contentions was relating to the vicarious liability of the state for the negligence of its officers in performing the operation. But the state contended that the

\(^{249}\) (2000)1 SCC 182.
negligence of the medical officers in performing unsuccessful sterilization operation would not bind the state.

By rejecting the theory of sovereign immunity, in the light of *Nagendra Rao & Co. v. state of A.P, Common Cause, A Regd Society v. Union of India*, the court decreed the suit for a sum of Rs. 54,000/- with an interest of 12% and this decree was affirmed by the appellate court and the High court. This implementation programme was in the hands of government officers involved in the family planning programme. So she was entitled to claim full damage from the state government to enable her to bring up the child at least till she attained puberty.

In the above cases the court was reluctant to apply the principle of sovereign immunity, while fixing the liability of the state.

*In the electricity Board v. Shail Kumari and others*[^250], the cyclist aged 37 was electrocuted from broken live wire that had fallen on the public road. The claim for damage filed by the dependent of the deceased was resisted by the board. Then the High Court directed the board to pay compensation of Rs. 3.4 Lakhs to the claimants. Before the Supreme Court, the appellant sought exception to the rule of strict liability. Even assessing that all safety measures had been adopted by the board, if the activity was hazardous or risky exposure to human life, it would be under the law of torts to pay compensation for the injury suffered by him. The basis of such liability was foreseeable, risk

inherent in the very nature of such activity. The defence of “Act of stranger” would not apply in this case because there was no evidence to show that the board had anticipated the act of strangers and it had already taken precautionary measures to prevent it. In this case the court expressed its view that even if all safety measures had been provided if the activity affects the human life, it is the bounden duty to pay compensation. This principle is applicable only in case of hazardous cases so the victim has to prove that the case comes within the purview of this category. So this principle can be enforced in certain circumstances as specified in *Rylands v. Flecher*. This can be applied in cases relating to state liability by taking into consideration its duty. In a welfare state it engages in all activities which are beneficial to the society.

In *State of A.P v Challa Rama Krishna Reddy and Others*\(^{231}\) even if the first respondent and his father had informed the Inspector of Police that there was a conspiracy, to kill them and their lives were in danger, the inspector did not treat the matter seriously and said that no incident would happen within the jail. In spite of representation made by them, adequate protection was not provided to them. Extra guards were not appointed for duty. But a bomb was hurled into the cell and in the bomb explosion his father died and the respondent suffered serious injuries. When sued for compensation the state raised the defence of sovereign immunity. The trail court allowed the

\(^{231}\) AIR 2000 SC2083.
contention and dismissed the suit on the ground of sovereign immunity relying on *Kasturi Lal Ralia Ram Jain v. State of U.P.* that the maintenance of jail is a part of the sovereign activity of the government and so suit for damages would not lie as the state was immune from being sued on that account.

On appeal the High court also relied on the decision of Kasturi Lal but did not dismiss the appeal. But the court clarified that the right to life was a part of fundamental right of a person and a person cannot be deprived of his life and liberty except in accordance with the procedure established by law and the suit was liable to be decreed as the officers had acted negligently without taking adequate precaution even after sufficient information was given by the petitioner and his father about the danger to their lives.

On appeal before the Supreme Court, (the Bench consisting of S. Saghir Ahmad and D.P. Wadhwa, JJ.) the court referred to the observation made by the court in *Nagendra Rao & Co and Common Cause, A Registered Society v. Union of India* and rejected the theory of sovereign immunity. The Supreme court stated that the concept of public interest has changed with a structural change in the society. No legal or political system can place the state above the law as it is unjust and unfair for a citizen to be deprived of his property by the negligent act of the officers of the state without any remedy. The basis of sovereign immunity has gone round and now the emphasis is more on liberty, equality and rule of law. The watertight compartmentalization of the functions
of the state as sovereign and non-sovereign or governmental or non-
governmental is not sound. It is contrary to the modern jurisprudential
thinking. The need of the state to have extraordinary power cannot be doubted
But statutory power being statutory duty for sake the of society and the people
the claim of a common man or ordinary citizen cannot be thrown out because
it was done by an officer of the state even though it was against the law and
negligent. The needs of the state, duty of its officials and the right of the citizen
are required to be reconciled so that the rule of law in a welfare state is not
shaken. In a welfare state, the functions of the state are not only defence of the
country or administration of justice or maintaining law and order but it extends
to regulating and controlling the activities of people in almost every sphere
educational, commercial, social, economic, political and even marital. The
demarcating line between sovereign and non-sovereign powers for which no
rational basis survives has largely disappeared. Therefore the functions like
administration of justice, maintenance of law and order and repression of crime
etc which are among the primary and inalienable functions of the constitutional
government the state cannot claim any immunity.

In this case the court referred the case of Common cause. A Registered
Society v. Union of India in which after going in to the history of sovereign
immunity which existed during the time of East India Company, this theory
was rejected. Then a series of cases like Nilabati Behera v. State of Orissa
Death of Sawinder Singh Grower and D.K. Basu v. State of W.B. decided
protecting human rights and fundamental rights and promoting human dignity and so the law has marched ahead like Pegasus. Still the government attitude clings to the old doctrine of sovereign immunity and it tries to defend it in the name of immunity or Act of state. After stating the above reasons the appeal filed by the state was dismissed.

In this the judiciary took a progressive attitude in protecting and promoting the rights of the people. Now it is necessary to have a change in the attitude of the government. It is the need of the hour to modify the existing law in this line still the government goes back and cling on to old principle of sovereign immunity.

In *State of Punjab v Des Raj and others*[^252], the Plaintiff filed a suit for recovery of damages for malicious prosecution launched against him by one food inspector. The Plaintiff was illegally detained for seven days based on false report made by the said inspector, both the trial court and the first appellate court, found the plaintiff innocent and a launching of prosecution against him and his consequent arrest was malicious Damages were qualified as Rs.2000/- holding the state vicariously liable for illegal and the wrong act done by its agent. The appellate court held that the state could not be immune from the consequence of the act of its agent.

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In *Rakesh Sami and others v Union of India*\(^253\), passengers were hit by a running train when they were boarding another train and the total failure of electricity at the relevant time. The Deceased along with other passengers were compelled to cross the railway track meant for the incoming train to board the train standing at the outgoing track. There was Negligence, on the part of railway, in not providing proper platform as well as over bridge. Compensation awarded to the dependents of the deceased compensation would amount to Rs. 4,75,200/-

In *State of J&K v Zarina Begum and others*\(^254\), Mohammd Bashir was electrocuted on 2\(^{nd}\) August 1996. He came into contact with a broken live electric wire when he proceeded towards the main road. Negligence was attributed to the officials of the electricity department. The Deceased, 30 years of age was earning Rs. 150/- per day. The total income of the deceased was said to be Rs. 4,500/- per month. Breach of duty and the consequent damage failure to keep required caution and safeguard would amount to negligence which were actionable under law. The Court held that the state could be made liable to pay damages on account of negligence on the part of officials. The question as to whether the appellant state was liable to pay damages and whether the negligence could be attributed to it was examined. The Violation of duty was considered by the Division Bench and the compensation was

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\(^{253}\) AIR2004 Del. 107.  
\(^{254}\) AIR 2004 J&K 23.
calculated by considering the deceased person's earning per day Rs. 150/- and his compensation was fixed as Rs. 5,08,000/-. 

In the *M.P. Electricity Board v. Shail Kumari and others*\(^\text{255}\) a cyclist aged 37 was electrocuted from the live electric wire, which fell on the public road. The claim for damage filed by the dependent of the deceased was resisted but the High Court directed to pay compensation of Rs 4.35 lakh to the claimants. Before the Supreme Court appellant sought exception to the rule of strict liability. Even assessing that all safety measures had been adopted in the undertaking the activity of hazardous or risky exposure to human life was liable under the law of torts to pay compensation for the injury suffered by the victim. The basis of such liability was a foreseeable risk inherent in the very nature of such activity. One of the exceptions provided was the act of stranger that did not apply so was not available to the board as the act attributed to the third respondent should have been anticipated or the consequence should have been prevented by the appellant board.

From the above cases, it was concluded that decision and the observation of Justice Peacock in *P&O*, made a confusion in distinguishing sovereign and non-sovereign function. This became more evident in the case of *Nobin Chander Dey* and *Hari Banji* when they interpreted the law differently in determining the immunity in the light of *P&O*. The interpretation followed in *Nobin Chander Dey* influenced the court more, than the 'Act of state'.

\(^\text{255}\) (2002) 2 SCC 162.
principle of Hari Banji. There was no doubt about the liability of the state in cases of non-sovereign functions.

From these cases, it was clear that the court faced the difficulty to decide whether the particular act of the state in question is sovereign or non-sovereign. There were no guidelines issued by the court or legislature for demarcating these two functions. Really there is no rationale in distinguishing it, because of this perplexity, in certain cases, the court adopted the traditional custom of treating the function as sovereign and non-sovereign as the sovereign functions cannot be done by private persons but in the case of non-sovereign functions, which can be done by private persons, the state was held liable. While determining liability for the non-sovereign functions, the court in certain cases applied the theory of benefit and ratification to restrict the liability of the state for non-sovereign functions also.

After the commencement of the constitution, a considerable change was made by the judiciary, by narrowly interpreting the sovereign immunity to protect the rights of the citizen of a democratic country, as decided in Vidyawathi's case. In an action against the negligent or arbitrary acts of the employee of the state, under the statutory function like injury due to rash and negligent driving, seizing the goods illegally and arbitrarily by the employee and refusing to return the goods even after the conclusion of trial was over. Thus the courts began to limit privilege to the consequence of the act. In cases like Nagendra Rao and Lucknow development authority, the court was
reluctant to consider the sovereign immunity but is not inclined to overrule the
decision of Kasthurilal. Because of uncertainty in distinguishing these
functions, decision depends on the discretion of judges.

(ii) Exemption from liability on the ground of sovereign immunity

As stated earlier after the decision of Peninsular and Orientation Steam
Navigation case, the divergent views followed in cases like Nobin Chader Dey
and Hari Banji, to grant immunity to the state. In the former case, the court
followed the distinction between sovereign and non-sovereign and in the latter
the court limited the application of the immunity only to the ‘Act of state’.
Now let us go through the cases where the court exempted the state from
liability.

As explained earlier (Nobin Chander Dey\textsuperscript{256}), the distinction based on
sovereign and non-sovereign principle was applied to determine the
maintainability of the suit against the state, in the subsequent cases. This
principle helped the court to interpret the functions of the state according to
their will and pleasure. If they wanted, they could give privilege to the state
making the act as sovereign. There was no a rationale criterion to determine a
particular act as sovereign.

\textsuperscript{256} Supra note 35.
In *Shiva Bajan*\textsuperscript{257}, the police officer who seized the goods under a statutory authority, failed to return the same after the release, when he went to claim for. In an action against the state for compensation for the loss of goods, the court dismissed the suit on the ground of exercise of public function.

Here the statutory privilege was extended to the consequence of the act even if the concerned officer had done the act negligently, without keeping it in safe custody.

There is no justification in extending the privilege to negligent act. Here the court failed to see that the statutes are made for the purpose of exercising a statutory duty by the employee of the state without any hindrance. This can be enjoyed, provided if he had done the act in good faith. There is no need of extending this privilege in case of negligence abuse or excess of power. In this case the goods were seized while exercising statutory authority but it was refused after the order for release. Without considering the breach of duty of the employee the court dismissed the suit on the ground of non-maintainability of the actions for the statutory function done by the employees.

In *Mc Inery v. Secretary of state*\textsuperscript{258}, the plaintiff sustained injury, while walking along the public road by coming in to contact with a post set up on the road, due to the negligent act of the employee of the state. By putting up a post, the government was not carrying commercial or trading operation. Flecher, J. by relying on Nobin Chander Dey said that the maintenance of public path is

\textsuperscript{257} *Supra* note 37  
\textsuperscript{258} *Supra* note 38
not a commercial function which is relating to sovereign function. So the state was exempted from liability on the ground of privilege of doing public function. He questioned that

'What commercial undertaking or other trading operations was the government of India carrying on in maintaining the public path on the public highway?'

He further restricted the state liability for such functions only, where there was some benefit or advantage to the government there could not be any liability unless it resulted in its benefit. Then court applied the theory of benefit and held the state not liable as it did not benefit by the act.

The theory propounded is that state liability would extend only where there were some benefits to the government out of the alleged tortious act. The very purpose of the institution 'state' is for the benefit of the people. Instead of compensating the infringement of the rights of the people, the court tested whether the state benefited from the public function.

In the case of Secretary of State v. Cockcroft, when the driver of the military vehicle suffered serious injuries, due to the negligence of the P.W.D. employee, suit for compensation was dismissed on the ground of sovereign immunity.

There is no logic in dismissing the suit on the ground of sovereign immunity. Here the injury was caused because of negligently storing the heap

\[259\, Supra\, note\, 39\]
of gravel, on the sides of the road and after committing negligence, the state claimed privilege. What is the justification, in granting privilege, on the ground that there is no profit, to the government by conducting public function?

The same way in *Kesoram &Co. v. Secretary of state*[^260], when the war goods were brought by the private company due to commandeering orders, the authorities failed to take delivery of and pay for it. In an action by the company, the court held that the suit was not maintainable on the grounds of sovereign immunity.

Here the court had to see that the company had acted on the basis of valid order, and the government failed to comply with it and so it was necessary to compensate the company by the government for the value of the goods. Instead, the individual company had to bear the loss and this was great injustice shown towards the company by the court on the ground of sovereign immunity.

In *Etii v. The secretary of state*[^261], when the child was lost due to the negligence of the hospital authorities, the court exempted the state from liability on the ground of sovereign immunity and stated that the hospital was run for the benefit of public out of the revenue. But the court failed to understand that the revenue can be used to compensate the injured due to the act of state as explained in P&O.

[^260]: Supra Note 40
[^261]: Supra note. 41
In *Gurucharan kaur v. Province of Madras*\(^{262}\), the police officer acted in good faith according to the instruction of the public authority, but mistakenly prevented the Maharani instead of the Maharaja from leaving the station and boarding the train. Dismissing the appeal, the Federal court confirmed that the government could not be held liable for the improper conduct of the public servant unless those acts had been done under the orders of the government or had been ratified by the government.

If the decision depends upon the ratification, the state can easily escape from liability. It is also necessary to note failure on the part of employer in complying with the statutory duty of selecting the good and efficient workmen while giving employment. If a suit for compensation is filed by the aggrieved for the wrong committed by the employee of the state, the court has to see whether the act committed by the employee was ratified by the state or not. If ratified, state would be liable for it. So the judiciary can exercise its discretion to favour the state by exempting it from the liability.

These privileges can be used to protect the concerned officer who had done the act in good faith but this Privilege can not be used to determine the state liability. Actually this would help the state to enjoy more privilege if the liability depends upon the ratification by the state. The state can ratify the acts which would not impose liability.

\(^{262}\) *Supra* note 43
Union of India v. Harbans Singh\textsuperscript{263} is an appeal filed by the Union of India, the defendant against the decree dated 24-7-1953 issued by the first class Subordinate Judge of Delhi. The plaintiffs are the sons, daughters and widow of Khushial Singh, the deceased and they brought an action to recover Rs 50,000/- as damages, on account of the death of their father resulting from the defendant Union of India's employee for knocking him down and running over him when he was riding his cycle.

The plaintiff alleged this was due to the rash and negligent driving of the defendant's employee in driving the military vehicle in such a manner as to cause the accident that resulted in the death of their father.

A number of defences were taken by the defendant, Union of India; one of them was that it was not liable to damages for any acts of its servants done in pursuance to the exercise of sovereign powers. But the trial court decreed the suit against the defendant and granted a decree of Rs10,000/-

In the appeal before court, the only point raised was one regarding liability of the state for damages by the act of the defendant, the employee of the Union of India. It was contended by the Union of India that it was not liable for the torts committed by its driver while driving the military truck for bringing meals from the cantonment and for distributing the same where military personnel were working. When it was being thus used the accident took place resulting in the death of the person.

\textsuperscript{263} AIR 1959 Punj 39.
In this case the court referred the P&O case to test whether particular act in question is sovereign function or not, and came to the conclusion from it that

“There is a great and clear distinction between acts done in exercise of what are usually termed sovereign powers and acts done in the conduct of undertakings which might be carried on by private individuals without having such powers delegated to them”.

In this particular case the learned judge Megar Singh J. came to the conclusion that the act was the type of act that could be carried on by private persons without reference in any delegation of power by the sovereign for carrying it out.

What was done in this case was carrying meals to the military personnel in a military vehicle and on the basis of illustration given for sovereign function in P&O as any act of duty done for military or naval etc, this act of the defendant was done while he was engaged in military duty in supplying meals to the military personnel and the East India Company could not have been liable and not be sued if the company were doing these acts.

So there was no cause of action against the Union of India because the position of Union of India was like that of East India Company; no action would lie against it. The Court concluded by applying technical ground that at the time of accident it was engaging in a sovereign function.

In this case the court had taken the view that meals being taken by the truck belonging to the military department from cantonment for being
distributed to the military personnel were a sovereign function and that the state was not liable for the death of a person resulting from an accident caused by the truck.

In this case the court failed to note that Military function may be a sovereign function but the person got injured due to the negligent act of the military staff while carrying meals to them. After committing a negligent act and thereby killing the plaintiff's father, there is no justification to say that the state is exempted from liability because they were exercising sovereign function. They forgot to consider that vehicle used by the defendant was in military service and the accident happened because of the negligence of the driver and it was in the course of employment. Without applying ordinary vicarious liability, the privilege granted to the state is not justifiable even if in the name of military work.

In K.Krishnamurthy v State of A.P\(^2\)\(^{264}\), a boy of five years was going by the side of the road and a road-roller belonging to the P.W.D. was coming at a high speed after the work, for being placed at the place of its halt. When the road roller came nearer, the boy got up and then the edge of the truck struck him. He fell down and his right palm was crushed under the front wheel so that his hand was amputated up to wrist. The accident could have been avoided if the driver had not been negligent. He failed to give warning to the persons

\(^{264}\) AIR 1961 A.P. 283.
standing there. The accident occurred because of the rash and negligent act of the driver.

The trial court took evidence and came to the conclusion that the accident was the direct result of negligence. It was due to the rash and negligent driving of a road roller by the driver. As contended by the driver the accident was not inevitable. The court also came to the conclusion that the damages claimed were reasonable and in no way excessive. The disability incurred by the plaintiff was permanent and the plaintiff has to suffer for this disability in future. But the court expressed its difficulty of giving favourable decision by taking into consideration the condition of the boy.

In appeal it was proved beyond doubt that the accident occurred because of the negligence of the driver causing permanent injury to the boy. He was not crossing the road and he was well on the side of the road.

The court explained that the acts done for the exercise of governmental powers may fall under different categories. They are one- 'acts of state' where the immunity is absolute and other class of acts are those which are done under the sanction of municipal law or statute and its exercise of powers thereby conferred.

This classification again is divided into two. They are those connected with detention of crown land and the one connected with duties. Here the driver was an employee of the PWD and was entrusted with the work of highways. The road roller was sent from this department and halted there in the
department after the work got over. It was concluded that the road roller was being used for the maintenance of highways. Making and maintenance of highways is a public purpose, the duty of the government and not a commercial undertaking. Now this function is largely delegated by statute and municipality.

Justice Kurnarayya of the Andhra Pradesh High Court observed that the road roller used for the maintenance of highways was for the public purpose, the government was not undertaking any commercial activity so no liability was imposed.

The court itself expressed its helplessness in compensating this small boy. According to the present law, the court could not give any remedy because of the sovereign immunity even if the boy suffered due to the negligent act of its employee. In the present case, the small boy had taken reasonable care and caution and the accident occurred because of the negligence of the driver. Article 300 of the constitution is intended to meet the needs of the welfare state but this is equal to the Government of India Act 1858. This shows the reluctance of the court and legislature in taking actions against the state. Even after the employee committing negligence which resulted in the injury, what is the justification in telling that state has not benefited out of the act and so the victim has to go without remedy. Here the court expressed its shock over the suffering of the boy and sympathy of taking such a decision of not providing remedy to him due to uncertainty in law. In
case of urgent need, the judiciary must be bold enough to create the law so as to give justice to the parties.

In Kashturilal\(^{265}\) (facts stated earlier) what is the justification in telling the owner that the seized goods were lost and the state is not liable for the damage suffered by the plaintiff, because the officers acted on the ground of statutory function. In this case the court would have followed the decision of Vidhywathi. V. State of Rajasthan\(^{266}\) in which it was stated that there is no justification distinguishing the function of the state as sovereign and non-sovereign in a Democratic Republican form of state while fixing the liability for its acts. Instead of following the above decision, Gajendragadkar C.J.said that the employee of the act had acted under a statutory authority which could not be done by private person. The water tight compartmentalization as sovereign and non-sovereign or governmental or non-governmental function was out of tune with a modern jurisprudential thinking and unworkable in practice.

Actually this privilege is given to protect the public servant from liability and not to protect the state from liability. Whenever a public servant is engaged in statutory duty he has to comply with it so this privilege is extended to the consequence of the act also. But there is no need of extending this privilege in the case of state if the citizen suffers by the act. The privilege can be extended, provided he has committed the act without any negligence.

\(^{265}\) Supra note 48
\(^{266}\) Supra note 46
In all the above cases the wrong or damage was caused by the employee of the state, while exercising the statutory function and the privilege was granted on that basis. But there is no justification in granting immunity to the state in case of negligence of its employees even if it was done under a statute.

In *Maharaja Bose v Governor General in council*\(^{267}\), the suit was against the Governor General in Council, for damages due to malicious prosecution. The facts of the case is that on the evening of Feb 3 1944, the plaintiff boarded an interclass compartment in Punjab Mail at Howrah. On 4\(^{th}\), the said train stopped at Asansol railway station, then three soldiers holding third class ticket forced their way into the said compartment. One of the soldiers occupied the plaintiff's seat. He approached two employers of the defendant's company but no steps were taken against them. When the train started, the said soldiers threatened him, thereupon out of fear he pulled the emergency chain and caused the train to stop. Defendants servants to whom the plaintiff had earlier complained reached there and made certain enquiries and asked the soldiers to vacate it. While this was being done the Assistant station master on duty rushed in to the compartment and accused the plaintiff for pulling the chain and abused him by using filthy languages. The Plaintiff who was a renowned dancer was on the way to take part in a dance programme at Patna in aid of Red Cross. But the plaintiff failed to give his name and identity so the railway servant arrested him and with the assistance of others.

\(^{267}\) AIR 1952 Cal 242.
he was dragged out of the compartment and was taken in custody of the railway police on false charges and detained there and later released on a personal bond. On Feb 23, 1944 he was prosecuted before the Magistrate ultimately acquitted on July 24, 1944.

When he claimed compensation on the ground of vicarious liability, the defendant contended that the suit was maintainable because he was arrested because of his failure to give his name and identity and he had honestly believed in the guilt of the plaintiff. According to section 132 of the Railways Act, the railway employee was empowered to arrest a person if he failed to reveal his name and identity.

Mitter C.J. stated that

‘Whatever the damage he suffered in consequence of the unfortunate episode must be borne by him; the tax payer cannot be answerable for the same’.

This act was committed by the employee incidental to the act of commercial undertaking by the state.

Then the doubt arose regarding the maintainability of the suit. Here the maintainability of the suit against the state was determined by referring decision of P&O, by Sir Barness Pea Cock, in which, reference distinction had been made between the acts which are done by the crown in pursuance of ventures, which a private individual is undertaking and acts done in exercise of governmental powers, which would not be lawfully exercised by the sovereign.
authority or persons to whom the sovereign authority might delegate such powers. So in this, suit would lie against the government in a business or commercial undertaking owned by the state based on the theory of benefit. While conducting the alleged wrong the employee was engaged in a commercial function which is incidental to the conduct of commercial undertaking. An undertaking which a private individual can equally undertake. So it is not in the exercise of sovereign powers. Thus the action was maintainable. Next question was whether the state had committed the alleged wrong of malicious prosecution. Here the plaintiff failed to give his name and identity so the railway servant was empowered to arrest the plaintiff. So the state was not held liable for the act of employee.

There is no rationale in applying theory of benefit to determine the maintainability of the suit. This theory would help the court to show a leniency towards the state than protecting the injured citizen. According to this theory, liability of the state depend upon, whether the state had benefited out of the act committed by the employee. After injuring the rights of the people, it is not justifiable to say that the state had not benefited out of that wrong so the suit against the state would not be maintainable.

In state of M.P v Saheb Dattamal and others\(^{268}\), it is an appeal by state from the judgment and decree against it passed by the Addl. Dist judge Indore.
in favour of heirs and the dependents of Lala who was killed by a shot alleged to have been fired by the police while controlling riot on 21st July 1954. On that day there was a student’s agitation at the main road at Indore. The Dist Magistrate ordered firing. When Lala and his grandson after closing the shop were nearing their house, police from behind fired and one of the shots bored through the body of the car from behind and hit Lala on his back as a result of which he died. The shooting was illegal and damage was claimed.

The trial court decreed Rs. 5,000/- and Rs. 4,000/- for Lala’s car unusable to others and Rs.1000/- to the grandson for the loss of guidance in his business by grandfather.

On appeal by state against this order the appellate court said that liability of the state would not arise while exercising sovereign function to maintain law and order. There is no remedy in Indian law as we have no similar law like the Crown Proceeding Act. Lala was shot while the police were trying to disperse the mob and the price of the car was allowed in the appeal and the grandson could not prove how much business loss was suffered or affected due to the death of his grandfather. In this case, the court failed to consider the grievance of the victim and the violation of guaranteed right to life.

In State of Orissa v Padmalochan269 the plaintiff, an advocate claimed compensation of Rs. 10,500/- as general damages and Rs. 500/- as special

269 AIR 1975 Ori 41.
damage from the defendants. There was a students agitation on 28th Oct 1964, while he was standing in the court premises he saw students were assaulted by C.M.P. personnel and later he himself became the victim.

But the defence of state was that four students went into S.D.O.'s office and asked him to comply with the demands. On refusal they forwarded to the collector. Then S.D.O. specially deputed CMP personnel for this purpose, came to maintain law and order but the students snatched away their lathe. So they were forced to use force to maintain peace and order.

After going through Article 300 and its reference back in to Government of India Act 1858, P&O' case and the test was laid down for determining the liability of the state.

Certain principles emerged out of it. They are

1. The Union of India and the states have the same liability for being sued in tort committed by their servants which the East India Company had.

2. The Union of India and the states are liable for damages for injuries caused by their servants if such injuries would render private employer liable.

3. The government is not liable for tort committed by its servants if the act was done in the exercise of sovereign power.

4. Sovereign powers mean powers which can be lawfully exercised only by a sovereign or by a person by virtue of delegation of sovereign powers.

5. The Government is vicariously liable for tortious acts of its servants which have not been committed in the exercise of sovereign powers.
6. The court is to find out in each case whether the impugned act was committed in the exercise of delegated sovereign power.

7. No well defined test as to the meaning of sovereign power has been attempted or can be precisely laid down. Each case must be decided on its own facts. Functions relating to trade business and commercial undertakings and to socialistic activities by a welfare state do not come within the purview of delegated sovereign authority.

8. The sovereign function of the state must necessarily include the maintenance of the army, various departments of the government for maintenance of law and order and proper administration of the country which would include ministry, police and the machinery for administration of justice.

9. Where the employment in the course of which a tortious act is committed is of such a nature that any private individual can engage in it then such functions are not in the exercise of sovereign power.

10. In determining whether immunity should be allowed or not, the nature of the act, the transaction in the course of which it is committed, the nature of the employment of the person committing it and the occasion for it have all to be cumulatively taken into consideration.
Article 53\textsuperscript{270} 73\textsuperscript{271} and 162\textsuperscript{272} of the constitution makes it clear that the sovereign executive power can be exercised even in a sphere where there is no legislation. So it is therefore not correct to contend that unless a function is authorized by a statute, the government function or act cannot be done in exercise of sovereign power of the state.

In \textit{Dattamal} as stated earlier, the act was in the exercise of the sovereign power of the state and the police officers were purported to disperse the unruly mob. In every case where the government is sought to be made vicariously liable for acts done by its servants there is invariably an element of irregularity excess or abuse of power.

In \textit{Union of India v Sugrabai}, accident occurred while an equipment was transported from the workshop to the artillery but this can be done by the private persons also, so it was treated as non-sovereign function and hence the state was made liable for it. The same way in \textit{Rooplal v Union of India} for the illegal act of committing 'tort of conversion', the Union of India was held liable for it.

But here the nature of the case was like that of \textit{Kasthurilal} in which the state was held not liable for the act which was committed in the course of

\textsuperscript{270} Article 53 lays down that the executive power of the Union shall be vested in the President and shall be exercised by him either directly or through officers subordinate to him in accordance with the constitution.

\textsuperscript{271} Article 73 prescribes the extent of executive power of the Union. Subject to the Provision of the Constitution the executive power of the union shall extend to matters with respect to which Parliament has power to make law and to the exercise of such rights authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement. The Article itself shows that even if there is no statute in a particular field the executive power of the Union extends to such matters.

\textsuperscript{272} Article 162 is in similar language with reference to the state.
exercising sovereign functions of the state. Section 127 Cr.P.C. confers the power to disperse an unlawful assembly on the Magistrate or officer in charge of the police station and section 128 they may disperse an unlawful assembly by force and 129 and 130 authorises to use force to disperse the assembly.

Here the question that arose was whether the illegality committed by the police personnel in making lathi charge without the direction from magistrate comes within the purview. But Mr Misra conceded that the position of the police personnel for cordoning in front of SDO's court was in the exercise of delegated sovereign powers. So here the force was used by the Police Personal to disperse an unlawful mob and so the state was not liable to pay compensation for the illegal acts committed by the defendants.

The Court clarified that the plaintiff could not prove that the injuries were received from the defendants. Using force to prevent riot and to disperse crowd etc were sovereign function of the state and was justified.

While suppressing riots, maintaining law and order, use of force is justified even if there may be interference with the rights of the citizens but this has to be compensated by the state. Now the courts began to think about the real suffering of the victim due to defective law which is not suited to the modern world. So there is an urgent need to enact a law to limit sovereign immunity by the state. In order to maintain law and order, the state needs some form of extraordinary power there is no doubt about it. Even if use of power or force by the state is justified it must be within the law and it cannot be claimed by throwing out the claim of ordinary man.
In *state of M.P v Chironji Lal* \(^{273}\) the Plaintiff claimed Rs.600 as damages caused by police to loud speaker amplifier, mike and other accessories which when a student’s procession was being taken out and the loud speaker fitted in the Rickshaw was damaged due to the lathi charge. There was no dispute to the point that there was lathi charge and the loudspeaker was damaged because of it.

The state resisted the claim of the plaintiff and contended that the state cannot be made liable for the damage even if caused by the acts complained of by the plaintiff. The trial court decreed the suit for Rs377/-. Aggrieved by this judgment and decree the defendant preferred an appeal which has been dismissed hence this Second appeal.

Before the appeal court, the learned counsel argued that under section 30 of the Police Act deals with the regulation of procession and section 144 of Code of Criminal Procedure Code deals with the maintenance of law and order. Quelling of riot is considered as sovereign function and the state government is immune from liability.

It was contended that here the issue was regarding the exceeding of power by the police and the state is liable for the unlawful acts committed by the employees in the course of employment.

In this the court concluded that lathi charge was used only when the mob became unruly. This loud speaker kept in the auto which was used for

\(^{273}\) AIR1981 M.P 65.
leading the procession when hurriedly taken to the other side of the road became damaged on account of lathi charge.

The court made a reference to P&O and concluded that

'Where an act was done in the course of the exercise of powers which could not be lawfully exercised save by the sovereign power, no action in tort lay against the secretary of state for India in Council upon the principle of respondent superior”

Then the court referred to the cases like state v. Dattamal, in which the liability was sought to be imposed on the state on the ground of the firing was in excess of the need and it was held that the state was not liable for the act and immunity was extended to the consequence of the act. In the state of Rajasthan v. Vidyawathi it was held that the state can be made vicariously liable for the tortious acts, like any other employer. In the case of Rooplal v. Union of India, the state was held liable due to the nature of the acts complained of in that case.

In this case the court applied the Dictum laid down in Kasthurilal as stated earlier, the test to know whether the state is liable in a given case or not has been decided in the light of it.

"If the tortious act committed by a public servant gives rise to a claim for damages the question to ask is, was the tortious act committed by a public servant in discharge of statutory functions which are referrable to and ultimately based on the delegation of the sovereign powers of the state to such
public servants? If the answer is affirmative the action for damages for loss caused by such tortuous acts will not lie. On the other hand if the tortious act has been committed by a public servant in discharge of duties assigned to him not by virtue of the delegation of any sovereign power, an action for damages would lie.

This function of regulation of procession is delegated to the police by section 30 of the Police Act and Section 144 Cr. P. C. is used to maintain law and order and this case also falls within that dictum and so the state is immune from the liability sought to be enforced by the plaintiff.

From the above cases relating to exemption from state liability, It was concluded that the judicial creation of the distinction of sovereign and non-sovereign in determining state liability first applied in P&O. But there is no rationality, no demarcation or guidelines stated by the judiciary or legislature to distinguish the function of the state as sovereign and non-sovereign. In certain cases the court followed traditional method to determine the function as sovereign and non-sovereign. In order to limit the liability of the state in case of non-sovereign functions, the courts began to apply the theory of benefit, theory of ratification etc. By way of applying this principle, the court narrowed down the maintainability of suit against the state for non-sovereign functions. So this principle helped the court to exempt the state from liability
and protecting the citizen. If the judiciary wants to give favourable decisions to the state, it could interpret the law in the light of these theories.

Even if a chain of Acts were passed like the Government of India Act 1858, 1915, 1935 it made no effect in the decision making and the government enjoyed this privilege even after the commencement of Constitution.

There were several criticisms regarding the law relating to state liability in torts. The Law Commission asked why the government should not be placed in the same position as a private employer subject to the same rights and duties, imposed by the state. The commission recommended several times to modify the existing law and introduced the Bill to amend the law in this regard to make the state liable like that of an ordinary person. Late Dr. Rajendra Prasad, President of India took initiative for considering the Law Ministry of India to amend the law similar to English Crown Proceedings Act 1947. This matter was referred by the Law Commission and went through similar laws existing in different countries and submitted the First Law Commission report in the Parliament on August 31st 1965 but this lapsed due to the dissolution of Third Lok Sabha. This was reintroduced in the year 1967 but the government allowed the bill to lapse on the ground that if it was enacted, it would bring rigidity in determining state liability in torts. It was stated that the bill will do away with judicial discretion to determine the act as sovereign and non-sovereign. The court failed to produce any jurisprudence as to the liability

of the state. The better course the court would have adopted by overruling the unfortunate law which is the creation of the judiciary so that the remedy can be obtained from the lowest court as envisaged in the Common law system, so that the error in the judgment can be cured.275 A bill was again presented in the Lok Sabha on March 25, 1969 to make uniformity of law in India in this aspect making the government liable like that of an ordinary person of full age and capacity. This bill exempted the state from liability if any acts were done in good faith. By providing exemption, actually it was protecting the rights of the state than protecting the rights of the citizen. Even after fifty nine years of independence no sincere effort has been made to modify the law relating liability of the state in torts. Modern view butters the concept that state is the guardian of the citizens. So the dominant theme of twentieth century private law has been the replacement of tort liability by the principle of compensation276. The Controversy whether the state should be made liable for the wrong of its servants is in fact is the liability of the state itself and the ground on which the state claimed immunity was the doctrine that as the makers of the law must be beyond the reach of tentacles277. Now there is no satisfactory provision to fix the liability of the state in India.

277 B.M. Thulasi Das, Liability of the State for the wrong of its servants 1965 KLT (J)12.
(iii) **Conclusion**

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

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to pay damages The court repeatedly stated through the decisions that the remedy lies in the hands of legislature and that it would amount to denial of justice to the aggrieved. The law being the civilizing machinery of the people, it is necessary to make the law as a predictable working system.

**Law relating to state liability in the U.K, U.S.A, and France**

The Present law relating to state liability in India is not adequate and it is indispensable to amend the law in this area. Law in the above countries would shed some light on the proposal.

**Law relating to State Liability in England**

In England, the liability of the Crown was determined by the two ancient fundamental rules, which existed in British Constitutional Law. They were substantive law base on ‘King can do no wrong” Rex non potest Peccare, and Procedural law “King could not be sued in His own Courts”. These two artificial theories of feudalism do not mean the king is above the law but he must be just and lawful.

In the political sphere, if the administration was badly conducted, it was not because of king’s fault but it was because of the advice given by the ministers. In the legal concept, his privileged position and powers, is not amenable to the ordinary jurisdiction but law gives him no authority to transgress. Under feudalism it was unthinkable to file a suit against the King.

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So that the king or Lord could not be sued, in their own courts, as they were at the apex of the feudal pyramid. There was no human agency to enforce law against the king. The King was not liable to be sued civilly or criminally for the supposed wrong doing. This was invoked to negate the right of the subject to sue the king for the redress of wrongs committed by him. The maxim *qui facit per alium facit per se* and *respondent superior* had no application in case of wrong committed by the crown servants. No form of writ or execution could be laid against him as there was no way of compelling his submission to it. This practice made the crown servant who is sued in respect of a tort that he had committed in the course of employment, personally liable for it. In 1234, the King’s court proclaimed “Our Lord the king cannot be summoned or receive a command from any one”. The king is the fountain of justice and equity and that he could not refuse to give justice when petitioned by his subjects. The king had to redress claims against him, and refer the matter to the courts. Later a standard of procedure in presenting the claims against the king by the Petition of Right was introduced.

During the fourteenth and fifteenth century, number of petitions of different claims were brought to get justice from the crown. By the petition of 1256, an attempt was made to seek remedy, against the king’s feudal powers, and their demand was to confer power to the royal courts, to deal with anti-feudal powers. The king and his officers could be sued, by waiving the

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282 Quoted by G.P. Verma, State Liability in India, p.25
privilege of non-suability, with the commencement of statute of Westminster 1275. The wrong done under a royal commission was made actionable in 1331. Abolition of Star Chamber in 1641 and the enactment of Habeas Corpus Act 1679 was a blow to feudalistic powers of the Crown. After the revolution of 1688, the king’s powers gradually eroded, the judges began to enforce contract against the king. By the Petition of Right 1660, the difficulty of proceeding against the king due to sovereign immunity was relaxed. If the petition given to the Secretary of state for Home Department was rejected, there was no remedy against the king. When the fiat is obtained law suit is ensued between the petitioner and the Attorney General. After obtaining the fiat or justice, the plaintiff could seek the help of the regular courts for getting justice. But in the case of tort, there could be no remedy against the king. Thus in the past, the crown was not liable in tort.

In the nineteenth century, the ordinary vicarious liability began to apply so that the personal liability of the official was recognized and this became the great bulwark of the rule of law. The damages were awarded and they were paid out of public funds. The laws, relating to the liability of the ministers were not adequate, and it was also necessary to prevent immunity of the officials so a draft bill with regard to the governmental liability was prepared by the Crown Proceedings Committee in 1927. In practice, the action against the officers concerned was defended by the Treasury Solicitor but the difficulty arose when the actual wrongdoer was not identified. Then the government
department began to nominate a defendant, putting up nominated defendants was criticized by the House of Lords, as whipping boys. But this practice was condemned by the House of Lords. Firstly there was no clear evidence as to which crown servant was liable and secondly the suit could be filed only against the representative suit and not against he real defendant. In Adams v. Naylor the court expressed its difficulty in exercising jurisdiction and in deciding the case against the defendant who is in truth not the real defendant. This case was decided on the ground that the claim failed by reason of the provisions of personal injuries (Emergency Provisions) Act 1939. The action failed because of statutory immunity of the Crown but the House of Lords pointed out that it would have also failed in common law. In the course of judgment, the court observed that the legislation on the subject or liability of the crown for the torts of its servants was overdue.

In certain kinds of torts the employer will be liable and not the servant example, for not providing adequate safety measures in the factory.

In Royster v Cavey, the court expressed its inability to pronounce judgment against the defendant who in truth is not the real defendant. Such a

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283 *Adams v Naylor* (1946) 2 All ER 241. Action for damages was brought against the army officer in charge of that area, for the death of a boy when he came in to contact with wire fence of the mine field owned by the ministry House of Lords criticized the practice of instituting suit in the name of nominated defendant and dismissed as the negligence could not be attributed to the officers as he was no way responsible for laying the mines and causing death and injury to the boys. Mine field was in the occupation of the crown and not in the occupation of the nominated crown servant.

284 (1946) 2 All ER 241,245.

285 (1947)K.B. 204 ; (1946) 2 All ER 642. In this case when an employee claimed compensation for breach of statutory duty against the occupier of the factory under Factories Act, suit being not
practice of rendering non-guilty as guilty was also repugnant to the Rule of law. The House of Lords refused and protested against the fiction of taking action against the nominated defendant who could be sued on the understanding that the crown would stand behind him and indemnify him against damages.

In the above two cases, there was sufficient cause of action to sue for compensation. But Immunity of the sovereign debarred the plaintiff from representing the crown as defendant. In both these cases the court expressed its difficulty of deciding the case due to lack of jurisdiction. Till 1946, a citizen's redress against the crown for tortious conduct committed by its servants was at best indirect. Even if various reforms were introduced before the Act of 1947, all attempts were refused by the powerful government department. Due to the change in the socio-economic conditions (from Laissez faire to welfare system, the crown became the largest employer of men and the largest occupier of the property) and modern civilization, the government felt intolerable with the old feudal doctrine and felt the need to change the crown immunity rule. The decision in *Adams v. Naylor* in 1946 and the subsequent discussion, compelled it to introduce reform in the immunity principle as late as 1947 which resulted in the enactment of the Crown Proceedings Act 1947 which came in to force on January 1, 1948.

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lie against the state he took action against the nominated defendant supplied according to the agreement.
The Crown Proceedings Act 1947

This Act supported in making the crown liable, like that of private person of full age and capacity when the crown servant committed a tort in the course of employment. So that the ordinary legal process instituted against the crown, through ordinary courts and the remedies, such as an action for damages, injunctions and declarations become available. If the authority acted without power, there was no justification for it and it constitute torts or contract or any other wrongful acts and is actionable like a private person. The purpose of this Act was to put the crown in the shoes of an ordinary defendant. The crown would be liable as if the minister or servants were acting on the instructions from the crown.\footnote{Section 2 of the Crown Proceedings Act 1947, provides that: "(1) Subject to the provisions of this act, the Crown shall be subject to all those liabilities in tort to which, if it were a private person of full age and capacity, it would be subject:-(a) to torts committed by its servants and agents: (b) to any breach of those duties which a person owes to his servants or agents at common law by reason of being their employer: and (c)in respect of any breach of the duties attaching at common law to the ownership, occupation, possession or control of property; Provided that no proceedings shall lie against the Crown by virtue of paragraph (a) of this subsection in respect of any act or omission of a servant or agent of the Crown unless the act or omission would apart from the provisions of this Act have given rise to a cause of action in tort against that servant or agent or his estate."}.

The defence of 'Act of State' was available to the crown servant and this could be used by the crown also. This could be applied only in limited
circumstances like in the course of relation with another state or with the subjects of another state, and the claim arising out of treaty rights. The liability of the Crown with the respect to the failure to comply with the imposed statutory duty was dealt with in Section 2 (2) of the Act. According to this provision the crown could, be held liable for breach of statutory duty.

By means of Section 2(3) of the Crown Proceedings Act, the crown would be liable under common law, for breach of duty or breach of statutory duty. So common law action for damages would lie against the crown if a wrong was committed by its agencies. So that crown would be liable like that of an ordinary person, if any wrong was committed by its servants while exercising statutory duty.

In order to raise claim against the crown for the wrong of its servants or officials, certain conditions were required. The crown would be liable only if the particular officer was appointed by the crown and paid out of treasury. This

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287 Garner, Administrative law, p28.
288 Section 2 of the Crown Proceedings Act 1947 which provides that 'When the Crown is bound by a statutory duty which is binding upon persons other than the Crown and its officers, then, subject to the provisions of this Act, the Crown shall, in respect of failure to comply with the duty, be subject to all those liabilities in tort to which it would be so subject if it were a private person of full age and capacity.'

289 Section 2(3)of the Crown Proceedings Act 1947 provides that 'Where any functions are conferred or imposed upon an officer of the Crown as such either by any rule of the common law or by statute and that officer commits a tort while performing or purporting to perform those functions, the liabilities of the crown in respect of the tort shall be such as they would have been if those functions had been conferred or imposed solely by virtue of instructions lawfully given by the Crown.'
section had the effect of excluding the crown from liability, in cases of action taken by the servants of some statutory corporation. For example according to section 48 of the Police Act 1964, the chief constable was rendered liable to be sued and the injured victim was paid out of local funds. The purpose of giving such restriction was to exclude the crown from liability for the action taken by the officers or servants of the statutory corporation even if the particular corporation acted as an agent of the crown. In England, if a tort was committed by a police constable, the chief constable was responsible. The section 2 (6) of the Crown Proceedings Act made it clear about the liability of the crown.

The crown was exempted from liability 'while discharging or purporting to discharge any responsibilities of judicial nature vested in him or any responsibilities which he has in connection with the execution of judicial processes. Section 9 and 10 of the Act also exempted the crown from liability in connection with postal and armed Forces.

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290 Section 2 (6) of the Crown Proceedings Act 1947

'No proceeding shall lie against the Crown by virtue of this section in respect of any neglect or default of any officer of the Crown, unless that officer has been directly or indirectly appointed as an officer of the Crown and was at the material time paid in respect of his duties as an officer of Crown wholly out of the consolidated Fund of the United Kingdom provided by Parliament, the Road Fund or any other Fund certified by the Treasury for the purpose of this subsection or was at the material time holding an office in respect of which the treasury certify that the holders thereof would normally be so paid.'
Even though the postal department is exercised the governmental function, its liability was expressly laid down in the relevant statute. Such statutory corporation was created with a juristic entity and the liabilities for the negligent acts were determined according to the statute. This statutory corporation would be liable to be sued for torts committed by its servants as any other private employee.

Section 32 strengthened the principle of vicarious liability which said that no proceeding for the enforcement of claim was abated or affected by the demise of crown. This section guaranteed the rights of the people even without the existence of the crown.

The borstal officers failed to exercise statutory duty of taking proper control of supervision, resulting in the damage of the plaintiff and they could not justify their failure to oversee the damage done by the trainee, so the court denied the protection and shelter given to the servant under the crown’s mantle. The House of Lords applied the Crown Proceedings Act 1947 in determining the liability of the Home office in Dorset Yacht Co. Ltd v Home Office\(^\text{291}\). Here the court applied ordinary vicarious liability arising out of private law concept, the Home Office was held vicariously liable under the Crown Proceedings Act for the damage caused by the run away borstal trainees.

\(^{291}\) [1969]2 Q.B. 412. In this borstal boy, during training exercise, escaped from the Borstal establishment, caused damage to the yacht of the plaintiff. When sued the Home office declined to defend the case that they did not owe a duty towards the plaintiff on the ground of sovereign immunity. The court of Appeal rejected the claim, and on appeal before the House of Lords it was held that administration of this school is the primary and inalienable functions of the constitutional government.
who escaped. The court clarified that the crown’s unlawful command cannot be rendered lawful on the ground that crown could do no wrong. According to their legal system, the borstal affairs must be treated as if they were ordinary private individuals and this special duty statutorily imposed upon them to take care of and supervise the conduct of borstal boys as it were an ordinary duty owed by an ordinary private individual to other members of the public. For the breach of this public duty the remedy was found on the basis that duty was to be treated as if it were a duty privately owed

Merits of the English Legal System

The English legal system gives effective remedies in private law, in cases of infraction of primary rights. This private law concept is flexible enough to cope with public law situation and can be used to regulate public law relation by changing the Royal immunities to the Royal responsibilities. The English legal system has had some notable success historically. It has given remedies particularly effective in case of infraction of primary rights especially those relating to torts, flexible enough to cope with the public law situation.292

The Crown Proceedings Act gives a certainty regarding the area where the crown can enjoy privilege and exception. In the same way it was clearly explained the conditions when the crown becomes liable for the wrong of his servants or officials. Now the English system is successful in

safeguarding the primary rights and in giving the injured subject, an extremely prompt and efficacious remedy by directing its process against the immediately responsible individual. Payment of compensation maintains to restore the equilibrium where the injured cannot go to the original position and thus protects the rights of people in general293.

The primary function of the judiciary is to determine the dispute either between subjects or between subjects and states. In England the chief constitutional function is to ensure that the administration conforms to law where the supremacy of Parliament is absolute. The Parliament can override the decision of the court if need be with retrospective effect.294 More recent trend in England is that courts are capable of evolving new principles to meet the changing situation of the modern welfare state and to see whether the administrative agency has acted ultra vires or not. So judicial review is to see, whether the administrative agencies acted according to law. They must not act beyond the power conferred on them. So the function of the court is to see that these authorities whether performing judicial, ministerial, and discretionary do not act in excess of their power.

If the act of the Crown is outside the exemption, the ordinary courts possess jurisdiction to decide and the action will lie against the state. In England, no court is competent to enquire into the misconduct however gross

of an official performing public duty such as that incumbent upon a borstal officer, for the purpose of giving a remedy in damages to a member of the public, however directly injured. So the aggrieved has to approach the ordinary courts for getting justice.

In India, in addition to the defence of 'Act of State' there are other instances where the state enjoys privilege by distinguishing its functions as sovereign and non-sovereign though there is no rationality behind it. There is no demarcating line and guidelines for treating the public function as sovereign and non-sovereign and it is determined according to the discretion of the courts. In India, the principle of Respondeat superior is not applied in case of statutory functions done by the state.

2) Law relating to state liability - U.S.A.

In American legal system, the Rule of Law was absent in the field of governmental liability, as the government could not be vicariously liable, since it could not be subjected as defendant on the theory. There can be no legal right as against the authority that makes the law on which right depends. The reason for adapting the sovereign immunity principle in American legal system may be financial instability of the American states after the revolutionary war. Garner in an article seeking to explain Anglo-American approach towards administrative law commented that it is difficult to understand how in a democratic republic the people could have accepted the doctrine of immunity
of the state and its non-liability for damages inflicted by its agents on private individuals".\(^\text{295}\)

In 1798, the Eleventh constitutional amendment was passed to restrain state immunity. Judicial activism played a vital role in abolishing the doctrine of sovereign in some states but in some states this was left in the hands of legislature. In 1821, the first authoritative pronouncement regarding state immunity was made by Marshall C.J. According to him, no suit can be commenced or prosecuted against the United States, that the judiciary does not authorize such suit.

In 1868, the Supreme Court went to the extent of holding that no government has ever held itself liable to individuals for the misfeasance, laches or unauthorized exercise of power, by its offices of agents. It was thought that if the sovereign immunity principle is restricted, it would endanger the performance of public duties by the sovereign if the sovereign is repeatedly tendered with suits. In the year 1907, Justice Holmes, brought a powerful argument, supporting sovereign immunity. The Sovereign is exempted from suit because there can be no legal right against the authority that makes the law on which right depends and also the sovereign cannot exist in the absence of the government and this would be assumed only if some immunity is granted to it.

By the middle of the nineteenth century, the citizen was not satisfied with the doctrine of sovereign immunity and they proceeded action against the government for getting relief. Due to the dissatisfaction by the citizen, The Court of Claims Act was enacted in 1855 and set up a tribunal to investigate on claims against government and to submit a report. It was possible only in compensating a victim of administrative action arising out of contract but not the liability in tort. The result was that talented men were discarded from entering the government service due to the fear of accountability. The officers were not financially sound enough to pay adequate compensation to the aggrieved party.

This Struggle was continued by the citizen for the protection of their rights against the state. By the Twentieth century, there was a change in the attitude of people supporting sovereign immunity so that a gradual change was made from state irresponsibility to state responsibility. In 1910, certain claims for infringement of rights were recognized statutorily like compensation for admiralty and marine torts, federal employee's compensation, war damages, postal claims, and claims against the Federal Bureau of investigations. Thus the Bill for securing damages was introduced in 1924 and 1925 and later the Bill of 1928 adopted under the chairmanship of the senator which was vetoed by President Coolidge. In 1942 President Franklin Roosevelt in his message suggested a change in the law relating to governmental liability in Tort. This change could not be brought about due to Second World War
resulting in economic depression. Federal Tort Claims Act 1946 came into force. President Lincoln requested that citizens must get prompt justice from the government.

The remedy by way of personal liability was futile, where the officials doing the wrong may not be financially sound enough to pay adequate compensation to the aggrieved party. The United States found a solution to this problem by enacting the Federal Tort Claims Act 1946, which set aside sovereign immunity.

**The Federal Tort Claims Act 1946**

According to The Federal Tort Claims Act 1946 the United States is liable only for torts of any employee of the government, while acting within the scope of his office or employment. The basic provision of the Act towards sovereign responsibility is as follows:

The United States shall be liable respecting the provisions of this title relating to tort claims in the same manner and to the same extent as a private individual under like circumstances but shall not be liable for interest prior to judgment or for punitive damage.

The state should not be liable for all damages caused to private persons by its actions and it should be immune from liability in genuine cases. The legislatures and the judges were of the opinion that the state should not be responsible for all activities and not to fully curtail the sovereign immunity of the state. Borchard, who was in favour of governmental responsibility, stressed
the need of limiting the state responsibility. The exceptions in the Act are mainly divided into three categories.296

It was stated that the first part of this section leads to a confusion that should the state always be immune from liability for what is prudently done in carrying out a statute or regulation. The second part of exception says the liability will be in the same manner and to the same extent as a private individual under like circumstances. But in the exercise of discretionary functions, governmental units should be immune from liability for damages on account of negligence, fault, mistake or abuse of discretion. If the discretion is the basis for a decision, revocation of license, denial of zonal permit then the

296 The exceptions in the Act are mainly divided into three categories they are

1) Act or omission of officers while exercising their functions or abusing the power while exercising discretionary power.

2) There is no liability for intentional torts, any claim arising out of assault, battery, false imprisonment, deceit or interference with contract rights.

3) The U.S. government is not liable for any claims arising out of foreign countries. But no claim is allowed under this Act for the loss miscarriage or postal matters, assessment or collection of tax or customs duty or detention of goods by custom officials, claims in the Admiralty Act 1920, act or omission in administering trade in Enemy Act, upon the imposition or establishment or quarantine by the United States, Upon the injury to a vessel or to the cargo, crew or passengers of a vessel while passing through Panama Canal or in Canal Zone Waters, Upon the fiscal operation of the treasury or regulation of monetary system, activities relating to military, naval or Coast guard during war, act done in the foreign country, claim arising out of the activities of the Tennessee Valley Authority and activities of the Panama Rail Road company. Claim arising out of the Federal land bank a Federal Credit Bank or a bank of cooperatives.
party aggrieved has no cause of action against the government. This part also
invites confusion to decide whether particular act of the government is
discretionary function. The purpose of including the third category of
exception is not clearly mentioned in the Act. By which the state is exempted
from liability arising out of specific torts.

Law made the state of U.S. liable for tort claim in the same manner and
to the same extent as private individual but it provided number of exceptions in
which liability can be evaded. Most of the exceptions exempt the state from
liability.

Moreover there is no liability for intentional torts also. So the aim for
state liability became weakened by exemption clause in *Delehite v U.S.* The
United States was not held liable because the case involved is concerned with
the exercise of discretionary powers. The fault was in the discretion of the
officers in deciding not to experiment further with combustibility of the
material and in arriving at a decision to proceed with a manufacture and
fertilizer. It was also found that fault was not only with the planning level but
also with operational level. So neither the United States nor the negligent
official may be held liable and the only way to reduce grievance was by private
legislation for compensating the loss by the government. So the Supreme Court
held that the wrong was done in the exercise of discretionary power neither the

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297 346 U.S. 15, (1953) In this case large cargo of ammonium nitrate fertilizer exploded on board
a ship docked at Texas City in 1947 as a result of it more than 560 persons were killed and
3000 injured and property worth hundreds of millions dollars damaged. When the suit brought
against the government Lower court found the negligence in production and transportation. But the
act fell within the exceptional clause like discretionary power of the government.
government nor the officials were liable for the tort committed in the exercise of discretionary power.

In *Hargrove v Town of Cocoa Beach*\(^{298}\) where a suit was brought against the municipality for wrongful death of an inmate of a jail who was suffocated by smoke, majority held that municipality was liable though the function was governmental. In this case the court said that the court should be alive with the demands of justice.

In *Muskopf v Corning Hospital District*\(^{299}\) the Californian court expressed:

'The rule of governmental immunity in tort is an anachronism, without rational basis and the exception operate illogically so as to cause inequality’

The doctrine of immunity was mistaken and unjust and as an anachronism without any rational basis.

In *Monroe. Vs. Pape*\(^{300}\), the police officers who broke the petitioners house, without warrant, roused them from sleep and ransacked every thing in the house, subjected them to torture under police custody and so the Supreme court held that the police officers were to be held liable under section 1983. Now along with the expansion of the concept of state, the scope of this section is also enlarged. The important factors like the essence of the rule of law, corrective justice and elemental principles of justice, equal rights etc are

\(^{299}\) 55 Cal 2d 211
\(^{300}\) *Monroe. v. Pape* 365 US 167 (1961)
incorporated in section 1983. Thus section 1983 compensates the wronged, and at the same it condemns the wrongdoer.

**Merits of this system**

In U.S.A. there is a written constitution which cannot be overridden by the ordinary process of litigation, the judiciary is in a special sense, the guardian of the constitution and so they declare a statute to be unconstitutional and invalid if it violates the rights of the citizen. But there is a special provision for judicial review and there the judiciary is famous for judicial activism. Section 10 of the Administrative Procedure Act 1946 is for the purpose of judicial review. In 1976, the Administrative Conference drafted a legislation by which the Congress amended Sections 702 and 703 of Administrative Procedure Act to allow review of administrative action in suits against the government for relief other than money.

The study conducted by the California Law Revision Commission reported that absence of malice in the torts of state's employees, the public entity has to bear the loss so that the recent trend is that of increasing liability of governmental units and decreasing liability of public officers and employees. The Supreme Court in the U.S.A. is the highest in guarding the interest of the people. Remedies are also provided by the Federal Tort Claims Act. Thus today in the words of renowned judges of the Supreme Court J. Frank Further that U.S.A. is famous for, review of administrative action and their Constitution is the largest and the category of court's work, comprising
one third of the total cases decided on the merits. Even then the Federal Tort Claims Act needs to be amended; otherwise it would affect the human rights and dignity of the citizen.

**Defects of this system**

It provides a long list of exceptional clause which exempts the state from liability. The exemption given to the discretionary function of the state is a serious flaw of this Act. Even after the Federal Tort Claims Act the injured party's compensation, depend on the discretion of the judges.

The state liability is limited to negligent, wrongful acts or omission and the state must be liable for all consequential damages which would affect the safety and security of the person and property.

3). **State Liability – French Legal system.**

France is a welfare state governed by the rule of law\(^\text{301}\) and the state is subject to law and as far as liability is concerned, it ensures the governmental liability. The maxim 'King can do no wrong has been superseded by the maxim that the state can do no wrong and as a honest man it will seek to repair damages caused by its wrongful acts. The French administrative court which is adopted as a model by a number of countries, have the jurisdiction to annul illegal administrative acts, when the citizens are injured by the acts of government employee.

i) Development of State Liability in France

Before the Revolution of 1789, there was a struggle between the traditionalist Bonaparte and the reformist Parliaments then the king was advised by Conseil du Roi in legal and administrative matters and was dissolved the dispute between the nobles. After the revolution in 1789, revolutionaryists wanted to curtail the power of the executive and the Conseil du Roi was abolished and the king's power was curtailed. Napoleon, the first counsel favoured the freedom of the executive and reforms. He wanted to give relief to the people against the excesses of the administration.

In 1799 Conseil d'Etat was established with the purpose to resolve dispute but in the course of time it began to do judicial function and advisory function. In 1872 it pronounced a formal judgment in Blanco.

It was insisted that liability of the state or in case of public power for the acts of its servants, cannot be regulated by ordinary civil law. Those principles were more appropriate to the relationships between private individuals whereas state liability is neither invariable nor unconditional but is subject to special rules which have to take in to account both the requirements of the public service and the need to conciliate the rights of the state with the rights of the individuals.
A critical decision was taken in France, while deciding *L'Arret Blanco*. Since the liability of the state in the performance of a public service was involved, the case could not be tried by the ordinary civil courts but belonged to the jurisdiction of those tribunals of which the *Conseil d'Etat* is the chief, which had cognizance of the affairs of the administration. This decision was not accepted by the majority of the French jurists because the rules applicable to the liability of the state were special and peculiar. The administrative tribunals were more favourable to the state than ordinary people and the executive was able to claim privilege at that time and had a lingering belief of the immunity of sovereign's executive power from the control of any court.

The principle expressed in the judgment of the Tribunal des Conflicts in *Blanco* in 1873 is that “This liability is neither general nor absolute that it has its own special rules which vary according to the needs of the service and the necessity to reconcile the rights of the state with private rights .......”

*L'Arret Blanco* is regarded as one of main points of departure in the remarkable development of the French system.

The tribunal des conflicts established three principle of state liability

1) The state is liable for the fault of its servant

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302 T C 8 February 1873, S. In this case when a workman carelessly pushed out a truck from the factory, in Bordeaux a tobacco processing unit, it knocked over and injured a girl namely Agne Blanco, when sued the issued involved the state liability with regard to public service

2) The administrative liability should be subject to the rules separate and distinct from civil

3) The question of administrative liability should be decided by the administrative courts.

According to Professor Waline, the above two principles supported the sovereign responsibility and the state shall be liable but shall not be subject to such strict rules of liability as private individuals. Later they developed special set of rules to be devised and enforceable by the administrative courts regulating liability in respect of the exercise of supreme public executive power. According to the French legal system responsibility arise from deliberate and intentional harm arising from negligence or risk. Examples are riots, war damage and school accidents and accidents arising form public works and compensation for criminal injuries. Besides these, the French administration may be liable where there has been fault and risk.

By Droit Administratif, the state is subject to law and it ensures the governmental responsibility. It consists of rules developed by the judges of administrative courts, rules dealing with administrative authorities and officials, the rules dealing with the operation of public services to meet the needs of the people, rules dealing with administrative adjudication to avoid the encroachment by the courts on the powers of the administrative authorities and

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to prevent the intrusion by the judges in the administration. In the case of
dispute between the jurisdiction of ordinary courts and administrative courts it
is to be determined by the Tribunal des Conflicts. The function of Droit
Administratif is to help the citizen against the excesses of the administration.

The main purpose of Droit Administratif is to decide

1) The matters concerning litigation between ordinary courts and
the administrative courts

2) Special rules are developed by this courts

3) Dispute arising out of jurisdiction is determined by the tribunal

4) It protects the government officials

5) It acts as consultative body.

**French doctrine of liability of the state**

The French doctrine of the liability of the state is based on the theory
that the state is an honest man and will not try to avoid responsibility to its
citizens for damage done by wrongful or improper acts by raising the shield of
immunity of the state.

The *Conseil d'État* which is not bound by any code or civil law and the
two principles of state liability evolved from legalité and responsabilité
According to the former the administration must act in accordance with the law
and in the latter the administration will be responsible for the injury to the

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305 Durga Das Basu, Administrative law 2004. p378
citizen due to its unlawful act. There are two principles to deal with the administrative torts; they are faute de service and faute personelle.

In faute personelle, where there is some personal fault the official can be sued personally in the ordinary courts. In faute de service one which is linked with the service of the official, the injured party can sue the administration before the administrative courts.

In some case faute de service and faute personelle may be difficult to distinguish and a combination of the service fault and the personal fault is called a *cumul*. Then the victim can sue both in civil court and in administrative courts but that does not mean that the aggrieved party can claim from both sides The Conseil d'Etat has applied the principle of joint tortfeasor and it has the final words in apportioning the liability by contribution. The Conseil indicated that once the commune had paid the damages to the complainant, it could require to be subrogated to the latter right against the mayor for his personal fault. But this was recognized to be an imperfect and clumsy device. As a result the most injured party decided to sue only the administration in cases of cumul having regard to its bigger pocket so that the negligent officer escaped from liability. In practice these irresponsible officers were encouraged to repeat the same acts in future. Prompted from this policy consideration, the Conseil d' Etat decided to have a direct action for contribution or indemnity against the official. The action would lie in the administrative courts to apportion the ultimate share of responsibility between
the official and the administration in cases of cumul. When an official has been ordered to pay the damages by 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 fault. In such cases damages are contributed by joint tortfeasors.

In Delville\textsuperscript{306}, when the liability of the defendant was fixed, he claimed 50\% contribution from the administration on the ground that the accident was due to the defective breaks of the vehicle; The Conseil d’Etat upheld his claim. So where there is a personal fault combined with service fault the victim can sue either the official or the administration in the appropriate courts. The official can be made to contribute appropriately according to his damage.

In France, even if the administrators are not at fault they can be made liable by applying the risk theory, the liability without fault. According to this theory when the administrators engaged in the public work involving risk, duty cast upon them to bear the damage by compensating the injured. In France liability of the state for Administrative torts\textsuperscript{307} is seen, like the injury caused by the fault of the public officials due to some defect in the machinery provided by the administration or if the operation involved special risk of the citizens. It ensures full justice to the victim on the basis of the risk arising out of the act.

\textsuperscript{306} CE28 July 1951. In this case, a government lorry was involved in an accident partly because of the drunken state of the driver, Delville and partly because of the defective breaks. Delville was sued in the ordinary courts by the other party to the accident and held liable for the damage caused.

and not on the basis of fault. In such cases French administrative law makes
the state liable as an insurer against social risk. This is applied in riot cases,
police while chasing the offenders and a lunatic escaping from asylum, military
munitions etc. In risk theory, liability is assessed in four categories

1) Person assisting in public service sustaining injury example injury
occurs while engaged in fire extinguishing operation.

2) Injury or abnormal risk while engaged in dangerous operations loss
of life and property due to blasting up of large quantity of ammunitions and
grenades.

3) Refusal to execute judicial decisions

In Couteas, the Conseil d'Etat held the Couteas were entitled to
borders not on the basis of fault of the government but on the basis of equality
in bearing public opinion. 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) Legislation

If the effect of the legislation is injury to an individual he is entitled to
damages from the state.

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308 CE 30 November 1923. In this case, the nomadic tribesman had occupied the extension tracts of
land covered by Couteas. Couteas had obtained a declaration from the civil courts of his right
over the land. His own efforts in evicting the land having failed he sought the help of public
authorities and the government but the help was not given to him due to government's fear of
civil war.
In the *Ministre Des Affaires Etrangers C. Consorts Burgat*[^309] a case of governmental liability where the damages were awarded against the state because of the statutory immunity of diplomats prevented the enhancement of the rent against the lady occupant of the premises. Now the right to indemnify or assurance arises only if it is proved that it was not the intention of the legislature to make the victim to bear the loss. Moreover the victim should not have engaged in the act which is injurious to public health, public order and good morals. It is the only company which was affected by the statute etc.

The state will be liable for ultra vires acts, error of law, abuse of power, if it violates the procedural law and natural justice.

The state is immune from liability only if the act was done by the officials wholly unconnected with the official function. But the state would not be liable where the impugned act is not administrative but political. Acts relating to international or diplomatic relation, parliamentary proceedings relating with executive and the legislature, reason of state or Act of State.

(iii) Merits of the French Conseil d'Etat

Conseil d'Etat the active court and its working is the highest degree remarkable and significant. Its administrative activity is the most suitable and appropriate to the exercise of public power and it is apt to the modern state.

[^309]: CE29 October 1976. Here the lady who occupied the premises of the Landlord subsequently married a UNESCO official who was living in the same flat when the landlord asked the tenant the payment of increased rent, the landlord had to meet with the plea of diplomatic immunity. The complainant successfully argued that the state had enacted the immunity statute which had deprived them of normal life.
and to the changing social organization The Conseil d 'Etat is the natural protector of the individual civil servant and it regulates the public power. The administrative public power in France can lawfully be exercised according to the norms and principles terms and conditions as determined by Conseil d 'Etat.

In case of dangerous situation the principle of justice is applied so that the burden of a public service should be equally distributed over the members of the public. To recoup the individual loss by means of money payment out of the fund to which the public has equally contributed by raising revenue by taxation.

The Purpose of this principle is that there must be penalty for all the unworthy actions of public office as not properly attributable. In service fault primarily, there must be some defect in the service. Service connected fault or service connected torts, by this principle means that responsibility for illegal interference with the protected interests of the citizen is primarily a responsibility of the public authority.

The *cumul* is check by which the irresponsible and negligent behaviour of the officers is controlled by making them liable. So that the quantum of contribution was determined according to the officials duties and responsibilities in the particular service in which he is employed rather than reference to the actual part played by him in causing the damage.
If the activity of the state is carried on in the interest of the community, and the state action results in individual danger to a particular citizen, the state should make redress. The state is an insurer of what is often called as social risk. The liability based on fault and risk theory are in consonance with the rule of law. The risk theory holding the government accountable, which would help to give great justice to the victim.

In some cases, the activities of the state may create risk, which results in the loss or injury of an individual. If liability without fault is the fundamental principle, the public burden must be shared by all citizens and it would help to attain equilibrium. This principle is founded in the declaration of Rights of Man. The French administrative follows the principle, that if injury is caused to the citizen, the state has to give compensation for it. Risk theory is applied in various activities of the state, risk arising from dangerous operation, risk in the course of employment, risk arising out of judicial decision, risk arising from legislative acts, risk factor in the cases of statutory liability etc.

The French administrative courts have expert, well trained judges and ensure proper mechanism for the needs of public administration. The courts began to see to public administration and to enforce the individual rights of the citizen in the era of human rights revolution. Its procedure is simple, inexpensive and highly effective. Now with the concept of welfare state and

service state, the concept of faults connected with service is expanding
tremendously and courts are recognizing combination of faults in situation
where tort could not have been committed by the officer but for the fault of
service and therefore the state could be held liable for the whole damage
claimed.

The French system is recognized as the best system in the world. In a
modern welfare state it discharges more functions of social responsibility, it
should not be over burdened with tortious liability. The Citizen must be able to
get redress for the damages he suffers as a result of official action. So the
government and the public authorities take out insurance to cover all risk of
injuries to third parties as a result of action.

**v) Conclusion**

In England the law relating to state liability defines the area where the
state can enjoy privilege so there is certainty of law in this area where as in
U.S.A exceptional clause is a great flaw and the state is exempted from
liability. In England there is no other courts except the ordinary courts where
the aggrieved has to file suit against the public officer. When comparing these
three systems, The French system is the most suitable one and it defines the
area where the sovereign can enjoy privilege and state would be liable like that
of an ordinary person in most of the negligent acts. In England; no court is
competent to enquire in to the allegation against officials of the state In U. S.A.
the Federal Tort Claims Act 1946 consists of exemption clause which exempts
the state from liability. The defect of English system is that the application of 'Act of state 'is limited where as in U.S.A, more exemption clause is a real flaw. In Delhite , this exemption clause exempted the state from liability even for negligent acts .In India while determining the liability of the state, application of sovereign and non-sovereign would affect the rights of the citizen guaranteed by the constitution. So the French system is more adaptable to the modern conditions making the country more responsible towards the citizen’s rights and justice.

In France the law of state liability is enacted by applying private law. The French administrative courts have striven effectively to impose control on officials and to raise the standard of administration\(^{312}\).

Researches have shown that no single institution has done so much for the protection of private citizen against the excesses of the administration as has been by the Conseil d'Etat\(^{313}\). The French administrative law succeeded in developing a new machinery and evolved a new technique in determining the liability of the state\(^{314}\). I think that

The French legal system is a notable one and it is a well developed and balanced system of state liability and it can be used as a model for equipping and shaping the law of state liability

(iv) Suggestion

There is an urgent need to develop public law of torts for governmental liability in India. So certain points are included in the suggestion.

1. The government should be placed in the same position like that of an ordinary employer. There must be equal treatment for the state and the citizen. The ruler and the ruled should have the same rights and must stand on the same footing.

2. If immunity is not granted, it would affect the existence of the state. No doubt power is needed for the state for its good and efficient administration. So application of immunity has to be limited to the areas where the power is essentially needed. While applying Act of state, immunity should be restricted to those functions of the state which would not affect the human rights of the non-citizens also. In the case of sovereign functions done by the agencies of the state while exercising the power under the power of statute can be allowed only if the work is done by the officers without any negligence and abuse of power. This provision must be made mandatory that the acts committed by the officers under a statutory power must act in good faith otherwise making the state or the employee statutorily liable. While fixing liability, the court has to consider the breach of duty of the state in selecting and appointing good and efficient officers.

3. Sovereign immunity is an anachronism which came into existence due to judicial creativity and now results in logical fallacy and practical
absurdity. Judicial creativity is necessary to narrowly interpret sovereign immunity for limiting its application while determining vicarious liability of the state. They must have a social viability to develop law on public law of torts.

4. There must be a clear demarcation between sovereign and non-sovereign functions of the state. This distinction must be based on public safety and the protection of the rights of the common people. So a balancing approach is needed while distinguishing the functions to determine liability of the state.

5. In the case of state liability arising out of public activities which are done for the benefit of the society, the compensation should be shared by the entire society. For the purpose of introducing socialization of compensation, some form of social insurance is necessary to compensate the victim.

6. The main defects of the civil court like time lag and complicated court procedures should be avoided to make easy access to the victim in the civil court in case of violation of rights by the state. The judiciary must act in consonance with social change.

7. Legislature must have the will power and determination to change the law, as recommended by the Law Commission and NHRC to suit the modern world.

8. Law being the civilized machinery, a well developed legal system is required for administration of a country by the state, then only it can protect the rights of the people.
9 Mere legislative enactments would be insufficient to make suitable law so it is better to refer to similar laws existing in different countries like U.K, U.S.A. and France. In the U.K. they have clearly defined the areas of exemption granted to the state from liability so it results in certainty of law and the French system is more suited to the modern world. They have got special courts and rules, to deal with the liability of the state and the personal liability of the officials. If it is difficult to separate both these cases, then both these cases are to be decided separately and this is called as service fault. It would be easy to decide liability and to give justice. Risk factors are dealt with separately like riot dangerous situation etc. Then the Burdon lies on the society. These separate machineries are administered by the experts and so it minimize the back log of docketing system in the courts It saves time and provides a cheaper remedy.

10. In the world of human rights revolution it is necessary to modify the law to determine state liability in the light of International human rights and to add an express provision in the constitution, in the light of Article 9(5) of ICCPR, to compensate the victim in case of state atrocities.