CHAPTER V

COMPARATIVE STUDY REGARDING STATE LIABILITY

A comparative study on State liability in various countries, gives a better knowledge to understand our own legal system. Promotion of international understanding is an acknowledged objective of comparative study. The purpose of comparison is to find out evolution of rule or investigation of principles of law in different legal systems. Law of torts involves a search for norms of proper behavior for evaluating the propriety or wrongfulness of human conduct. It occupies a pivotal role in the Common law, as a means of compensating individuals for harm inflicted by others. The law relating to tortious liability in India is the result of historical growth. It is a child of common law. For the detailed study and understanding of the extent of liability of India, it is very essential to have a survey and highlight on the important developments in this subject in various countries like United Kingdom, United States of America, France, Canada and Australia.

5.1. Position in United Kingdom

It is well known fact of legal history that, in Common law the Crown was under no direct liability of this nature. This was generally attributed in the old system of ‘feudalism’. There were two important rules of law, relating to the liability of the Crown in England. The first rule was ‘Rex non potest peccare’, which means ‘King can do no wrong’ based on substantive law. The second rule
was that ‘King could not be sued in his own Courts’, based on procedural law. This maxim applies not only to wrongs done personally by the sovereign but also to injuries done to a subject by the authority of the sovereign\(^1\). Another reason for the doctrine of immunity, was that it was regarded as an attribute of sovereignty that a State could not be sued in its own Courts without its consent\(^2\).

The King was exempted from civil and criminal liability, not only due to his position but also based on the clear recognition that “His legal position, the powers and the prerogatives which distinguish him by the law and the law gives him no authority to transgress.”\(^3\) This was invoked to negate the right of the subject to sue the King for the redress of wrongs committed by him\(^4\). The King could not be sued, because of the old principle that no feudal lord could be sued in his own Courts. Any wrong committed by the King was presumed to be the wrong committed by his servant and was held personally liable for his own wrongful acts. Theoretically, the King was always subjected to law but in practice no law could be enforced against him. The reason was that the Court was King’s Court and the King could not issue any orders against himself. Sovereignty vested with the king and he was the fountain of justice. No writ of execution or any orders could be issued against the King. But, he could not refuse to render justice. If there was any claim, it was referred to the ordinary Court of law.

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\(^1\) Feather v. The Queen, (1885) 122 E.R. 1911; the maxim “the king can do no wrong at one time meant simply that the king was not privileged to commit illegal act.
i) The Crown and ‘Petition of Right’

The only instrument in practice to sue the Crown was the petition of right. This was a petition to the Crown by the subject for his just rights which was voluntarily referred by the Crown to the Courts for decision. This system of giving judgment, on the basis of the petition emerged during 1234 AD. Whenever the petition of right was presented for enforcing the tortious liability of Crown it was rejected. There was no appeal against such refusal.\footnote{Sir William Hold worth, A History of British Law, P 19 (Vol.1X 3rd Edn.1976)}

Throughout Fourteenth Century, some rules and regulations were made to render justice through petition of rights. A large number of petitions, were received in all kinds including technical grounds. When there was a petition of right, there must always be a reply and it will end with the judgment. But to a petition of grace there was merely an assent or refusal with no judgment.\footnote{G.P.Verma, State Liability in India – Retrospective and Prospective 26,(1st Edn 1993, Deep and Deep publications).}

The confused stage of tortious liability of the Crown was of serious concern. Through petition of right, King was made liable for breach of contract. Thus the King could not be held liable for the wrongful acts of his servants. However there were difficulties with this system of enforcing tortious claims against the Crown and from time to time there were protests from all the corners, against the Crown’s technical legal immunity in respect of this matter, which led legal confusion.
ii) Development of Crown Liability in Tort

In 1688, the liability of the State in tort was clearly recognized in England when it was decided in *Pawlett v. The Attorney General* that the subject was entitled to equitable relief against the Crown. In *Banker’s case*,\(^7\) after the revolution of 1688, the bankers took legal Proceedings to recover areas from the Crown, by presenting a petition for the payment and the case turned on the question whether this was proper method of procedure. The Court of Exchequer, answered in the positive. Nineteenth century witnessed a remarkable increase of State functions. Due to this fact, the various activities of modern State necessitated some remedy against the Crown for the wrongs committed by its agents. The Petition of Right Act was enacted in the year 1860. This Act, made the procedure to avail justice very simple and speedy. In most of the cases the Courts decide the scope of the petition of rights in torts. In *Viscount Canterbury v. Attorney General*,\(^8\) some workers were employed by the Crown. They negligently caused fire to break in certain portions of both Houses of Parliament and Speaker’s House. Due to this, the Speaker lost his valuables including personal belongings. The Speaker brought a petition of right to recover the value of his personal belongings destroyed, by fire. The Crown was held not liable for the negligent act of the servant. The important procedures followed were that the petition of right, could be filed only if the Attorney General gives his consent. He had absolute

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\(^7\) (1960) 14, S.T.1
\(^8\) (1842) 1 Phil, 306.
discretion to grant or refuse the fiat. In case of refusal, there was no right to bring an appeal. Thus justice ended with dissatisfaction.

In England the Corporations were treated as separate entity as per various Statues. The corporation could sue and be sued. In *Mersey Docks Harbor Board v. Gibbs*, the Court held that the intention of the statute is to extend the liability. Thus the corporations would be liable for the torts of their servants. The corporations are subject to ordinary law, unless there is some statutory immunity as in the case of Post Office. It was very difficult to identify that who was Crown’s servant and who was not. In this respect there was no clarity on the matter of fixing liability of Crown for the wrongful acts of its servants.

The judicial approach to save Crown’s position from liability, was explained Cockburn C.J in *Feather v. Reg.* In this case, a petition of Right, in respect of a wrong in the legal sense of the term shows no right to legal redress against the sovereign, for the maxim that the king can do no wrong applies to personal as well as to political wrongs and not only to wrongs done personally by the sovereign. If such a thing can be supposed to be possible but the injuries done by a subject by the authority of the sovereign. In *Attorney General v. Dekeyser’s Royal Hotel Ltd.*, The House of Lords laid down the principle that “the petition of right does no more and no less than to allow the subject in case to sue the Crown. There is

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10 (1865) 122 B.R. 1191
11 (1920) A.C 508 at 530-31
also a controversial decision which confused the situation. In *Tobin v. Reg.*,\(^\text{12}\) the commander of a Queen Ship employed in the suppression of slave trade in the coast of Area, seized a schooner belonging to the supplicant, who he suspected to be engaged in slave traffic and it being inconvenient of take her to a port for condemnation caused her to be burnt. Deciding this case, Cookburn C.J. pointed out that from the maxim, King can do no wrong, it followed that the King could not authorize a Wrong as in the Eye of Law, no such wrong could be done in law, & thus no right to redress could arise. The petition failed on the ground that a petition of right in respect of a wrong in the legal sense of the term showed no right to legal redress against the sovereign. By the end of the nineteenth century the principle of vicarious liabilities was fully developed. Moreover, in this time the Crown adopted the practice of accepting moral responsibility for the torts of its servants and paying damages out of public funds\(^\text{13}\).

The anomaly in tortious law became very important in the nineteenth century when the Courts developed the law of vicarious liability and the State became a large scale employer. There was however, increasing dissatisfaction with this system of enforcing tortious claims against the Crown and from time to time there was a protest from the Bench and in the press against the Crown’s technical legal immunity in respect of this matter. Moreover to personal liability of public authorities was

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\(^{12}\) 143 E.R. 1148.
\(^{13}\) Glan Ville Williams, *Crown Proceedings* (1st Edn. 1948) P.17
recognized in the cases like trespass\textsuperscript{14}, negligence\textsuperscript{15} and nuisance\textsuperscript{16}. In practice, the action against the officers concerned was defended by the Treasury solicitor but, the difficulty arose when the actual wrong doer was not identified. Then the State department began to nominate a defendant, was criticized by the House of Lords in \textit{Adams v. Naylor}\textsuperscript{17}. In this case, a boy was killed and another was injured on falling into a mine while they were searching for a ball. The fence or warning notice of the mine was not visible as it was heaped with sand. In the suit the Crown nominated Royal Engineers as defendants. The Court expressed its difficulty in exercising jurisdiction and in deciding the case against the defendant which who is in truth not the real defendant the Court criticized the practices 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. Thus, the suit failed and the Court totally rejected the practice of exgratia indemnity. In fact the mine was being used in combating the enemy and the injuries were “war - injuries”. Section 3 of the Personal Injuries (Emergency provisions) Act 1939, provides that no damages shall be payable in respect of war injuries.

The Court also expressed its inability to decide against the nominated defendant in \textit{Royster v. Cavey}\textsuperscript{18}. In this case, a women employee was injured in a Royal Ordinance Factory; she brought an action for negligence and breach of duty.

\textsuperscript{14} Cooper v. Wands worth Board of Works (1863) 14 C.B NS
\textsuperscript{15} Fisher v. Ruislip Northwood U.D.C (1945) K.B. 584.
\textsuperscript{16} Campbell v. Paddington Corporation (1911) 1 K.B. 868.
\textsuperscript{17} (1946) 2 All E.R. 241
\textsuperscript{18} (1947), K.B.204
The defendant was nominated by the Crown. It was held that there could not be any duty to take care by the defendant and hence the action failed.

The above two cases stressed for the introduction of legislation to decide tortious liability of State. Even when there was sufficient cause of action, to sue for compensation; the immunity of the Crown debarring the plaintiff, from representing Crown as defendant. Outcome of these decisions was the enactment of the Crown proceedings Act 1947\(^{19}\) by which the petition of right was abolished and the Crown was subjected to suits for torts.\(^{20}\)

**iii) Steps towards Legislation**

The 20\(^{th}\) century, marked a huge social, political and legal change in England. It was the time of transformation from Laissez Faire to welfare State. Emerging trend of rights of the people and responsibilities of the State necessitated proper remedial measures. The State itself felt uncomfortable with the old and traditional feudal doctrine of ‘King can do no wrong’ and realized the need for taking care of the individual liberties. The Court also could not exercise their judicial freedom due to the concept of absolute immunity of the Crown. Along with these circumstances, the decisions like _Adam v. Naylor\(^{21}\)_ and _Royster v. Cavey\(^{22}\)_ compelled the British Parliament to enact legislation in this regard.

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\(^{19}\) Lord Chancellor introduced with House of Lords in February 1947 a State sponsored Crown Proceedings Bill based on the draft Bill of 1927 which became law on 31\(^{st}\) July 1947 and it came into force on 1\(^{st}\) January 1948

\(^{20}\) Street, State Liability (1953) PP 5-61

\(^{21}\) (1946) Ac 543 & 5 others.

\(^{22}\) (1947) K.B. 204.
As a result of social and legal change, the law relating to tortious liability of the Crown was strongly felt. In 1921, Lord Chancellor appointed a committee to assess the position of the Crown in litigation. The committee recommended to abolish the petition of right and presented a Draft Bill in 1927. The aim of the Bill was to make the Crown liable in tort. The clouds of Second World War and its impacts on State activities compelled to introduce the Crown Proceedings Bill, based on 1927 Draft Bill on 13th Feb 1947. After discussions and perusal of its implementation the Bill was enacted as the Crown Proceedings Act on 31st July 1947. It began to operate from 1st January 1948 as per the provisions of the Crown Proceedings Act (Commencement Order) 1947.

iv) The Extent of Liability of Crown

The Crown Proceedings Act 1947 made a tremendous change in the rights and liberties of the Crown and its relations with the subjects. It also introduced changes in the procedure relating to proceedings by and against the Crown. The Act was considered as a landmark in the English legal and Constitutional history. Section 2 of the Act is very important because it provides liability of the Crown in Tort.


The Crown Proceedings Act 1947 changed the existing law relating to the civil liability of the Crown in many aspects. There are various provisions by which the Crown was made liable for the wrongful acts of its servants. The Act fixed liability of the Crown under common law, for breach of statutory duty etc; it also
gave exceptions from liability under various grounds. The doctrine that the “King can do no wrong,” which was a relic of the old feudal system and on which the immunity of the Crown was based on, was not entirely given up by the Act. Under the Act the extent of the liability of the Crown in tort, is the same as that of a private person of full age and capacity.

Under the section 2(1)²³ of the Act, it is provided that the Crown is subjected to the same liability in tort as a private person in respect of torts committed by its servants and agents. However, the proviso to action 2 (1) enacts that the Crown shall not be liable unless ‘the Act or omission would apart from the provisions of this Act had given rise to a cause of action in tort against the servant or agent of the State.

Thus the Crown is made liable for tortious acts of its servants, like liability imposed on an ordinary individual of full age and capacity. There is however a saving, as to prerogative and statutory powers particularly in relation to defense and the armed forces.

However, limitations are provided in this Act as to the actions in respect of highways and drainage works. Under Sec. 2(3) of the Crown Proceedings Act 1947, no action shall be brought against the Crown to enforce a claim for damages

²³ Section2(1) of the Crown Proceedings Act 1947 Roads as follows Subject to the Provisions of this Act, the Crown shall be subject to all those Liabilities in Tort to which, if it were Provide Person of full age and Capacity, it would be subjects;

  a) In Respect of Torts Committed by its Servants or Agents
  b) In Respect of any Breach of these 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.
alleged to have been caused by an accident arising, after July 1, 1973, from the condition of a highway including a sidewalk, or from the presence of a nuisance on a highway including a sidewalk, unless

(a) Notice in writing of the accident, indicating the place where it occurred as well as the nature and alleged cause thereof is served upon, or mailed by registered mail to the Deputy Minister of Transportation and infrastructure Renewal within ninety days of the happening there of and

(b) The action is brought within two years after the date of accident.\(^{24}\) Section 3 of the Act, provides the citizens the right to sue the Crown. Liability of the Crown in tort also extends to breach of statutory duty. It is also no defense for the Crown that the tort was committed by its servants in the course of performing or purporting to perform functions entrusted to them by any rule of the common law or by statute. The law as to indemnity and contribution as between joint tort-feasors shall be enforceable by or against the Crown and the Law Reform (Contributory Negligence) Act 1945, binds the Crown. Thus after the enactment of this Act, the position of the Crown was brought at par with the position of an ordinary individual in the matters of

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\(^{24}\) Section 2(3) (b) applies whether the alleged liability of the Crown arises as the result of misfeasance or of non-feasance.
actions on torts. The Crown would be liable only if the particular officer was appointed by the Crown and paid out of treasury.

vi) Exceptions

The Crown Proceedings act 1947 has recognized an area of exceptions. They are enumerated in the following sections.

1. Judicial Acts

Judicial acts are exempted from liability under the Crown Proceedings Act 1947. The Act had to take steps to end litigation. Under public policy, judge is to give immunity for the performance of his duties. The litigants are not competent to reopen the suit by bringing personal actions against them, as the judicial functions are absolutely privileged. Section 2(5) of the Act exempts the Crown from liability for anything done by an official, in connection with the execution of judiciary process. Thus for a valid administration of justice, the Court official is protected by statute.

The word “judicial” is not defined in the Act. The meaning arises in other contexts, e.g., the application of the rules of natural justice, the availability of certiorari and the defense of absolute privilege in an action for defamation.\(^25\) A tribunal hearing applications for deferment from military service has been upheld judicial in *Co Partnership Firms v. Harvey Smith.*\(^26\) In *Sirros v. Moore,*\(^27\) a

\(^26\) (1918)’2 K.B 405.
\(^27\) (1975)Q. B. 118
distinction was made between the status of inferior Courts and superior Courts. In this case, a circuit judge sitting in the Crown Court was the subject matter of discussion. Lord Denning M.R., rejected the relevancy of such distinction and held that every judge of the Courts of the land, from the highest to the lowest is protected to the same degree. He strongly supported the protection from liability to damages. It is to be noted that, before the Crown could in any case made liable under section 2(5), it would have to be shown that the person discharging judicial responsibilities, etc, was a Crown servant, and that he himself could have been sued. Section 2(5) of the Act exempts the Crown from liability for anything done by an official in connection with the execution of judicial orders the Court official is protected by Statute.

2. Armed Force

Section 10 of the Act, prevents a member of the armed forces suing either the Crown or another member of the armed forces for personal injury suffered by him while on duty, or even if not on duty, while on premises of the armed forces, if the alleged tort has been committed by a member of the armed forces while on duty. Thus the Crown or an officer of the Crown cannot be sued for death or personal injury suffered by a member of the armed forces, in consequence of the nature or condition of property or equipment used for the purposes of the armed forces.
Adam v. The War Office,\textsuperscript{28} is an unfortunate example of the effect of the provisions of section 10, which exempt, the Crown from the general liability in tort where death or injury has been caused to a member of the armed forces by some other member of the armed forces on duty.\textsuperscript{29} The plaintiff sued the war office, claiming damages by way of compensation to them for the financial loss they had suffered by the death of their son, who was, while on duty as a member of the armed forces of the Crown and while taking part in the military exercise. The plaintiff, contended that his son’s death was caused by the negligence of somebody who allowed the shell to be fired among troops taking part in the exercise. Under the shade of the provisions of section 10 of the Crown Proceedings Act, the Court, held defendants were not liable. In Bell v. Secretary of State for Defense\textsuperscript{30} a soldier was injured while he was fighting with an English army came to Germany. Later he was sent to German Civilian hospital for treatment. Due to the negligence of doctors, the soldiers died. The Court, in majority held that the thing suffered by the soldiers were due to the negligence of the doctor, which occurred outside the scope of the section 10 of the Act. In practice, the compensation payable to the members of the armed forces, whose claims fell within the section, was lower than what would have obtained by way of damages in actions in the Court of law. So in 1986, the State decided to repeal section 10 of the Act.\textsuperscript{31}

\textsuperscript{28} (1955) 3All E.R.245
\textsuperscript{30} (1986) Q.B.322
3. Post Office

The Crown Proceedings Act exempted United Kingdom from liability arising in relation to postal pockets.\(^{32}\) The Post Office Act 1969,\(^{33}\) says that no proceedings shall lie in tort in respect of any loss or damage suffered by reason of (a) anything done or not done on relation to anything in the post or failure to collect the mail, (b) failure or interruption of such service, or error in or omission from a directory for use in such service. This Act, also exempts the post office employee or sub-post master from liability.\(^ {34}\)

4. Act of State

The doctrine of “Act of State,” is also a shield to protect the sovereign power of the Crown. In *Home office v. Dorset Yacht Co*,\(^ {35}\) the Crown was held liable for the damages caused by runaway borstal trainees, who escaped because of the negligence of the borstal officers in the exercise of their statutory function of controlling the trainees. The House of Lords, applied the provision of the Crown Proceedings Act 1947 and the liability was fixed under ordinary vicarious liability. All proceedings against the Crown in the Court of Appeal or the Supreme Court shall be instituted and proceeded with in accordance with the Judicative Act 1988.

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\(^ {34}\) Under Section 30 of the Post Office Act 1969, the Authority is Liable to Pay Damages for Loss or Neglect Act respect of Inland Pocket. The Building and Civil Engineering Holidays Scheme Management Ltd. v. Post Office, (1965) 1 All ER 113 it was held that such damage shall not exceed the market value of the pocket or the maximum amount available under regulations having regard to registration fee paid.

\(^ {35}\) (1970) AC 1004: (1970) 2 All ER 294 (HL)
In proceeding under this Act, the Crown shall be designated as the “State of Prince Edward Island.”

The Human Rights Act was passed in the year 1998 with effect from 2nd October 2000. The Act was drafted on the basis of European Convention on Human Rights. The Act provides that it is unlawful for any public authority to act in a way which is incompatible with a convention right and a person who considers that his rights have been violated, can sue the public authority for damages.

**Conclusion**

The English legal system is stable and it provides adequate justice to the affected persons. The traditional concept of immunity of the Crown was legally changed through the Crown Proceedings Act 1947. The Courts also apply uniform procedure to fix tortious liability of public authorities. The Crown is treated at par with ordinary individual while remedy is rendered for breach of the public duty.

For administrative convenience and maintenance of peace the Crown Proceedings Act, has suitable provisions for privileges and exceptions. Also clear guidelines are fixed for exempting Crown from liability. In England, the parliament is absolutely supreme. So, the parliament is empowered to overcome the decision of the judiciary. But the Courts are equipped to render equitable justice by evolving new principles to meet the changing conditions of the society.

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36 Section.11 of Crown Proceedings Act.
This Crown Proceedings Act 1947 is a landmark in European History in the aspect of State liability in tort.

5.2. Position in United States of America

The law relating to the liability of United States of America, for the wrongs committed by the servants is different from the law relating to State liability in United Kingdom. The reason was that in USA the sovereign immunity rule was deeply rooted. So the State could not be made vicariously liable during the early days.

But there is no source to know the origin of sovereign immunity in United States of America. The reasonable understanding is “that the English doctrine should have been introduced in to the United States”, the makers of the Constitution did not adopt the principle of sovereign immunity. In *Cohens v. Virginia*, the Supreme Court in *Gibbons v. United States* holds that “No State has even held itself liable to individuals for the misfeasance, latches, unauthorized exercise of power, by its officers or agents. In 1907 Holmes J. explained in *Kawananakova v. Polyblank*, that a sovereign is exempted from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends. Thus, the application of sovereign immunity doctrine to the United States is “one of the,
mysteries of legal education.” A suit could be brought against the United States, only with its consent which could be signed only by statutory provisions.

The Congress enacted various private laws and the petitions for relief. But this system did not satisfactorily workout. Most of the claims were left out unsettled. In 1798 the Eleventh Constitutional Amendment, was passed to restrain State immunity. In most of the States, judiciary played a vital role in abolishing the doctrine of sovereign immunity. Justice Holmes in 1907, said that the sovereign is exempted from all suits 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 State and this would be assumed only if some immunity is granted to it. No one was satisfied with the system of immunity. As a result of it, the Congress enacted Court of Claims Act, in 1855. The Act enabled to establish a tribunal consisting of three members. The tribunal acted as a fact finding organ, investigated and reported to the Congress in matters arising out of contracts and not torts. However, people felt some relief due to the implementation of this Act.

During 20th century, certain claims regarding marine and admiralty torts, war damages, federal employers’ compensation, postal claims and claims against Federal Bureau of investigations were settled. Thus compensation was awarded,

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40 Bornard Schwartz and HWR Wade, Administrative Law in Britain and the United States, 193 (1972 Edn )
41 1US 357 (1788) Repulica v Sparkhawk is an example. In this case when a city was an fire, the authority did not give direction to pulldown 40 wooden houses or to remove the furniture’s etc. belonging to the lawyers of the Temple, then on the circuit for fear he should be answerable for a trespass and in consequences of the conduct half of this city was burnt.
for the claims on infringement of rights were recognized in U.S.A. This laid the foundation for the enactment of Federal Tort Claims Act, 1946.


In 1924 and 1925 two different Bills,\textsuperscript{42} were introduced to secure compensation for the claims of tortious acts in United States of America. Another Bill of 1928 was adopted under the chairmanship of the senior Senator, which was vetoed by President Coolidge. In 1942, President Franklin Roosevelt in his message suggested a change in the law relating to State liability in tort. The change could not be brought due to Second World War resulting in economic depression in United States of America. The Act was enacted as Title IV of the Legislative Recognition Act of August 2\textsuperscript{nd} 1946 and owes its insertion, to the alertness of Senator MC Carron, the Chairman of the Judicial Committee of the Senate.\textsuperscript{43} The Federal Torts Claims Act, is the statute by which the United States authorizes tort suits to be brought against it. With exceptions, it makes the United States liable for injuries caused by the negligent or wrongful act or omission of any federal employee acting within the scope of his employment, in accordance with the law of the State where the act or omission occurred. By enacting the Act, Congress waived sovereign immunity for some torts suits. The Federal Torts Claims Act 1946, was amended in the year 1966, to allow the heads of each

\textsuperscript{42} Under Hill Bill 1924 and 1925.

\textsuperscript{43} G.P.Verma, \textit{State Liability in India}, 72( First Edn, Deep and Deep Publication, 1993)
federal agency, to settle any claim except that an award in excess of twenty five thousand dollars, must have the prior written approval of the Attorney General.

The Federal Tort Claims Act makes United States liable for the torts of its employees of the State, while acting within the scope of his office or employment to the extent of the private employers.

There are thirteen specific exceptions in this Act. Under these exception clauses, no claim is maintainable against the State. They are as follows,

1. When there is any loss, miscarriage or negligent transmission of letters or postal matter;

2. Any claim based upon an act or omission of an employee of the State, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the State, whether or not the discretion be abused.

3. In case of the assessment or collection of a tax or custom duty or a detention of goods by custom officials;

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44 The Term “Federal Agency” includes “the executive departments and independent establishment of the United States and Corporations, whose primary function is to act and while acting as instrumentalities or agencies of the United States whether or not authorized, to sue or be sued in their own names; provided that this shall not be considered to include any contractor with the United States; Section 2671.

45 Section 2672

46 The Federal Torts Claims Act, 1946 defines employee of the State includes officers or employees of any federal agency, members of the military or naval force of the United States and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States whether with or without compensation.
4. Any act which causes justifiable under the suits or claims in Admiralty Act 1920.

5. Any Claims arising out of an act or omission of any employee of the State in administering the provisions of the Trading with the Enemy Act.

6. When there is any damages caused by the imposition or establishment of a quarantine by the United States.

7. In case, of an injury to a vessel or to a cargo, crew or passengers of a vessel while passing through panama canal or in Canal Zone waters;

8. Any damage caused due to the fiscal operation of the treasury or regulation of the monetary system;

9. Claim arising out of combatant activities of the military or naval forces or the Coast Guard during a war;

10. All acts done in a foreign Country.

11. Matters arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit or interference with contract right.

12. Upon any claim arising out of the activities of the Tennessee Valley Authority and activities of the Panama Rail Road Company; and

13. Disputes arising from the activities of a Federal Land Bank, a Federal Co-operative Bank or a Bank for Co-operative.
The exceptions are so wide and extensive that the Federal Tort Claims Act falls much behind the English Law and fails to give to the citizens full justice against the wrongs committed by the servant of the State. It is also pointed out that the Federal Tort Claim Act exempts the State not only from liability for committing specific torts, but also exempts the State from liability for any claims arising out of the specific torts.\(^{47}\)

The exceptions are mainly classified into three major categories, they are as follows;

(a) For specific administrative functions or agencies, as well as for all claims arising in foreign countries.

(b) For intentional torts like assault, battery, false imprisonment, false arrest, malicious prosecution abuse of process, libel, slander, misrepresentation, deceit or interference with contract rights.

(c) For acts or omissions of federal officers exercising due care in carrying out statutes or regulations whether they be valid or not and for acts of discretion by State employers in the performance of their duties, whether or not the discretion is abused.

It is pointed out that the tortious liability of the United States is more restricted than that of the State of England.\(^{48}\) From the exemption clause, we understand that in most of the cases, the State is exempted from its

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\(^{47}\) Such Specific Torts are clearly given in the Act.

\(^{48}\) M.P. Jain and S.N. Jain “Principles Administrative Law (5th Edn) 2007
responsibilities. Most of the officers may not take care while exercising discretionary powers or statutory powers. The immunity clause restricts the poor claimants from claiming compensation moreover there is no liability for intentional torts also. In *Delehite v. U.S*\(^{49}\), a large cargo of ammonium nitrate fertilizer exploded on board a ship docked at Texas city. As a result, more than 500 persons were killed and some 3000 people injured. The loss of property was unaccountable. Several suits were filed against the State, claiming compensation under the provisions of Federal Tort Claims Act, based on negligent handling of the fertilizer by the State. The lower Court had found negligence in the production, transportation, and storage of the fertilizer. But the Supreme Court held that, this did not make the State liable since discretionary authority was involved. The judgment clearly shows that where discretionary authority is involved; neither the State nor the negligent officials may be held liable\(^{50}\).

In *Borkovitz v. United States*,\(^ {51}\) the Supreme Court held that the United States could be held liable under the Federal Tort Claims Act, because the plaintiffs had proved that the federal employees had failed to follow regulations that specifically prescribed a course of action.

\(^{49}\) 346 U.S. 15 (1953)

\(^{50}\) The only means of redress in such a case is through the exercise by congress for its authority to enact private legislation to compensate for Stately caused losses (see Gellhors and Lauer,” Congressional Settlement of Tort Claims against the United States,” 551Columbia Law Review 1955)

\(^{51}\) 486 U.s. 531 (1988). In this case the plaintiff was an infant.
The American Court held in *Dolan v. United States* Postal Service\(^{52}\) that the postal exception is in applicable to a claim that mail left or the plaintiff’s porch caused her to trip and fall, just as it is inapplicable to the negligent operation of postal motor vehicles. The Court also decided that for loss arising directly or consequentially, because mail either fails to arrive at all or arrives late, in damaged condition, or at the wrong address are at least to some degree avoidable or compensatable through postal registration and insurance.

The Federal Tort Claims Act also approves immunity under “Act of State” doctrine. In *Sosa v. Alvarez Machain*\(^{53}\) the Supreme Court held that the Federal Tort Claims Act foreign country exception, bars all claims based on any injury suffered in a foreign country regardless of where the tortious act or omission.

**ii) The Feres Doctrine and Medical Malpractice**

The Supreme Court unanimously held in *Fares v. United States*,\(^{54}\) that although the Federal Tort Claim Act contains no explicit exclusion for injuries sustained by military personal incident to service, such an exclusion result from construing the act “to fit” so far as with comfort with its words, into the entire statutory scheme of remedies against the State, to make a workable, consistent and equitable United States is liable only “to the same extent as a private individual under the like circumstances”

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\(^{52}\) 546 U.S 481 (2006)  
\(^{54}\) 340 U.S. 135 (1950)
The American Bar Association and the Administrative Conference have proposed an amendment to the Administrative Procedure Act, which would abolish sovereign immunity in actions for specific relief in the federal Courts.

Since there are more exception clauses, the responsibility of State of U.S.A are very limited than the responsibility of the State of U.K. under the Crown Proceeding Act.

In *Seigmon v. U.S.*, the Court held that the claims of a person are not maintainable when he was injured by other co-prisoners. The reason was that, the Federal Tort Claims Act was not intended to create a new cause of action. But in United Kingdom for the similar case, remedy was available under the Crown Proceeding Act 1947.

In *Indian Towing Co. v. United States*, the Court adopted liberal approach in the discretionary function thereby limiting it to the planning level only.

In *Rayoiner v. United States*, the State was held to be able for negligent non-feasance in which the Forest service failed to carry out of fire fighting properly since the discretionary functions exception is limited to the planning or policy level.

*Musko v. Corning Hospital District*, the plaintiff claimed damages for the negligent act of Hospital staff. The Court held that the State is liable for all harm that results from its activities. The doctrine of immunity was mistaken and unjust.

55 (1953) 110 FR 906,
56 350 U.S.6,69(1955)
57 352 U.S.315 (1957)
58 55 Cal 2 d 211
and as an anarchism without rational basis. No one defends total State immunity. The decision in Muskof has been considered as a greatest judicial decisions of the twentieth century.

In United States, the legal proposition is that a State unit is not liable in tort for acts of ‘discretionary character’. Where the Court held in Lipman v. Brisbane Elementary School District,\(^59\) that a school district is not liable for discretionary action in discharging a teacher.

In Runkel v. City of New York,\(^60\) a city building inspector, after examination, instructed both owner and city administration to demolish the abandoned dwelling house. Due to their negligence, the building collapsed and hurt the plaintiff’s children. The Court held that, the city as well as the owners were liable. The amounts of damages were recovered from the owners.

Now the liability of States is extended and individual rights are protected. In Monroe v. Pape,\(^61\) the petitioners’ house was ransacked by the police and they were subjected to torture. The police were held liable and sanctioned compensation under Section 1983 of the Federal Tort Claims Act.

After the enactment of Federal Tort Claims Act 1946, only the velocity of sovereign immunity was reduced but it was not removed. In Hargrove v. Town of Cocoa Beach, an inmate of the plaintiff died in jail due to the suffocation by

\(^59\) 55 Cal 2 d 224
\(^60\) 123 N.Y.S. 2d 485(1953)
\(^61\) 365 US 167 (1961)
smoke. It was stated that the jail authorities could have prevented the smoke. The Court held that the municipality was liable though the function was ‘State’.

iii) The Sovereign Immunity and Administration of Justice

The judicial officers are executing administration of justice. So they cannot be subjected to litigation. They have to act free and without fear. In United States of America, when the plaintiff shows that his conviction has been set aside and he proved innocence, damages could be awarded against the State according to the provisions of 1938. For example, an error of law of the parole authorities was a ground for liability. In *Bonnan v. State*, the State was held liable for detention of an eighteen year old girl who was in jail overnight without any reasonable ground.

**Conclusion**

The Constitution of U.S.A. is the custodian of the rights of the people in U.S.A. Excessive acts of State are subjected to judicial review. It is very common to declare a statute unconstitutional, when individual rights are affected. The Federal Tort Claims Act was the major step towards justice in U.S.A. but due to the immunity provisions, it could not achieve much, when compared with the Crown Proceedings Act in United Kingdom. Like United Kingdom, the State of U.S.A. is liable in the same manner as a private individual; but in practice, Courts applied strict principles against the individual when he is a litigant and liberal

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principles against the State. Recent trend in U.S.A., is to increase the liability of the State and providing compensation to the litigants. The California Law Revision Commission, also reported that the absence of Malice in the torts of States’ employees, the State has to bear the loss. The term “discretionary powers” has not been clearly defined by the Federal Torts Claims Act 1946. The grounds for sovereign immunity, should be reduced and the basis for State liability to be increased by reasonable modification and amendments in the legislation. Monetary remedy is preferable in all types of damages caused by the State functionaries to achieve social security and individual justice.

5.3. Position in France

The French legal system is different from U.K. and U.S.A. France is subjected to law and it undertakes responsibility for the tortious acts of its servants. In pre revolution period the principle of ‘le Roi ne peut malfaire’ which means the ‘King can do no wrong’ also prevailed in France. But during post revolution period, the State realized the liability and need for compensation to the victims.

It was realized that, every functioning of the State service creates a risk. If the risk materializes and an individual is occasioned injury or loss, it is only just that the State should indemnify him. The principle behind it is that, what is done in the public interest, even if lawful, may still give rise to a right of compensation, when the liability falls on particular individual.
When a risk arising from dangerous operation or risk in the neighborhood, the State should come forward to pay compensation. A leading case, in this respect *Regnault – Desroziers*, where the *conseil d’ Etat* held the State liable. During the First World War, a grenade dump in a residential neighborhood blew up with considerable loss of life and damage to property. Rejecting the view that the State was liable because of faulty methods of operating the dump, the Court held the State liable on the ground of risk, introduced into neighborhood by installing ammunition dump. It felt unnecessary for the victims to establish any fault or negligence.

The State owed an obligation to indemnify against the risk of employed, to those engaged in public service was accepted in France. The same principle is extended to cover even those cases where a person assists public service in a voluntary capacity. In *Gaillard*, when a old woman fell into the ditch and suffered injuries. Conseil d’Etat, held Gaillard competent to recover damages from the State as he had suffered injuries, rescuing the old lady, and thus undertaking a public service.

In France, Judicial officers, are immune from liability. Though they are engaging in administration of justice, they may be sued for fraud, arbitrary conduct, extortion and willful denial of justice. But the only condition is that consent of the Court having jurisdiction over it is essential.

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63 C.E.28, March 1919
64 C.E.9 November 1970.
In France there exists a systematic law which is administered by special Courts. The conception of the State as “a honest man”\textsuperscript{65}, spread among the public. The basic principle that administered the tortious liability of State is based on public power to the public need. This cannot permit any principle recognizing States capacity to do wrong. This system entirely eliminates the doctrine of sovereignty as a reason for non-responsibility. It eliminates the distinction between public or sovereign acts and proprietary or fiscal acts. The English traditional concept “King can do no wrong” has no place in French legal system. Since there are separate administrative law Courts, it has the jurisdiction to invalidate the State actions, when they are injurious to the general public.

\textbf{i) History and the growth of State liability}

During ancient period the employees of State were personally liable for the wrongful acts committed by them, unless the King transferred the cases to his council to make them immune. The State was however, not liable for the torts committed by its servants.\textsuperscript{66} The administration has to apply public power to the public need. This cannot permit any principle recognizing State’s capacity to do wrong.\textsuperscript{67} The system entirely eliminates the doctrine of sovereignty as a reason for non-responsibility. It eliminates the distinction between public or sovereign acts and proprietary or fiscal acts.

\textsuperscript{65} Brown and Garner, French Administrative Law (1\textsuperscript{st} Edn) P.110
\textsuperscript{66} H. Street, State Liability, P.14
\textsuperscript{67} The King was the source of all powers and justice. This excluded his responsibility for his acts
Under the Ancient Regime the officers of administration were personally liable for the torts committed by them unless the King transferred the cases to his council to make the officers’ immune\(^\text{68}\). The State was however, not liable for the torts committed by its servants.\(^\text{69}\)

From the beginning of the Revolution (1799-1800) there were three main theories emerged related to the liability which gathered momentum of confusion.\(^\text{70}\)

During the period which extended from the year VIII to the decree of September 1870, the responsibility of the State was governed largely by the civil law of responsibility. Article 75\(^\text{71}\) of the Constitution of the year VIII, provided a separation of authorities and denied the Courts the right to exercise jurisdiction over acts of the administration. It was also laid down that State agents other than Ministers could not be sued in respect of acts done in the discharge of their official duties, except with the authority of the Counsel d’ Etat, which is the highest administrative Court in France established in 1799. Thus total immunity of public officers was abolished by the Decree of September 1870 so that surest

\(^{68}\) Bernard Schwartz, French Administrative Law and the Common Law Word, P.256

\(^{69}\) H. Street, State Liability, P.14

\(^{70}\) These are, the theory that officers should be responsible; the conviction that although they should be responsible they should be protected from unjust and malicious suits and the principle that officers and administrative affairs should be free from interference by the ordinary Courts in tort. Frederic F. Blachly, “Approaches to State Liability; A comparative survey,” Law and Contemporary Problems (Vol.9,1942), p.205.

\(^{71}\) Article 75 had provided; “The agents of the State, other than the ministers, may not be sued for acts relative to their functions, except by virtue of a decision of the Council of State; in this case, the suit must be brought before the ordinary tribunals.”
safeguard of individual liberties,\textsuperscript{72} may be provided for by a decree of September 19, 1870, the “administrative guarantee” was abolished and the idea of the public law of responsibility of the State, was developed with its doctrine of fault of service and risk\textsuperscript{73}. The French Revolution spread the ideas of sovereign infallibility. In order to make the ideas of democracy, self State and social security meaningful, State should be more responsible for the wrongs of the civil servants, to strengthen these ideas.

The Tribunal Des Conflicts, established three principles of State liability in the Blanco\textsuperscript{74} case. The first principle is that the State is liable for the fault of its servants. The second principle, highlights that administrative liability should be subject to the rules separate and distinct from Droit Civil. And the third principle, laid down by the Court is that the questions of liability should be decided by the administrative Courts.

\textbf{ii) Modern Position}

A series of remarkable decisions made by the Tribunal of conflicts and the Council of State from about 1873 to the present time, have developed the doctrines concerning both the responsibility of officers and that of the State. The

\textsuperscript{72} Leon Blum in Lemonnier, Council of State 26-7-1918, cited by B. Schwartz, Supra. N. 60 p. 257: “It was desired that as for example, in England, in the event of an arbitrary arrest, an illegal seizure, or a manifest irregularity of any kind, the officer who had given or executed the order should be subject to personal liability.”

\textsuperscript{73} Frederic F. Blachly, “Approaches to State Liability in Tort” in Law and Contemporary Problems, Vol.9, (1942) p. 206

\textsuperscript{74} T.C. February, 1893.
Tribunal Des Conflicts in Blanco’s case\textsuperscript{75} established principles of liability of the State for Torts. The ratio laid down by the Court, in this case provided that, the State is liable for the fault of its servants and the administrative liability should be subjected to the rules separate and different from civil. The Court also decided that, the question of administrative liability should be decided by the administrative Courts. Following Blanco’s was a position taken by the Council of State in the Rothschild\textsuperscript{76} decision, that the responsibility which may rest upon the State for damages caused to individuals by the acts of persons whom it employs in the public services, cannot be governed by the principles which are established in the civil code for the relationship of individual with individual; that this responsibility is neither general nor absolute; that it has its special rules which vary according to the needs of the service and the necessity of reconciling the rights of the State with private rights. Blanco case, confirmed the jurisdictions of the Conseil d’ Etat over actions for damages against the administration.

In \textit{Pelletier},\textsuperscript{77} the Tribunal made the famous distinction between faute personnel and faute de service. The officer is liable, according to the Tribunal, only in case of personnel fault. When there is only a service connected fault, the identity of the officer is merged with the public service and the burden is first on

\textsuperscript{75} T.C. 8 February, 1873, The child agenes Blance was injured by a wagar which was crossing road between different parts of the State owned tobacco factory. The tribunal des Conflict held that the injuries arose out of service public and so administration Court had jurisdiction.

\textsuperscript{76} Rec. Cons. D’Bt (1855), 707 cited in Law and Contemporary Problems p. 207

\textsuperscript{77} T.c. 30 July 1873
the administration rather than the public officer. Suit against the public officer, would lie in the ordinary Courts whereas suits against the administration would lie only in the administrative Courts\textsuperscript{78} a procedural distinction only.

There was a distinction still made between acts of public power (actes d’autorite) and acts of management (actes de gestion) or business acts. For acts of public power, the rule was that, the State was not responsible. When, however, mere acts of management were performed in connection with the operation of the public service, the State could be held responsible. A narrow category of ‘actes de gestion privee’ were subject to the private law in the civil Courts, while all the rest were under the jurisdiction of the Conseil d’Etat.

In the twentieth century, great change was brought about regarding administrative torts by Conseil d’Etat. The term ‘personal fault’ and ‘service connected fault’ is referred to weakness, passions and imprudences; of a public officer or to the existence of that circumstance manifestly separable from administrative function.\textsuperscript{79} The service connected fault includes misfeasance, non-feasance and late feasance. When the administrative officer digresses from the standard of ordinary care of a reasonable and prudent men or when his act is ultravires, or has gone beyond his jurisdiction or he failed to observe the procedure required by law or commits abuse of power, the service is held liable rather than

\textsuperscript{78} This is the result of theory of separation of powers between administration and judiciary. Another result of the theory is emergence of two systems; torts and contracts law; private tort, private contracts and administrative tort and administrative contract.

\textsuperscript{79} Haurion, cited by B. Schowartz, sup. N.60 p.260
the errant-officer. At last in the case of combination of personal fault and service connected fault, the Conseil d’ Etat has developed the doctrine of “Cumul”.

The liability of State is based on the ‘fault’ and ‘risk’ or both. According to the French legal system, responsibility arise from deliberate and intentional harm arising from negligence or risk. Example are riots, war damage and school accidents arising from public works and compensation for criminal injuries. Fault is of two kinds. ‘Fault de service’ and fault ‘personnel’. In fault personnel, where there are pure personal fault, the official can be sued personally in the ordinary Courts. In ‘fault de service’, one which is linked with the service of the official the affected person can sue the before the administrative Courts.

A minor regulatory inform, the dismissal of a civil servant is a service fault. Police service and hospital service are considered as serious faults.

Sometimes there is combination of faults. Then it is difficult to identify whether the fault is ‘fault de service’ or ‘fault personnel’. In such cases the citizens are denied compensation. The question of jurisdiction of the Court may also arise. This led to the formulation of ‘Cumul’. Then the victim can sue both in civil Court and in administrative Courts. But remedy can be availed from any one of the Courts.

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80 When the occasion of service provides the means and instruments of fault, which together with personal fault has caused the wrong-doing, there is said to be a “Cumul”. Leon Blum in Lemonnier case cited by Brown and Garner, French Administrative Law, p. 96. The doctrine of “Cumul” was established in ANGUET case (C.E. 3 Feb. 1911) developed further in Lemonnier (C.E.26 July 1918); Delville and Laruelle, (C.E. 28 July 1951)
In Anguet, a visitor to a post office, was assaulted and had his leg broken by two members of the post office staff because he left by the staff entrance, for the public having been prematurely closed. The Conseil d’ Etat found that there were two distinct “fautes”, there was the premature closing, which was a faute de service, and there was the unwarranted violence of the officials- a faute personally. The Court went on to recognize that it was this combination (cumul) of both fault and personal fault which occasioned the complainants injury, but that as it would not have occurred for the fault de service the State could be held liable for the whole damages claimed.

In the course of the twentieth century and especially since 1944 the Conseil d’ Etat has built a general principle of liability without fault based on the theory of risk. Blanco was again a landmark by affirming the separateness.

In French legal system, may be liable where there has been fault and risk. The State is responsible for intentional harm arising out of negligence. The State is also responsible to pay compensation for criminal injuries like riots, school accidents and accident arising from public works. The Conseil d’ Etat has been characterized as the ‘bulwark of civil liberties’ and also the guardian of administrative morality. The system has come to be regarded as providing an effective protection to individual rights, against the despotism of public administration. The French legal system also permits personal liability. Where there is some personal fault, the official can be sued

82 Brown and Bell, French Administrative Law (1993)
personally in the ordinary law Courts. When a person is connected with the service of
the official the injured party can sue the administration before the administrative
Courts. In Delville, the drunken driver while driving State lorry met with an accident,
Delville was sued in the ordinary law Courts and held liable for the damage caused.
When personal liability was fixed, he claimed 50% contribution from the
administration on the ground that the accident was due to defective break of the
vehicle. The Court upheld his claim.

In fact the ordinary citizen, has an easy access to the Courts; the
proceedings are judicial and associate wide powers of investigation with the rule
of contradictory defense; and relief in either results in quashing an administrative
decision or provide financial compensation for damage received through illegal or
arbitrary action. Unlike the ordinary Courts in France the Administrative Courts
are not bound by any code and the law applied by them, has been built up entirely
on a case law basis by the Counseil d’ Etat acting on its own initiative. In
developed some remarkable and liberal principles of compensation.iii) Advantages and Disadvantages

The most important advantage in French legal system, is that it permits
ordinary law Courts and administrative Courts separately. The administrative

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83 In Couiteas, Ce 30 Nov 1923 the couifeas were entitled to damages not on the
basis of fault of the State but on the basis of equality inbearing public opinion.
84 In Minstre Des Affaires Etrangers C. Cosorts Burgat, CE 29 October 1976 the Conseil d’ Etat
recognised individuals right to enhance the rent of the flat which was occupied by a diplomat. The
Court fixed State 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.
Courts are very particular in protecting the interests of general public from arbitrary acts of the servants of the State. There is no strict rule of ‘respondent superior’. The State is immune from liability only if the act done by officials is totally unconnected with the official function.\textsuperscript{85} The Conseil d’Etat applies the principles of justice, equity and public opinion besides the rules of its own while deciding the cases.

Another special character is that judges and their commissioners, as well as advocates are highly skilled persons. This expertise leads to solid and judicious justice.

The Administrative Court need not depend in the statutes enacted by the State because Conseil d’Etat is the master to draft the code to fix the extent of the liability of the State.

The quantum of compensation is also reasonably determined by the Court on the basis of individual loss.

The Conseil d’Etat as the custodian of law and the protector of individual right also take case of the civil servant and regulates the State power. The State is making liable for excessive acts, error of law, arbitrary acts and for violation of procedural law and principles of natural justice.

The traditional concept of “sovereign immunity”, had no much value in France. The Administrative Court also fixes the liability based on ‘fault’ and

\footnote{Immunity is Recognised for ‘Act of State’ parliament proceedings, International affairs etc.,}
‘risk’ theory which makes the State accountable. Thus equitable justice is rendered to the affected person.

France as a welfare State concentrates the welfare of the people is working with social responsibility. Thus litigations are less and the individual is easily redressed in the matter of State torts.

**Conclusion**

In France, the tortuous liability of the State has been developed by the French ‘Droit Administrative’. The Court applies the principles of Fault and risk while deciding the State liability. The Court has judges and other fully trained experts in administration. The Conseil d’Elat is not bound by case laws or strict rules. It can formulate new rules in accordance with changing condition of society. The administrative Courts itself provides remedy. There is no hardship in filing suits. The procedures are also very simple.

**5.4 Position in Australia**

In Australia, Parliament is enable to make laws conferring rights to proceed against the Commonwealth or State. The Commonwealth of Australia Constitution Act 1900, by Section 73, provided that the legislature of Australia “may make any laws conferring rights to proceed against the Commonwealth or State in respect of matters within the limits of the judicial power.” The formula adopted in Australia is that, the rights of the parties shall be nearly as possible, be

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86 The Commonwealth of Australia Constitution Act 1900.
the same as in a suit between a subject and a subject\textsuperscript{87}. It gives a wide scope for judicial interpretation, and it is difficult to say to what extent the State’s liability, without distinction between sovereign and non–sovereign functions would be recognized under the Australia formula\textsuperscript{88}. Part IX of the Judiciary Act 1908, gave right to sue the Commonwealth both in contract and tort without petition of right. Section 56 of the Act, enables the citizens to bring a suit in tort against the State in the High Court or Supreme Court.

In \textit{Baume v. Commonwealth}\textsuperscript{89}, it was held that, the Act gave the subject the same rights of action against the State as against a subject in matters of tort as well as contract and that the Commonwealth was therefore responsible and an action was maintainable for tortious acts of its servants in every case in which the gist of the cause of action was infringement of a legal right. If the act complained of is not justified by law and the person doing it is not exercising an independent discretion, conferred on him, by statute but is performing a ministerial duty, the State is not liable. The party, therefore making a claim against a State has to establish his legal right and the infringement there of and would be entitled to a decree for damage if the act complained on is not justified by law and was not done in the course of the exercise of an independent discretion, conferred upon a person by the State. In other words to make the State liable the servant must have performed a ministerial duty and not a discretionary duty.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{87} Section 64, The Judiciary Act 1908.
\item \textsuperscript{88} Law Commission of India, First Report, (Liability of the State in Tort) p.24.
\item \textsuperscript{89} (1953)2 All ER, 149.
\end{itemize}
\end{footnotesize}
The Australian Courts have held that the Crown can be made liable in both respects for their wrongful acts or omissions. By the provisions of the Claims against the State and Crown Suits Act 1912, “any person having or deeming himself to have any just claim or demand whatsoever” was authorized to bring his claim before the Court by way of petition. On any such petition the rights of the parties were to be “as nearly as possible is the same as in an ordinary case between subject and subject.”

i) Exceptions

Where a servant designated by statute to perform a particular duty and in so doing to form an independent judgment, there can be no direct liability on the State because the servant and is not charged with responsibility. There is no vicarious responsibility because the servants’ right to form an independent judgment excludes the operation of the maxim, respondent superior. In these cases the servants are doing his job in his own way. In Stanbury v. Exeter Corporation,\(^\text{90}\) the defendant corporation who had appointed a sanitary inspector could not be sued for his tort in seizing sheep, when delegated legislation imposed the duty upon him directly. In Fisher v. Oldham Corporative\(^\text{91}\) the police officer was directly held liable for wrongful arrest.

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\(^{90}\) The State is subjected by the Statute to Direct Liability or Vicarious Liability

\(^{91}\) (1905) 2 K.B 83
In Australia, the qualifications which might require the finding of a private analogue before an action can succeed against the Crown. In this situation a Court would appear to have open to it a choice of three courses of action viz;

1. To apply a strict requirement of a private analogue before accepting that a claim lies against the State;

2. To require only that the plaintiff be able to set up as a basis of his claim, one of the recognized causes of action in tort, whether or not the circumstances giving rise to the claim can be duplicated between private persons. This course leaves the Court a good deal of flexibility particularly in actions based on negligence.

3. To attempt to create a State for liability, perhaps on a basis of recompense for harm done.

In Australia the High Court, has adopted the middle course and has established as its approach the testing of the State liability by reference to the recognized causes of action as they apply between private parties so that to succeed against the Crown, the litigant must present his case on the basis of such a cause of action. This however, is not a requirement that a complete private law analogue must be demonstrated before an action will be against the State. If this were the case, there would be no action in respect of wrongful custom’s seizures or unauthorized acts done in the course of administration of regulatory legislation.
Lacunae have been demonstrated in Australia, in respect of actions for which breach of duty and negligence Distinctions have been made between statutory provisions which regulate matters as between the commonwealth and its officers and those which regulate functions as between the Crown and the subject.\textsuperscript{92} In the case of provisions of the former class, an individual could not base an action against the servant, but he could base are directly against the Common wealth on provisions of the latter class. A similar distinction arises between an officer’s responsibility to the State as his employee for the manner in which he performs his duties and his responsibility to every person who might be thereby affected.\textsuperscript{93} In Wood Sliping and Scouring Company v. Central Wool Committee,\textsuperscript{94} it was held that no right of action maintainable in respect of an omission by defendant committee, to perform an act the obligation which had been laid upon it by certain war regulations. The problem is that the right to bring an action in tort against the State may be denied for reasons of social policy actions. In particular, a distinction has been made between State activities which are analogous to profit earning private corporations and those in respect of which no such analogy can be drawn. In Evans v Finn,\textsuperscript{95} it was held that the State was liable in respect of bullets flying from rifle range to physical danger of nearby residents.

\textsuperscript{92} Zachariasen v. The Commonwealth (1917) 24 C; L. 166  
\textsuperscript{93} Field v Nott (1939) 2 CLR  
\textsuperscript{94} (1920) 28 C.L.R. 51  
\textsuperscript{95} (1904) 4 S.R. (N.S.W) 297
In Australia, there is wide scope for judicial interpretations

5.5. Position in Canada

The consolidation of the State liability in Canada has added another milestone in this topic. Initially the Crown enjoyed immunity from tortious liability. But a suit could be brought as in England so in Canada through the petition of Right which was accorded a statutory base in all the Canadian provinces and also at the Federal level. The English Crown Proceedings Act 1947 served a model for the enactment of such legislation in the provisions of Canada. The rule that the Crown was not liable in tort still applied in the provinces of British Columbia, New – found land and Prince Edward Island”.

The Canadian Petition of Right Act 1927\footnote{Which Replaced Legislation} , the Crown was suitable in a separate Court, the Court of Exchequer, on Petition of Right but so far as liability in tort was concerned that was confined to negligence\footnote{Palmer v. The King(1952) 1 DLR 259}. In 1953 a Crown Liability Act was passé by the Dominion legislature under which the Crown in right of Canada is made liable for damages in tort an much the same lines as those of Crown proceedings Acts in England and New Zealand. The British Columbia which enacted the Crown Proceedings act in 1979.

In Canada also the Crown was put in most respects in the same position as an ordinary person. The Crown liability Act\footnote{R.S.C. 1970, C-38} does not prevent the issue of an
injunction against the Crown in the right of Canada. For the purpose of litigation, the Crown is to be treated par with ordinary subject\(^99\). In *Windsor Motor v. District of Powell River*\(^100\) the plaintiff company was given a license by a License Inspector to set up a used car business which was later found to be invalid because it contravened a zoning by-law. The company was awarded damages for the financial loss it suffered under the Hedley Byrne Principle. The Crown is also not subjected to the prerogative writs. Regarding the production of documents in evidence, the objection can be taken on the ground of doctrine of Crown or executive privilege\(^101\).

The law regarding State liability in Canada has no clarity. Expressly and impliedly the State is given privileges in respect of suits and proceedings. Theoretically it is subjected to liability in law but practically it is immune from ordinary individual. The principles and procedures in Canada cannot compare with Indian legal system.

For intentional torts the public officers continued to be personally liable.\(^102\) However, the Federal Constitution has been used as a sword of remedies, when the constitutionally guaranteed rights have been invaded. In 1974, Congress amended the Federal Torts Claims Act, 1946, to make the State liable for the torts, of false imprisonment and false arrest if committed by an investigative or law enforcement officer.

\(^99\) Article 14 of the Code of Civil Procedure 1968  
\(^100\) (1969)4 DLR(3d)155  
\(^101\) S.S.Srivastava, Rule of Law and Vicarious Liability of State, 27 (Edn 1995, Eastern Law House)  
\(^102\) But this was not done in case of acts done in exercise of discretionary powers.
5.6. Steps towards Legislation in India

As far as India is concerned, it is a fast developing country with vast State function. Nearly sixty five years after independence, its legal system, is yet to find an adequate answer to the liability by the State actions. Not merely has any legislative solution been attempted to solve the problem of compensation for injuries caused to Indian citizens out of the routine activities of State agencies, but also the State has usually put forth the defense of sovereign immunity whenever compensation claim have been pressed. This violates the directive principles and the preamble of the Constitution. The true implication of Article 300 of the Constitution is to denote suability of the Union and the States and not their respective liabilities. Disinclined to follow the corpus of past cases, tests and distinction, judges have repeatedly urged for legislation. For better administration of State tortious liability law, the old dichotomy distinction should be done away with and giving way to legislation. Twice steps were taken. But they have never gone through the parliamentary bridges. The important aspects of these efforts are discussed below.

i) The First Law Commission Report

Among the two steps, the first step was taken by the Law Commission (First). To evade uncertainty in the law of State liability in tort, President of India made a reference to the Law Commission for its consideration and report on the

103 A.G. Noorani, Public Law in India, "Developments in Indian Administrative Law.
104 Distinctions sovereign and non sovereign functions as laid down in Peninsular case.
105 Judges in Vidyawati case and Kasturilal case.
liability of the State in tort. The Law commission after making exhaustive survey of case laws,\(^{106}\) stressed the need for legislation in this area. The Commission suggested that the old distinction between Sovereign and Non-Sovereign or State and Non-State functions should no longer exist.

The Law Commission analyzed the cases from Pre-Constitutional period as well as Post-Constitutional period in this regard. In its Report in 1956, it had recommended to do away with the dichotomy test and proposed proper, test which is based on the nature and form of the activity in question. It also recommended\(^ {107}\) that, legislative sanction be given to the rule laid down by Sir Charles Turner in *Haribhanji*\(^ {108}\) case.

The commission laid down the following principles on which legislation should proceed:

1. **Under the general law of torts, State as an employer should be liable**
   
   (a) For the torts committed by its employee in the course of their employment.
   
   (b) For breach of those duties which a person owes to his employees or agents.
   
   (c) For torts committed by an independent contractor under the following circumstances-

   (I) Where the employer assumes control as to the manner of performance of the work;


\(^{107}\) Law Commission of India (First Report) p. 32.

(II) Where the wrongful act is specifically authorised or ratified by the employer;

(III) Where the work contracted with the independent contractor is itself unlawful.

(IV) Where the work contracted to be done, though lawful in itself, is of such a nature that it is likely, in the ordinary course of events, to cause injury to another, unless care is taken or that the law imposes upon the employer an absolute duty to ensure the safety of others in doing of the work;

(V) Where the employer is under a legal obligation to do the work himself.

(d) For torts where a corporation owned or controlled by the State.

(e) For torts in respect of breach of duty by its employees.

(f) For torts arising under the common law duty of ownership, occupation and possession or control of immovable property.

(g) For injury caused by dangerous things

(h) For the wrongful exercise of power by its employees causing damage.

2. **In its rights and duties**

(a) The State should be equivalent to a private employer.

(b) The State should be entitled to identify from the errant employee.
3. In respect of duties of care imposed by statute

(a) If a statute authorizes the doing of an act which is in itself injurious, the State should not be liable.

(b) The State should be liable, without proof of negligence, for breach of statutory duty imposed on it or its employees which causes damage.

(c) The State should be liable if in the discharge of statutory duties imposed upon it or its employees, the employees not negligently or maliciously, whether or not discretion is involved in the exercise of such duty.

(d) The State should be liable if in the exercise of the powers conferred upon it or its employees the power is so exercised as to cause nuisance or trespass or the power is exercised negligently or maliciously causing damage.

Exceptions from liability as recognition of immunity of the State arising from the following acts

(a) Act of State

Under the Commission’s Report “Act Of State” means an act of the sovereign power directed against another sovereign power or the subjects of another sovereign power not owing temporary allegiance, in pursuance of Sovereign rights.

(b) Judicial acts and execution of judicial process.

(c) Acts done in relation to the Defense Forces.

(d) Acts done in the exercise of political functions of the State and foreign affairs.

(e) Any claim arising out of-

(I) Defamation, malicious prosecution and malicious arrest.

(II) Operation of Quarantine Law,
(III) Immunity under Indian Telegraph Act, 1885 and Indian post Offices Act, 1898.

(IV) Foreign Torts.

To eradicate the confusion, the Commission defined the terms like “Agent”, “Employee”, “Independent Contractor” and “State”.

The Commission also recommended that a provision be inserted in the General Clauses Act, as “In the absence of express words to the contrary, every statute shall be binding on the Union or the State, as the case may be”.

The Parliament of India, never took any steps to make the proposals effective. In the absence of legislation, the old method of case law continued to perpetuate the distinction between ‘sovereign’ and ‘non-sovereign’ functions of the State, as a basis for determining the liability of the State, for the torts committed by its servants, Inspite of the Law Commission’s stress of the Haribhanji\textsuperscript{110} principles, the Courts continued to find solution in sir Barnes Peacock’s dictum\textsuperscript{111} and the tests of dichotomy laid down in it. While Vidyawati\textsuperscript{112} case reaffirmed the ratio of Peninsular\textsuperscript{113} case, three years later the Supreme Court wrongly decided the law in Kasturial\textsuperscript{114} case and expressed the opinion that the Law may be specifically laid down by the legislature, despite the fact that the second step was taken by the State and a Bill was introduced in Parliament.

\textsuperscript{110} (1882) \textit{ILR} Mad. 275
\textsuperscript{111} Peninsular Case
\textsuperscript{112} A.I.R.1962 S.C.933.
\textsuperscript{113} (1891)5 HCR APP.1.
\textsuperscript{114} A.I.R.1965 S.C.1039
ii) The State (Liability in Tort) Bill 1967

The State introduced this Bill,\(^{115}\) in the Parliament in 1965 to ‘define and amend’ the Law with respect to the liability of State in tort. It had lapsed and it was again introduced in May, 1967. It has not yet been enacted into law. The Bill was referred to a Joint Committee which had submitted its report in March 1969. Even then the Bill did not enter the further stages of Parliamentary process. An analysis of the important provisions of the Bill is considered useful for the present study. The Bill considered the recommendations of Law Commission. The intention of the Bill is to do away with the sovereign, non-sovereign tests and liberalize the liability of State, under specific provisions. The following are an analysis of the relevant portions of the Bill which deals with the liability and exception of the State in tort.

1. Under Clause 3(a) of the Bill, State shall be liable in any respect of any tort committed by an employee of the State or an agent employed by the State in the course of his employment or under the authority of the State or when the act is ratified by the State.

2. Under Clause 3(b) of the Bill, the State shall be liable for the torts committed by an independent contractor employed by the State or any servant or workman in doing the act contracted to be done for the State, where the State controls or authorizes or ratified the act alleged to constitute the tort; where the duty of care or legal obligation or absolute duty is upon the State.

\(^{115}\) Bill no.43 of 1967 (as introduced in Loksabha on 22.5.1967)
3. Clause (4) of the Bill extend the common law liability on State. Under this clause, where the State is the owner of any immovable property or in possession or occupation or control of any immovable property, in respect of any breach of duty attaching by law, the liability is in the same manner and to the same extent as a private person of full age and capacity.

Also, Under clause (5) of the Bill, the State shall be liable in respect of any personal injury or any damage to property caused by any dangerous things in the possessions of the State or over which the State exercises control in the same manner and to the same extent as a private person of full age and capacity would be liable in similar circumstances if he were in possession of, or exercised control over, such thing.

**Defense of State**

There are defenses open to State under the Bill. These defenses are provided under Clauses 10 and 11 of the Bill. They are as follows

1. The State shall not be liable, for any act, for causing death of another person or for causing personal injury to another person by a member of armed force of the union or by a member of police force while on duty and the State certifies it to be attribute to service.

2. For any act of State, acts done under the external affairs power and claims arising in a foreign country, the State shall not be liable.
3. The State shall not be liable for any act done by the president or governor as the heads of respective legislature in the exercise and performance of the powers and duties of his office in relation to summoning and prorogation of the Houses of Parliament, the dissolution of the houses of the people, the assent to or the withholding of assent from, any Bill, the return of any Bill to the houses for reconsideration of the Bill or any specified provisions thereof or the issue of any proclamation under Constitution.

4. For any act done or ordered to be done by a judge, magistrate, or any other person while discharging or purporting to discharge any responsibilities of a judicial nature vested in him, done by any person bound to execute the warrants or orders, the State shall be immune.

5. The State shall not be liable for any act for which immunity is granted under the Indian Telegraph Act, 1895, the Indian Post Offices Act, 1898, the Indian Railways Act, 1890, the Quarantine Laws or under any other enactment for the time being in force.

6. For any claim arising out of defamation, malicious prosecution or malicious arrest, the State shall not be liable.

7. The State shall be immune for any personal injury or any damage to property caused by an act which by its nature was likely in the ordinary course of events to cause such injury or damage, if the doing of the act was authorized by any enactment for the time being in force.
8. The State shall not be liable for any act done by any member of a police force or a public servant in good faith for the prevention or suppression of breach of peace.

From the above analysis it can be seen that the Bill does not intend to prescribe permanent solution for State liability in tort. But it is a newly introduced tool to help the individual claims consistent with the changing trends of society.

**Conclusion**

The maxim ‘*King can do no wrong*’ and ‘*King cannot be sued in his own Courts*’ dominated the common law world. In English law, the justice was meted out to the victims of wrongful acts of the servants of the State. In contractual matters only through the mechanism of ‘*fiat justitiae*’. But it depended upon the sole discretion of the sovereign to grant or refuse the ‘fiat’. So action against the errant official of the State could not be subjected to liability. The real actions were depended upon the responsibility accepted by the Crown itself. The system of innocent official being implicated to face the legal battle was contrary to justice. So after Adams v. Naylor, this practice was taken away from judicial procedure. The enactment of the Crown Proceedings Act 1947 was a landmark in English legal system. This Act, made the liability of State par with the liability of an ordinary employer for the wrongs of its servants. Since exception clause provided in this Act are very lenient, the errant officials may take undue advantages.
The doctrine of sovereign immunity is deeply rooted in American legal system. Initially, the victim who was affected by the wrongful acts of servants of State could not succeed in any claim against the State. A suit against the State was permitted only when there were specific statutory provisions. Even when the claim was entertained, it was only for contractual liability and not for torts. The Congress permitted claims on torts by private legislations. This resulted with legal confusion and the victims who affected by the negligent acts of servants of the State had no remedy. This confusion was diluted by the enactment of the Federal Tort Claims Act 1946. This Act authorizes to bring any suits against United States. With exceptions, it makes the United States liable for injuries caused by the negligent or wrongful act or omission of any federal employee acting within the scope of his employment. The exception clause provided for discretionary functions of the servant of the State is one of the drawbacks for the victim to claim compensation.

The most important advantage in French legal system is that it permits ordinary law Courts and administrative Courts separately. There is no strict rule of ‘respondent superior’. The State is immune from liability only if the act was done by officials totally unconnected with the official function. Another important character of French legal system is that, only legal experts are sitting as judges to decide the cases. The Conseil d'Etat, applies the principles of justice, equity and public opinion besides the rules of its own, while deciding the cases. The Court also need not depend on the statutes enacted by the State, because Conseil d'État is
the master to draft the code fix the extent of liability of the State. The Court applies the principles of ‘fault’ and ‘risk’ while deciding the State liability. The procedure to file a suit is very simple and the administrative Court itself is providing remedy.

In Canada also, the Crown was immune from liability and the suit could be filed only with the consent of the Crown. Most of the petitions were rejected since it was the dissertation of the Crown. Only after the enactment of the Crown Proceedings Act 1947, in England, all the provinces in Canada enacted the Crown proceedings statutes on the model of the United Kingdom. The statute put the State liable, for the tortious acts its servants. The liabilities and immunities are granted in accordance with the statute.

State liability in Australia was also restricted to a limited extent since the State was immune from the wrongs committed by its servants. Now, by various legislative efforts, the State could be made liable for the wrongful acts of its servants. The important problem is that the right to bring an action against the State may be denied for the reasons of social policy actions. In Australia, there is wide scope for judicial interpretations.

The present law in India regulating State liability in tort is based on Article 300 of the Indian Constitution. Even though, most of the cases were decided on the basis of the dictum given by the Supreme Court of Calcutta in Peninsular Case. The Supreme Court and the High Court are playing a vital role to demark the
extent of liability and immunity of the State. The Indian judicial trend heading
towards compensatory justice, taking recourse to Fundamental Right to Life and
Personal Liability, is a good trend. First Law Commission in its report recommended
for enacting legislation to deal the State liability in India. A Bill providing for such
liability was introduced in the Parliament in 1965 and then in 1967, which could not
be enacted as legislation. In India, we also need a legislation to bring uniform justice
in the matter of State liability in tort.