CHAPTER VII

CONCLUSION AND SUGGESTIONS

CONCLUSION

Modern welfare State is loaded with multifarious functions. These functions are carried out by the servants or agents of the State as per its express or implied instructions. The events of day to day activities of the servants of the State often subject people to loss or sufferings. It is natural to expect that the wrongdoer has to compensate the victim for the loss sustained by him. When the aggrieved person approaches the Court to enforce his rights, the errant servant may not be able to compensate due to his poor economic position. In this circumstance, the State as a master is liable to compensate the citizens whose rights are infringed by the unlawful and excessive acts on its part. Hence the State is vicariously liable for the wrongs committed by its servants.

Any welfare State, functioning in accordance with rule of law, must accept the liability. This is the primary duty of a ‘democratic republic’, working for the welfare of all the citizens. The law relating to extent of liability and immunity of State in torts has witnessed several phases of development. In India, tort litigation has so far been less diversified and quantitatively less than in United Kingdom, United States, France, Australia and Canada. As a welfare State having a written Constitution with equality clause and right to life and personal liberty clause, its legal system has yet to find an adequate answer to the question of the
State liability in tort for the wrongful acts of its servants or agents. In the absence of comprehensive legislation or fixed principles to decide the liability and immunity of the State for the tortious acts of its servants or agents, once again the past cases were being examined, tests and distinctions were searched for, old statutes were examined to put together a mirror of the past in which they tried desperately to catch the reflection of the law of today.

The liability of the Union of India and of the States to be sued is regulated by Article 300 of the Indian Constitution, which does not give rise to any cause of action or their respective liabilities. All advanced societies today take the stand that the main object of welfare State is to work for the benefit of the people generally. The rule of law merely protected the individual from arbitrary actions of the State. The irrational rules laid down in Peninsular case\(^1\), developed an irrelevant concept of ‘Sovereign Act’, putting the State in a protected position from liability, leading to anarchism.

The Courts have usually put forth the defense of sovereign immunity, whenever compensation claims are passed. After independence, Courts have actively laid down new principles, by deciding many acts, such as ‘negligent driving’, ‘malicious prosecution’, ‘conversion of property’, ‘banking business’, ‘running of railways’, ‘postal service’, ‘maintenance of hospitals’, ‘acts carried on by public works department’, ‘construction of reservoir’, ‘medical relief work’,

\(^1\) Peninsular and Oriental Steam Navigation Company v. Secretary of State for India, (1861)5 Bombay H.C.R. App.1
‘famine relief work’ and ‘fire service’ as non-sovereign acts, extending tortious liability of State. The attitude of Supreme Court, to reduce the State’s immunity is a plus point to protect individuals from public wrong. However, the watertight compartmentalization of the State’s functions into sovereign and non-sovereign, is highly reminiscent of the laissez-faire era. In the absence of guiding principles by legislation, Courts were confronted with the test of “sovereign - non-sovereign” distinction. Absence of uniformity in its application and the controversial opinions among Courts encourage only lack of confidence in the minds of the citizens. Courts have often prompted out that ‘it is the matter of the legislation to decide, not the Courts’.

The Supreme Court and High Courts took liberal approach in various cases in such a manner that the distinction lost much of its practical importance. The cases like Rudul Shah, Nilabatti, Saheli, Bhimsingh, Nagendra Rao, People’s Union for Democratic Rights, Common Cause, Sathyaavathy, and Chella Rama Krishna Reddy show, how the judiciary discarded the principle of sovereign immunity rule and extended the liability of State.

For the proper exercise of governmental functions, State requires immunity from liability. But it should not be absolute. There must be guiding principles by legislation or by uniform judicial precedents. Without any uniform judicial precedents or any rational basis to support the Courts to decide what is sovereign function and what is not, denial of liability by deciding the wrong act as
‘sovereign act’ leads to injustice. For instance, performance of statutory duty, maintenance of public path, maintenance of military road, commandeering goods during war, training for defense, arrest and detention, performance of military duty, maintenance of national highways, keeping stolen goods with police malkana, malicious prosecution, maintenance of law and order, administration of justice etc; were considered as sovereign functions and for such function, the State need not take responsibility. It is concluded that these norms laid down by Courts are unsatisfactory norms.

Moreover some of the legislations, by its various provisions of law exempt the State from suits and proceedings. Even though it is conflicting with the modern concept of sovereignty, these provisions protect the State from action taken in good faith for the convenience of smooth functioning of the State machinery.

‘Act of State’ is a weapon in the hands of Sovereign State to claim immunity from liability. In India, ‘Act of State’ is of historical growth. This is necessary to keep the status of sovereign States. But it must be governed with established principles formulated by international lawyers. The efficient analysis of this doctrine is in a controversial state, and is an inapt doctrine for modern States. The reason is that there is no borderline to derive, what are to be called ‘Act of State’ and those which are not.

The attitude of Courts towards applying the test of distinction between sovereign and non-sovereign function, based on logical fallacy is unsatisfactory.
Division of functions of a welfare State with the intention to deny justice to citizens infringes the fundamental concept of the legal system itself. So, it is desirable and equitable to abolish the test of dichotomy and to improve the attitude of giving compensation similar to the British, American and French model.

In England, the Crown’s immunity before 1947 arose from the maxim “King can do no wrong”, which implies that no wrong could be imputed to the Crown nor could it authorize a wrong. Under the Common law, the Public officers were immune from liability due to their official status. But at the end of the nineteenth century, the principle of vicarious liability was fully developed. The position had been changed in England by the Crown Proceedings Act, 1947 which made the Crown liable for torts, like a private person of full age and capacity. Even though the legislation provides exemption from liability, the existence of prerogative powers and limits of statutory power are subject to judicial review.

The Government of the United States of America enjoyed immunities similar to those in England. The acknowledgement of Sovereign immunity in the United States is regarded as one of the mysteries of legal evolution. It is also considered to be resetting on the policy imposed by necessity attributable to the financial instability of the infant American States and the poorly paid public servants. The immunity of the sovereign State is not shared by its officers because a distinction is made between the liability of the higher officials and lower officials. Now, the United States shall be liable in the same manner and to the
same extent as a private individual in circumstances under the provisions of Federal Tort Claims Act, 1946. But no effective step was taken to sweep away the sovereign immunity. Thus the State immunity and officer liability are the principle evolved by a proper interpretation of the Constitution and the Federal Tort Claims Act, 1946.

The French Legal system developed the basic principle that administrative law is application of the public power to the public need. This cannot permit any principle recognizing the capacity of State to do wrong. It eliminates the distinction between public or sovereign acts and proprietary or fiscal acts and accepted States responsibility. In France, by a process of gradual evolution, the Conseil has shifted the basis of tortious liability of the State from fault, to that of risk. This is a good starting point to guide democratic way of administration. The law regarding State liability in Australia and Canada has no clarity. Theoretically, the State is subjected to law in liability but it is immune from ordinary individual. In Australia and Canada, the State liability in torts is regulated by the Constitution itself.

The Common law principles were bodily lifted from their native soil and implemented in India by Judges who knew no other law, except the Common law, unconcerned whether they are suited to the social and other conditions in this country.
The law commission on its first Report argued a legislation to abolish the distinction by giving some suggestions. A Bill (introduced in 1965, then in 1967, lapsed in 1969) has not yet been considered by the Parliament.

It is clear that the rule of law requires that the government should be subjected to the law rather than the law to be subjected to government. To protect the equality clause guaranteed by the Constitution, it is necessary to govern tortious liability law by judiciary with guiding principles laid down by legislation. Individuals can be satisfied only if there is an independent public law of tort, which governs the tortious liability of State. It need not be on the basis of Crown Proceedings Act or Federal Tort Claims Act which leaves large loopholes to exempt the government from liability. It need not totally be based on the model of the Government (Liability in Tort) Bill, 1967 because the Bill does not intend to fasten permanent liability on the government.

It is submitted that the controversial problem in public tort litigation, should be governed both by judiciary and legislation. A new judicial trend has been manifested by the Supreme Court in the area of State liability called ‘Constitutional Tort.’

To achieve the objectives of the Indian Constitution, the Courts have interpreted Article 21 in new dimensions and bring out ‘compensatory jurisprudence’ which made a tremendous change in the area of modern Indian legal system, particularly in State liability in tort. Now the Court can award
compensation to one who may have unduly suffered due to Sexual Harassment, Custodial Violence, Encounter Death, Handcuffing, Illegal Detention, Medical Negligence, and Police atrocities at the hands of the employees of the State through a writ petition under Article 32 and 226 of the Indian Constitution rather than taking recourse to an ordinary civil suit.

While awarding compensation, the Courts are neglecting the feudal and pre Constitutional principle of ‘Sovereign Immunity’. This judicious and equitable move of the Supreme Court and High Court dilutes Article 300 and innovates Constitutional tort under Article 21 of the Indian Constitution. This welcome trend fixes more responsibility on modern welfare State and creates accountability towards the victims, whose fundamental rights are affected by the negligence or excessive acts of the servants of the State.

The role of judiciary in providing guidelines in *D.K Basu*\(^2\) to prevent torture is a tremendous step. Also the guidelines given by the judiciary in *Visaka*\(^3\) case to safeguard women from sexual harassment in working places is another hallmark to the extension of liability of State. It is submitted that the same vigour should be shown in overruling *Kasturilal*\(^4\) decision also which is still alive as bad precedent. Medical negligence on the parts of the servants of the State also lead for

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\(^3\) *Visaka and other v. State of Rajasthan*, AIR 1997 SC 3014

compensation to victims under public law. It is the duty of the doctors to preserve life, whether the concerned person is a criminal or an innocent person.

From all the above cases, we can infer that Courts now do not approach the matter purely from the point of view adopted in the traditional tort litigation based on sovereign and non-sovereign functions. Compensation awarded under Constitutional tort by making the State vicariously liable for the negligent acts of its servants. The basis of determination of liability is violation of fundamental right under Article 21 of the Indian Constitution.

SUGGESTIONS & RECOMMENDATIONS

After carefully analyzing the State liability in tort under Article 300, the researcher has concluded that the application of Article 300 of the Indian Constitution is vague and unclear in respect of laying down principles regarding extent of liability and immunity of State, for the wrongful acts of its servants or agents. Another lacuna found out by the researcher in application of Article 300 is in respect of demarcating the ‘Act of State’ and Sovereign functions. Thus, in order to curb the anomaly, the researcher has come up with certain suggestions, which are as follows,

A) A Comprehensive Legislation is urgently needed. However, the Parliament has brought a Bill namely, The Government (Liability in Tort) Bill, 1967 to implement the recommendation of the First Law Commission. The researcher has elaborately examined the above said Bill and found that it is not suitable
to the present socio economic conditions of the State. After considering the present modern society in the globalised world and the role played by the judiciary in expanding the fundamental rights of the citizens under Article 21, the researcher has conceptualized that the proposed Bill should be in such a way that the State must be made liable for its tortious actions and reasonable exceptions should be given for the acts of State to protect the sovereign functions and to reduce the vicious interpretation of the judiciary in expanding the liability of the State, by compromising the sovereignty of the State.

It is also recommended that the following provisions may be incorporated in order to balance both the rights of the citizens to enjoy and the rights of the State to protect the sovereignty of the State.

1. The errant servant or the agent of the State should be made personally liable for the wrongful or excessive acts and he should be liable to pay the compensation. If the errant servant or the agent of the State is not financially sound to pay the compensation amount, then the State is responsible to pay the amount and recover the same from the errant servant or agent.

2. Article 32(3) provides that “without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2), Parliament may by law empower any other Court to exercise within the local limits of its
jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2)”.

The State may take necessary steps to extent writ jurisdiction to other Courts for the Article 300 also. Any aggrieved person or affected party can file a writ petition before any other Court other than Supreme Court and High Court. This redressal mechanism for the citizens will be more convenient in seeking justice by easy access of course. This will help the poor and needy person.

3. If the writ jurisdiction is vested with the other Courts, it can award full compensation to the victim affected by the negligent acts of the servants of State. This feature has to be incorporated in the proposed legislation. This will make the other Court litigant friendly.

4. The proposed Bill should contain guidelines for fixing and providing compensation to the affected persons. The guidelines may be similar to the provisions of Motor Vehicles Act or Workman’s Compensation Act. In the case of sexual harassment, the victim should be compensated not only for physical injury but also for the mental agony that she had undergone and the trauma that she has to undergo in her future life and the expenses to be incurred for her rehabilitation physically as well as mentally.
The compensation proposal differs from case to case according to the facts, circumstances and the nature of the offence.

5. The proposed Legislation should contain guidelines to the public officials relating to the manner of discharging their duties and functions.

6. For the wrongful acts of the servants of the State, the plea of sovereign immunity shall be avoided. Exemption from liability may be given only on the grounds of ‘Act of State’, judicial functions, foreign affairs and defense of the country. This can avoid confusion and it will be helpful to render social and equitable justice.

7. There must be statutorily recognized time limit for the disposal of the cases to avoid inordinate delay to render justice.

8. There must be a compulsory insurance scheme so that the State can provide compensation to the victim. This is to avoid the compensation depending on the financial capacity of the accused.

9. In case of negligence in Postal Service and Railway Service compensation should be awarded.

B) By way of giving awareness to the servants of the State, periodical Refresher Courses, Orientation Courses and effective meetings must be conducted by legal and professional experts.
C) Provision shall be made for Free Legal Aid for the affected persons. Efficient lawyers shall be engaged to conduct the cases.

D) Frequent instruction and guidelines should be given to the servants of the State regarding duty to take care, consequence of negligent acts etc.

E) The decision in *Kasturilal* case must be overruled in order to avoid confusion while applying judicial precedents.

F) The existing laws in India unnecessarily make huge expenditure from State treasury in the form of compensation or damages. As we know prevention is better than cure. Steps should be taken to prevent the wrongful acts through departmental actions.

G) A Judicial Committee may be constituted to visit prisons in order to check the jail authorities and prevent torture. Atrocities against woman and children may be considered as serious act and in such cases besides compensation, criminal action shall also be taken against the errant public servant.

H) In Constitutional torts, if the violation of fundamental rights is established, the applicability of sovereign and non sovereign principles should be dispensed with.

I) As soon as a petition is filed before the Constitutional Court for any claim of compensation for wrongful act of the servant of the State, interim relief and ex-gratia payment shall be awarded.

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J) Time limit must be fixed by the statute for disposal of the case and for providing compensation. Then only, speedy justice is possible.

K) The copies of important judgments shall be displayed on all notice boards of the public office. The guidelines given by the judiciary in this regard must be informed to the authorities from time to time.

L) A permanent register shall be maintained to note the name of the errant official, date and nature of wrong committed, action taken against him, petition pending before Court or tribunal, compensation awarded or not and if awarded, the quantum of compensation. The register must also contain the particulars regarding notices, circulars or pamphlets issued to the servants to spread awareness about the careful discharge of their official works.

M) The protection clauses under various legislations must be restricted.

N) The entire railway crossing should be manned and should not be left free. It will protect the life of the individuals and also avoid unnecessary expenditure of the State in the name of compensation. Considering the day to day problems, due to the expansion of population etc, sufficient safety measures shall be given to safeguard the life and liberty of individuals.

If the State, Law making and Law enforcing authorities take effective steps to implement the above suggestions and recommendations, no doubt, the State liability will be minimized and public will get proper relief.