Chapter II

The Problems of the state liability

The liability or responsibility is the bond of necessity that exists between the wrong doer and the remedy for the wrong. One may commit a wrong, by breach of a duty; duty may be one enforceable by a rule of law or only by a rule of morality. Thus the distinction is between legal wrong and moral wrong. Though in most cases, we may distinguish between what is a legal wrong and a moral wrong, there are cases where the distinction is not clear. In the case of breach of moral duty, the sanction is that of social pressure or censor. In the case of breach of legal duty, generally there would be a legal remedy. The legal duties are classified into those, which are enforced by criminal law, and those which are enforced by civil law. In the former case, the punishment of the wrong doer is the aim of the law and in the latter case, compensation of the damage brought about by the wrong. It is well known that depending upon the policy of the state, more important interests, worthy of protection are assigned to the realm of criminal law. Other rights are protected by the civil law. There are certain interests which are protected both by the criminal law and the civil law.

\[22 \text{ Salmond on Jurisprudence, 12th Edition p.349}\]
The Concept Of State Liability.

Responsibility is fixed on an individual because he is an intelligent being capable of understanding the duty fixed on him by a norm of law. When we talk about the responsibility of the state, several problems crop up. First of all, the state is not an individual though the state can act only through individual. If responsibility is fixed on the state, one has to develop criteria for determining in what context and subject, to what conditions, the acts of an individual may be attributed to the state. Another problem is that for valid reasons, individuals are sometimes conferred immunity. Though they would be held responsible according to the ordinary principles of liability, there are cases of immunity from liability, for state actions. The extent of immunity depends upon the policy of each state. Obvious examples are Act of State, judicial immunity, sovereign immunity in some systems and immunity conferred on public functionaries; for action taken in good faith. All these may have impact on the state liability illuminating the particular purpose.

Relation between the state and the law

Another aspect of the problem of state liability is the relation between the state and the law. In general there are three theories in this area; law is a creation
of the state, state is creation of the law and state and law are one and the same thing. Where it is held that the law is the creation of the state there will be the problem of determining what constitute the state on some non-legal criteria and the problem of stability of a law which fixes liability on the state. Generally adopting the criteria of political theory state can be considered an association of people occupying defined territory, united under a government and possessing and having sovereignty. Sovereignty is considered unrestricted and unlimited. According to Austin's theory of law, law is the command of the sovereign, who can inflict a sanction for disobedience. The sovereign is unrestricted and illimitable. On Austin's theory, constitutional law, which defines the state and its activities, is only positive morality as there is no sovereign above the sovereign to enforce the sovereign, to command under threat of infliction of evil. The duty of such sovereign can only be a moral duty. Here we meet one of the key problems of state liability. It would mean that state would be liable only if it willingly accepts liability, a principle of auto limitation, which can be changed by the state at its pleasure.

The problem mentioned in the preceding paragraph has been sought to be solved by introducing the notion of higher law. This has been the method of natural law theory. Implicit in the scheme of nature, there are principles

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governing human life and activities which have got same validity as scientific law governing the universe. The principles of such a law of nature are discoverable by reason. Such a law of nature has a higher validity and is binding on the state. Such a theory which had its origin in the Greek philosophy was put to practical use by Rome in its *jus gentium*. This natural law theory had powerful influence on the development of political and legal theory. As an offshoot of the theory of natural law, the origin of state was explained in various theories of social contract during the seventeenth and eighteenth centuries. This in turn gave rise to various declarations of rights which ultimately found expressions in written constitution as limitation on authority. In order to maintain the ‘Rule of law’, the judicial review has been developed as an enforcing factor putting limitation on the governmental authority.

Even after the development of natural ideals as explained above, the problem of the liability of the state still remains that the sovereign state is bound by the law that it makes. So in the last analysis, the liability of the state towards the citizens, remain as moral obligation. There is no absolute limitation against the state, which prevents it from changing the law. What is laid down even in the constitution can be changed according to the principle of amendment.26

26 Here we may recall the basic structure theory unamendability of those principles according to the procedure of amendment provision prescribed in the constitution propounded by the Indian Supreme Court in *Kesavananda Bharti v. State of Kerala* AIR 1973 SC 1461. There is similar unamendable provision in the West German Constitution Article 1 to 20. However on that principle that at any point of time the present generation has its own sovereign, the long term validity of unamendable constitution provision is doubtful.
However a combined thrust, of various principles may hold the state to be bound by the law it makes. There is the paramount necessity for the state to act as an honest person to retain its credibility. There is the principle of *pacta sunt servanda* which states that every promise is a sacrament and this principle protects the sanctity of agreements. There is also the inevitable necessity of sharing a common life of which the state is the guardian. From these it can be inferred that the state is a necessity, acting according to the law it declares. The evolution of civilization is also in the direction of compliance through reason rather than through coercion. There is therefore a basis for the state to accept the principles of legal liability. The scheme of such a liability to have a limitation in a written constitution, in relation to human right followed by the legislative and executive relations under judicial review and rule of law, which would help legal enforcement against the duties of the state.

**State action in relation to human right**

What rights the state should protect, the failure of which would attract state liability is an important question regarding the state liability. It depends upon the functions of the state determined as a policy in the constitution or legislative prescription from time to time. In Hobbe's *Leviathan*\(^2\), the authority appears as two swords, the sword of justice and the sword of war, typifying the true original function of the state namely administration of justice within the community and the protection of the community from aggression or war. To these two minimal

functions of the state, the modern tendency adds many more welfare functions of the state. While the state may not unduly restrict the liberties of the people it is also bound to take positive action either by rules or restriction to prevent suffering from unmerited want. In a full scale programme of human right, each individual is allowed to realize the highest good in every area where the individual cannot help himself the state ought to render positive help. But such an ideal scheme at present remains in the realm of hope. In our constitution we recognize this in the division between fundamental rights and directive principles of state policy. We cannot claim human rights are protected to the full extent until all the directive principles are translated into practical reality and the citizen has been given a legal right to enforce any one of them. The spread of human right may even travel beyond the directive principles. However our present predicament is that we have been able to translate only a fraction of directive principles either by legislative prescription or by judicial activism.

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

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28 Nationalization of industries, transport system, banks, coal mines, concept of social justice equal pay for equal work etc are the progressive steps taken. Abolition of Zamindari system and directive to introduce village Panchayath etc.

29 'Menaka Gandhi v. Union of India AIR1978SC591', where the concept of reasonable fair and just procedure introduced.
The present study is confined to the liability of the state in India enforceable through writ petition, civil action in tort and through the procedure of criminal law. The scope of remedies through the agencies such as human rights commission though they do not acquire the status of full remedy also forms part of the study.

There is another aspect of the liability of the state with the regard to the enforcement of human right which forms part of international law, which is excluded from this study.