CHAPTER I
INTRODUCTION

‘The Constitution is Supreme and Sovereign’

A State or political society is an association of human beings established for the attainment of certain ends. It is a changing organization. It brings within its power in all forms of human activity, the control of which it deems desirable.\(^1\) The very idea of human society presupposes order.\(^2\) No society can exist when there are no norms to govern the social relations of the members. The lack of an integrated social system is unable to satisfy all the various aspirations of the human body and mind may cause serious psychological frustrations among the masses of the people, which may lead to disintegration of the social order, with all its concomitant effects.\(^3\) Man being a rational animal, order and peace are his age old aspirations.\(^4\) It could be maintained only through dynamic legal system. In a civilized community, there must be a firm legal system acceptable to the people, because the source of legal authority is always the people. Human law arises by the corporate action of people setting up rules to govern the acts of its members.\(^5\) Law primarily deals with rules of external behavior by which persons are bound to observe in any society. Ever since the time when human beings began to associate

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\(^1\) Harold J. Laski, Grammer of Politics 21 (Surjeet Publications, 5\(^{th}\) Indian Reprint 2008).
\(^3\) Bodenheimer, Jurisprudence - The Philosophy and Method of The Law 306 (Harward University Press, 2\(^{nd}\) Indian Reprint 1997).
themselves in some sort of groups, some rules of conduct were also found prevalent among them. These rules naturally became numerous in highly developed modern States.

1.1 State and Social Order

In ancient days people have regarded the law as received from divine source but in the modern world, where most laws have a known human author, people think of law as the product of designing human minds. Human beings are subjected to various needs and interest. The aim of human life is happiness, which is attained through the mechanism of law and justice. Hence, justice as a concept revolves around the ways in which peace and order could be maintained. Every society therefore likes to avoid a state of confusion which affects human ability and happiness adversely. This could be achieved only by a law abiding and responsible State. But unsettled and conflicting issues between the State and individuals are growing enormously. The conflicting interests of the State and individuals may lead to confusion and turmoil. As a result there are possibilities of State itself violating the rights of the individuals. The significant point however, is that in order to carry out its activities and functions, whatever may be their range, it becomes necessary for any State to establish certain basic organs or agents or instrumentalities which act on its behalf and through which the State can function.

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and operate. The vast accumulation of public power posed a serious challenge to the notions of individual rights. Every exercise of power by the State was, in some way or others, an encroachment on the rights of individuals. Wider the powers became; there was wider room for abuse of the powers. Unless the powers of the State are exercised according to law, it will ultimately lead to administrative despotism and social disorder.

1.2 Role of Law in an Ideal State

Law has to grow in order to satisfy, the needs of the fast changing society by keeping itself in just and fair manner. Law cannot afford to remain static in such a challenging situation. New principles and new norms have to be evolved in order to meet such challenges. The community after reaching a certain stage of development sets up a legal order which determines the method by which law is to be created, declared and enforced. Justice Venkatachaliah, observed that “Law cannot afford any favourite other than truth”.

Law must respond and be responsible to be felt and desirable compulsions of circumstances that would be equitable, fair and just and unless there is anything contrary in the statute, Court must take cognizance of that fact and act accordingly.

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10 V.D.Kulshrestha’s *Landmarks in Indian Legal and Constitutional History* 454 (Eastern Book Company, 9th Edn., 2009)
Law is never an ideal justice, but human justice defined by those who control the machine. What ends law has served is a question for legal history.\textsuperscript{13}

1.3 Police State to Responsible State

During laissez faire period, the responsibility of the State was very low. There were limited cases of infringement of individual rights. Everyone was allowed to have his own way to protect his own interest in the field of trade, commerce and industry. As a consequence of individual freedom and absence of State control, poverty, unemployment and depression of people created pressure upon the State to act. State controls on individual activities became inevitable. Taxing, licensing, and law and order are the three mechanism by which the State extended its control on the human activities. This paved the way for the emergence of welfare State. A welfare State is meant for maintaining social security and minimum standard of health and wealth. Here State acts more as an agency of social service rather than as an instrument of power. Today the State has become the dominant factor in the social and economic life of an individual.\textsuperscript{14}

As a result of Industrial revolution and the replacement of anarchy, the modern State is transformed from ‘Police State’ to ‘Welfare State’. The philosophy of socialism abandoned the concept of individualism. This reduced the

\textsuperscript{13} G.W. Paton, \textit{A Text Book of Jurisprudence} 92 (Oxford, Clarendon Press, 3rd Edn., 1964)

strength of ‘laissez-faire’ era and created a responsible State.\textsuperscript{15} The primary duty of a welfare State is to protect the rights of the people. Thus the modern welfare State is assuming more and more positive functions. The State acts as the protector, provider, and dispenser of social service, manager of industries and controller of economic and social affairs of the nation. So the functions, powers and activities of the present State are growing enormously. The conferring of discretionary powers on various State authorities is also inevitable. There has been a great expansion in the role of the democratic State. Now it is engaged with multifarious administrative functions like running of buses, railways, postal services, rationing, issuing passports, licensing, undertaking planning of social and economic life of the community, steps taken to raise the living standards of the people and reduce concentration of wealth, slum clearance, regulating urban and rural life of the people, looks after health, sanitation, morals and education of the people, generates electricity, production and distribution of food, mining, regulating import and export, fixing and regulating tax, regulating financial institutions and industries etc. With the creation of large number of new administrative bodies, the State cannot function without the assistance of servants. While exercising these functions, the servants of the State may go wrong or they may breach the statutory duties and thereby threatening the life and liberty of the people. This events of everyday activities of the servants of the State often subject

\textsuperscript{15} H.W.R. Wade, \textit{Administrative Law} 33 (Oxford Publications, 4\textsuperscript{th} Edn., 1997)
people to loss and sufferings. It is natural to expect that the wrong doer has to compensate the victim for the loss sustained by him. The concept of State liability thus emerged in the welfare State.

1.4 State and Concept of Liability

The liability may be imposed as a legal consequence of a person’s act or his omission if he is under a legal duty to act. Where the State enforces a right that is due to the plaintiff and its purpose is not the punishment of the defendant, the liability is regarded as remedial. However, the purpose of the law is wholly or partly the punishment of the wrongdoer, the liability is described as penal. Criminal liability is always penal as the purpose of criminal proceedings is the punishment of the offender. Civil liability, however, is not always remedial, because the immediate object of civil proceedings is compensation, in some cases there is also ulterior purpose of punishment of the wrong doer.

In the modern society the problem of rights of an individual in relation to the State is becoming more and more complicated. At present they are viewed in the angle of society rather than that of the individual. Every right carries a duty with it. The need to synthesis right with duty so as to achieve the objective of a cohesive community has been historically recognized.\(^\text{16}\) Ordinarily a right is that which one may properly demand or claim as just, moral or legal, that to which one is entitled.

\(^{16}\) Simranjith Singh Mann v. Union of India, 2002 Cr.L.J. 3368
The relation of the rights of the individuals to those of his fellow individuals in the community has gradually led to a profound modification of the legal values of the modern democracy. The concept of State liability in the twentieth century marks a shift from ethical to metaphysical foundation and is moving with the direction of searching the best risk bearer and most efficient loss distribution. Liability is normally grounded on some finding fault or wrong, in addition to finding responsibility for some occurrence.

In order to be a ground of liability, the law must have imposed a duty of carefulness. Particular legal systems will lay down their own cases where there would be duty to take care. It seems that, wherever law creates a duty, it should ensure the specific enforcement of it. Thus it is clear that ‘liability’ suggests ‘legal liability’ and the law imposes obligation on every person to repair loss suffered by another person.

1.5 Vicarious Liability of State

Vicarious liability has its origin in the legal presumption which gradually became conclusive that “all acts done by a servant in and about his master’s business are done by his master’s express or implied authority and are therefore in truth are the acts of his master for which he may be justly held responsible.” The Latin maxims closely related to the principle of vicarious liability are ‘respondent

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18 P.J. Fitzgerald, Salmond on Jurisprudence 401(Sweet & Maxwell Ltd, 12th Edn, 1979)
superior’ and ‘qui facit per alium facit per se’. The first means that “a principal is answerable for the acts of his subordinates” and the second explains that “he who employs another person to do something, does it by himself” or “he who does through another does it by himself”. There is no more settled doctrine in the law of tort than that a master is liable for the torts of a servant committed in the course of his employment, but there is no more controverter propositions than that a principal is generally liable for the torts of an agent committed within the scope of his authority.\(^\text{19}\)

Lord Pearce, therefore rightly observed that the doctrine has not grown from any very clear logical or legal principle but from social convenience and rough justice.\(^\text{20}\) In the modern law, tortious liability is generally based on some notion of fault but the result of vicarious liability, is to make one person compensate another for loss not due to his fault at all, but due to the fault of his servant, agent or independent contractor. ‘Wrongful acts are those which are considered to be mischievous in the eye of law.’\(^\text{21}\)

Servants are usually impecunious people and cannot pay compensation to the injured party. The master having placed the servant in a position where he can do injury to others is obliged by law, to assume the liability to pay for the injury.\(^\text{22}\) Thus the jural basis of this form of vicarious liability is to be found in expediency.

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\(^\text{19}\) Atiyah, *Vicarious Liability in the Law of Torts*, 99 (Butterwarths, 1st Edn, 1967)

\(^\text{20}\) Imperial Chemical Industries Ltd v. Shatwel (1965)AC 656


and public policy. In the case of vicarious liability, the injured person can claim from the master for the injury done by his servant only if he can show that the wrongful act was actually authorized by the master. The master’s liability is made out only when the act was done in the course of employment. This conception of vicarious liability is based on the personal negligence of the master which can be contrasted with the ‘servant’s tort’ or ‘guarantee’ theory. Lord Brougham,\(^{23}\) said: “The rule of liability, and its reason, I take to be this: I am liable for what is done for me and under my orders by the man I employ for, I may turn him off from that employee when I please: and the reason that I am liable is thus, that by employing him I set the whole thing in motion, and what he does, being done for my benefit and under my direction, I am responsible for the consequences of doing it”.

The legal concept of liability includes tortious, contractual and criminal liabilities. The liability is the legal accountability of a wrong doer to the wrong. A wrong is simply a wrong act – an act contrary to the rule of right and justice.\(^ {24}\) The present study is confined to the State liability in tortious acts of its servants. The powers of the public officer must be defined by law and the officers in exercise of these powers must not commit a wrong.\(^ {25}\) The concept of State liability is an enumeration of the concept ‘rule of law’ and the principle of ‘equality’.\(^ {26}\) The

\(^{23}\) Glanville Williams, “Vicarious Liability: Tort of The Master or of The Servant?”., 72 LQR 522 (1956).

\(^{24}\) Fitzgerald, Salmond on Jurisprudence 215(Sweet & Maxwell, 12th Edn.1966).

\(^{25}\) Durga Das Basu, Commentary on the Constitution of India 6 (Vol. 8, Lexis Nexis, 8th Edn., 2009).

\(^{26}\) The expression equality before the law means the absence of any privilege in favour of any person
State is vicariously liable for the wrongs committed by its servants.  

Absence of liability and the presence of vast areas of immunity would be destructive of very legal system itself. Therefore individuals need larger rights and different remedies against the administration than against the fellow citizens. The State as a master will be liable to compensate the citizens whose rights are infringed by the unlawful and excessive acts on its part. At present the problem of State liability for wrongful acts of its servants has gained tremendous importance. Now, it is universal in nature covering writ jurisdiction as well as civil jurisdiction, if the official who acts on behalf of the State commits any wrong which results in human rights violations, the State would be vicariously liable for it and the right to compensation is remedy available before the Court.

The common law doctrine of ‘sovereign immunity’, which was itself an expression of ‘absolutism’ and ‘feudalism’ developed a concept of ‘king can do no wrong’ and exempted the Crown from vicarious liability. Since India was influenced by English legal system, most of the cases in the beginning of the Constitution, the State claimed immunity. But now the doctrine of sovereign immunity has been narrowed down in all civilized countries including India.

1.6 Expansion of State actions in Constitutional Era


Significant developments in the field of State actions took place only after the Constitution of India came into force. But even during the British rule, the administration wielded considerable powers of licensing, subordinate legislation and regulatory powers for protecting public health, morality and public safety. Gradually State regulation was extended to other areas, such as transport, labour, trade and commerce. The Second World War necessitated enactment of emergency legislations which granted wide powers to the executive to interfere with the life, liberty and property of the citizen. Many of these powers remained with the executive even after the war.

Indian Independence changed the very outlook of the State. The Constitution of India proclaimed ‘Justice social, economic and political,’ as the avowed goal. The Directive Principles of State Policy provided that the ownership and control of material resources of the community should be so distributed as best to sub serve the common good. It also provides that the operation of the economic system should not result in the concentration of wealth and means of production to the common detriment. These welfare State ideas provided the basis for a number of statutes aimed at achieving socio-economic changes. The State began to regulate the operation of private trade and business in the interest of the general public. In addition, the State also assumed the role of entrepreneur, sometimes competing with private entrepreneurs and sometimes creating a monopoly in its favour. These new, responsibilities of the State resulted in an enormous expansion of executive power.
1.7 State Liability and Rule of Law

The doctrine of ‘Rule of law’ or Supremacy of Law finds its origin in Greek and Roman thought and more particularly in theory of natural law. The aim of which is to subordinate the State under ordinary law of the land. Modern jurists have attempted to view rule of law in a political perspective. The term ‘Rule of Law’ is derived from the French phrase ‘principle - de- legalite’ (the principle of legality), which refers to a government based on principles of law and not of men. The ‘rule of law’ has come to be regarded as the mark of a free society. In a broader sense, ‘rule of law’, is nothing but a principle of legality, governing all forms of official decision making and official action. One of the essential attributes of rule of law; is that, executive action to the prejudice of a detrimental to the right of an individual must have the sanction of some law. According to Dicey, the expression ‘rule of law’ primarily means, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, or prerogative or even of wide discretionery authority on the part of the government.

In this context, Douglas J. observed that “Law has reached its finest moments when it has freed man from the unlimited discretion of some ruler where

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30 Paul Craig “Formal and Substantive Conceptions of the Rule of Law; An Analytical Framwork.” 467 Public Law (1997)
discretion is absolute, man has always suffered”.

To regulate the actions of State and its officials, it is expected to generate scrutiny and appraisal and the officials are subject to assessment as to its fidelity to the rule of law and to the Constitution. The virtues of rules include their qualities of legality, certainty, consistency, uniformity, congruence to purpose, and accountability, all of which play an important part in the control of official discretion and may be seen as manifestation of the rule of law.

The doctrine of ‘Rule of Law’ dominates in the present legal system and by which the sovereign and the subjects are subjected to the law of the land. The basic principle behind the concept of ‘Rule of Law’ is “equality before the law” which implies that ‘No man is above the law’. Again, under the Constitutional aspect “rule of law”, it is stressed that there shall be no discrimination on the basis of rank or status. Thus from the President to scavenger, all are equally subjected to the ordinary law of the land and amenable to the ordinary law Courts. It suppresses the arbitrary actions of the State and its officials. It checks the wrongful acts of the servants of the State and impliedly compels the State to compensate the affected individuals when their rights are infringed by the servants of the State. Thus ‘rule of law’ opposes the immunity of the State and declares the principle that the State and individuals are par before the eye of law. The ‘Rule of Law’ implies that the functions of the State in a free society should be so exercised

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33 United States v. Wanderlick 342 (U.S. 98)
as to create conditions, in which the dignity of man as an individual is upheld. This dignity requires not only the recognition of certain civil or political rights, but also creation of Social, Economical, Educational and Cultural conditions which are essential to the full development of his personality.” The ‘rule of law’ requires the vicarious liability of the State to be based on the same principles as on an ordinary employer. It also emphasized that the same redress for the wrongs done by him as a subject is accountable for his wrongs to another.

Any system of law failing to make the State liable for the wrongs of its servants or agents, negates the ‘rule of law’ since the accountability is a key concept in Constitutional State under ‘the rule of law’. It is not unfair that he who takes the profit should have the risk of loss”. The ‘rule of law’, requires that the wrongs should not remain unredressed.

The doctrine of rule of law produced some positive results. The basic principle that executive must act under the law has established the basis for judicial review of administrative action. Thus rule of law served a useful purpose by providing a theoretical basis for restraining abuse of governmental powers. The emphasis is on the need for State to pay heed to the welfare of the individual. Courts should be readily available to all and not only to those who can afford to litigate.

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38 G.W.Paton, Jurisprudence 70 (4th Edn..).  
The Supreme Court plays a vital role to bring balance among the conflicting claims of different individuals. In *Additional District Magistrate, Jabalpur v. Shivkant Shukla*, the Supreme Court observed that “the term rule of law is not a magic wand which can be waved to dispel every difficulty. It is not an Aladdin’s lamp, which can be scratched to invoke a power, which brings to any person in need whatever he or she may desire to have. It can only mean, for lawyers with their feet firmly planted in the realm of reality, what the law in a particular State or country is and what it enjoins. And naturally, the Constitution of a country and not something outside it contains the rule of law of that country.” Thus, certainty of law is one of the elements of the rule of law.

In a broader sense rule of law is nothing but a principle of legality governing all forms of official decision-making and official action. According to Goodhart, the ‘Rule of Law’ is different from the ‘Rule under the Law’. The former may be an efficient instrument in the enforcement of tyrannical rule while the later is an essential foundation of individual liberty. Absence of arbitrary power is the first essential of the rule of law upon which our whole Constitutional system is based. Further, rule of law demands that the powers of the executive should not only be derived from law but also that the same should be limited by law. This is expected to generate scrutiny and appraisal and the officials are subject to assessment as to its fidelity to the law and to the Constitution.

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40 AIR 1976 SC 1207 at 1245.

**1.8 Constitution and Modern Welfare State**

The Constitution is the basic law, which limits every activities of the State in order to protect individual’s rights and to prevent arbitrary power. A democratic set up of society guaranteed equality before the law, as a fundamental right.\(^{42}\) The expression equality before the law means all are equal before the eye of law. This ensures the principle that the wrong doer whoever it may be including the agent for the State shall be liable to be tried in the ordinary Courts of law as a private person for the wrongful acts. Thus State actions have to be restricted and regulated in a manner that the enjoyment of fundamental rights should not be interfered. Further, to leave the injury unremedied or leave the wrong doer unpunished simply for the reason that such act is done by public official, would violate the Constitutional guarantee of right to equality.

The emergence of the British rule in India had far reaching effect upon law, culture and society with both negative and positive consequence.\(^{43}\) The principles of English common law and statutes provided foundation for Indian Statutes subject to adaptation in to Indian conditions.\(^{44}\) The principle of Constitutionalism requires control over the exercise of government power to ensure that it does not

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\(^{42}\) **Article 14 of the Indian Constitution**: The State shall not deny to any person equality before law and equal protection of law.

\(^{43}\) P.Ishwara Bhat, *Law and Social Transformation in India* 94 (Eastern Book Company, Lucknow, 1\(^{st}\) Edn., 2009).

\(^{44}\) M.C.Setalvad, *The Role of English Law in India* 36 (The Hebrew University Press, Jerusalem, 2\(^{nd}\) Edn., 1966).
destroy the democratic principles, upon which it is based. These democratic principles include the protection of fundamental rights.\textsuperscript{45}

Modern Constitutional law evolved over the course of the nineteenth century by merging political component of fundamental law, as originally understood, with ordinary law attributes and technique.\textsuperscript{46} Above all, the Constitution has been the source of the country’s political stability and its open society.\textsuperscript{47}

The Constitution guarantees the fundamental right to life and personal liberty. Personal liberty includes the existence of the human beings with full dignity. The State has to act within the Constitutional limits. States accountability for the wrongful act of its servants is reasonably expected by each and every individual in the modern society.

1.9 State Liability and Right to Personal Liberty

The right to personal liberty, as understood in England means in substance a person’s right cannot be subjected to unlawful arrest or other physical torture in any manner that does not admit of legal justification. Personal liberty is inevitably an integral component of the Constitution of almost every democratic nation. The meaning we have given to the expression “personal liberty” is in harmony

\textsuperscript{45} V.N.Shukla, \textit{Constitution of India} 53 (Eastern Book Company, Lucknow, 10\textsuperscript{th} Edn., 2007).
\textsuperscript{47} Granville Austin, \textit{Working of a Democratic Constitution} 635 (Oxford University Press, New Delhi, 1999).
with the meaning given to it in English Constitutional law. It is one of the most cherished values of mankind. The imperative necessity to protect those rights is a lesson taught by all history and human experience. Our Constitution makers have lived through bitter years and seen an alien government trample upon human rights, which the country had fought hard to preserve.\(^48\) Therefore, while arming the State with large powers to prevent anarchy from within and conquest from without; they took care to ensure that those powers were not abused to mutilate the liberties of the people. Men have readily laid down their lives at its altar, in order to secure it, protect it and preserve it.\(^49\) The primary duty of the State is to guarantee the safety, health, peace, general order and morals of the community. Therefore, there arises a need for adjusting the conflicting interests of the individual and the society. What the Constitution, therefore, attempts to do in declaring the rights of the people is to strike a balance between individual liberty and social control.\(^50\) In accordance with the English jurisprudence, no member of the executive can interfere with the liberty and property of a British subject, except on the condition that he can support the legality of his action before a Court of justice.\(^51\)

The conflict between individual liberty and larger public interest has been never ending. However, the liberty of the individual has to be subordinated within

\(^{48}\) Sasthi Chowdhary v. State of West Bengal AIR 1972 SC 1668
\(^{50}\) A.K.Gopalan v. State of Tamil Nadu, AIR 1950 SC 263-64
\(^{51}\) Eshugbayi Eleko v. Govt of Nigeria. (1931) AC.662.
reasonable limits to be reasonable.\textsuperscript{52} Every right rests upon some degree of restriction. The State is duty bound to maintain internal and external peace. Liberty can never mean license. It does not mean doing what one likes. Every man has to obey the reasonable actions of the State. As a sovereign State, it is essential to enjoy immunity to bring international order. No State can afford to take risks in matters relating to the security of the State. Liberty has to be measured against community’s need for security against internal and external peril.\textsuperscript{53}

\textbf{1.10 Human Rights and Sovereign Immunity}

Human dignity is valuable. To respect and protect is the duty of the authorities of the State. The concept of human rights has become a governing principle world over. Human rights of the individual are “those conditions of social life without which no man can seek, in general, to be himself at his best.”\textsuperscript{54} With the march of civilizations and the consequential strengthening of democratic institutions, human rights had emerged as an essential facet of modern jurisprudence. The object of human rights jurisprudence is to harmonize State agencies and to make the State accountable to the use of power only for the public good.\textsuperscript{55} Day to day affairs between the State and individuals lead for the emergence of frequent and widespread human right violations. In this context, there is a need for a machinery to compensate the affected individuals.

\textsuperscript{52} State of Madras v. V.G.Row AIR 1952 SC 196.
\textsuperscript{53} Vijay Narain Singh v. Bihar AIR 1984 SC 1334
\textsuperscript{54} H.K. Laski, \textit{A Grammar of Politics}, 91, (4\textsuperscript{th} Edn :1960 London, Butter Worths 1960)
International human rights law lay down obligations by which States are bound to respect and protect human rights. The obligation to respect means that States must refrain from interfering with or curtailing the enjoyment of human rights. The State must take positive action to facilitate the enjoyment of human rights. The State is also required to protect individual and groups against human rights abuses.

1.11 Scope of Article 300

The liability of the State for the tortious actions of its servants and agents is governed by the provisions of the Constitution under Article 300 which reads as follows,

“Suits and Proceedings – 1. The Government of India may sue or be sued by the name of the Union of India and the Government of a State may sue or be sued by the name of the State and may, subject to any provisions which may be made by Act of Parliament or of the Legislature of such State enacted by virtue of powers conferred by this Constitution, sue or be sued in relation to their respective affairs in the like cases as the Dominion of India and the corresponding Provinces or the corresponding Indian States might have sued or been sued if this Constitution had not been enacted.

(2) If at the Commencement of this Constitution –

(a) any Legal Proceedings are Pending to which the Dominion of India is a Party, the Union of India shall be Deemed to be Substituted for the Dominion in those Proceedings; and
(b) any Legal Proceedings are Pending to which a Province or an Indian State is a Party, the Corresponding State shall be Deemed to be Substituted for the Province or the Indian State in those Proceedings.”

Article 300 of the Indian Constitution is not clear in providing principles to fix the liability and immunity of the State. The change in the concept of tortious liability in India is reflected by judicial activism. But, it refers back to the Government of India Act of 1858, 1915 and 1935. The Government of India Act, 1858 says that the liability of the State would be like that of the liability of the East India Company. So, in order to understand the liability of the State in torts for the actions of its servants and agents, it is necessary to find out the liability of the State prior to the Government of India Act, 1858. When the East India Company was in power, in 1831, the Supreme Court of Calcutta rejected the plea of exemption from suit raised by the company on the ground of sovereign immunity. In Bank of Bengal v. United Company, it was held that the East India Company was not sovereign, but subject to the control of the Crown and Parliament. This was already explained before the Charter Act of 1833. In the Charter Act of 1833, no distinction was made between acts committed by the company in its political capacity and acts done by it in the exercise of commercial activities. But in Peninsular and Oriental Steam Navigation Company v. Secretary of State for

57 (1831) 1 Bignell’s, Report 87-181.
58 Moodalay v. The East India Company. (1785)1 Bro.CC.469; 28 E.R.1245.
India,\textsuperscript{59} the Court distinguished the functions of State as sovereign and non-sovereign for determining the liability of the State. This distinction is made without any rationality but it still lingers in the legal system of India as the basis for determining the liability of the State. In \textit{State of Rajasthan v. Vidhyawathi},\textsuperscript{60} the need to give up this difficult situation was further emphasized. In \textit{Kasthurilal v. State of U.P.},\textsuperscript{61} the Court supported the immunity of the State on the ground of sovereign function. Till now, this principle has not been overruled. Reference given in the judgment of \textit{Peninsular case} alleged immunity for sovereign function and illustration of such immunity is confined to what is usually called ‘Act of State’, led in to different interpretations by different Courts. In \textit{Nobin Chander Dey v. Secretary of State}\textsuperscript{62} and \textit{Secretary of State v. Hari Banji},\textsuperscript{63} according to the interpretation given in it, the liability of the State can be determined on the basis of the function of the State as sovereign and non-sovereign. In the case of sovereign function, State would not be liable but in the case of non-sovereign functions, State would be liable. According to the decision in \textit{Hari Banj case} the immunity of the State should be limited to the ‘Act of State.’ The Court compared the sovereign act with ‘Act of State’ and the suit filed against the State for the imposition of excess duty for the transit of salt was maintainable before the Court. However, there is no clarity on the point of State liability in tort. Hence, there is a

\textsuperscript{59} (1861)5 Bombay H.C.R. App.1.  
\textsuperscript{60} AIR 1962 SC 933.  
\textsuperscript{61} AIR 1965 SC 1039.  
\textsuperscript{62} (1873) ILR 1 Cal 1.  
\textsuperscript{63} (1882) ILR 5 Mad 273.
need for detailed analysis regarding the liability and immunity of the State under Article 300 of the Indian Constitution.

With a view to avoid confusion, the First Law Commission in its report in 1956 recommended to enact legislation in this regard. Again the Government (Liability in Tort) Bill was introduced by the government in 1965. The intention of the bill was to do away the sovereign – non sovereign test. It had lapsed and was reintroduced in May 1967.\(^{64}\) The Bill was referred to the joint committee which has submitted its report in 1969. Even then the bill did not enter the further stages of parliamentary process.

1.12 Review of Literature

An elaborate review of literature has been made. It is found that there are several books, dissertations and articles written on State liability for the tort of its servants. For the purpose of this study, the following books have been reviewed. In Prof. M.P. Jain Constitutional Law,\(^{65}\) D.J.De’s Constitution,\(^{66}\) V.N. Shukla’s Constitution of India,\(^{67}\) the cases relating to tortious liability and a little discussion over damages and Writs were discussed but there is no where a comparative analysis was made. Whereas, the First Law Commission Report in 1956 elaborately discussed about the position of other countries relating to State liability for the torts committed by servants. But, in the modern context, the judicial

\(^{64}\) Bill No. 43 of 1967 (As Introduced in Lok Sabha on 22.05.1967).
\(^{65}\) Prof. M.P. Jain, \textit{Indian Constitutional Law}, (Wadhwa, Nagpur, 5\textsuperscript{th} Edn. 2006).
\(^{67}\) V.N. Shukla, \textit{Constitution of India}, (Eastern Book Co., Lucknow, 10\textsuperscript{th} Edn., 2004).
innovation has brought sea of changes in Constitutional tort. The Seervai’s Constitutional Law of India\textsuperscript{68} has not been updated since 1996 and it lacks the present judicial innovation of expanding Art.21 in order to bring compensatory jurisprudence. D.D. Basu’s commentary\textsuperscript{69} made a very broad discussion but does not deal with comprehensive legislation and the proposed Bill before the Parliament in the year 1967. Few articles published in AIR provide only the compensatory jurisprudence,\textsuperscript{70} in which tortious liability of the State has been discussed under Art.21 but not under Art. 300. Further, in another article,\textsuperscript{71} it lacks the Constitutional tort developed by the judiciary.

Bailey Jones & Mowbray\textsuperscript{72} in their book, Cases, Materials & Commentary on Administrative Law. Provides international materials on liability of State in tortious acts of its servants. C.K.Thakker\textsuperscript{73} in Administrative Law gives some brief ideas on State liability in torts in various countries like India, U.S.A, U.K and France. Paul Craig’s\textsuperscript{74} Administrative Law appraises the position of State Liability in United Kingdom. S.P. Sathe\textsuperscript{75} discussed the liability of State in tort cases other than those involving Fundamental Rights. He also cited Nilabati case, where the Supreme Court held that awarding of compensation in public law

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\textsuperscript{68} H.M. Seervai, Constitution of India (Universal Law Publication, New Delhi, 4\textsuperscript{th} Edn., 1996).
\textsuperscript{69} Durga Das Basu, Commentary on the Constitutional of India 6 (Vol. 8, Lexis Nexis, 8\textsuperscript{th} Edn., 2009).
\textsuperscript{70} A. Reghunadh Reddy, “Liability of Government Hospital and Breach of Right to Life” 153 AIR (Jour) 1998.
\textsuperscript{72} Bailey Jones & Mowbray, Cases Materials & Commentary on Administrative Law, (London Sweet & Maxwell, 4\textsuperscript{th} Edn., 2005)
\textsuperscript{73} C.K.Thakker, Administrative Law, 1093 -1109 (Eastern Book Company, Lucknow, 2\textsuperscript{nd} Edn., 2012).
\textsuperscript{74} Paul CRAIG, Administrative Law (Universal Law Publishing, 6\textsuperscript{th} Edn., 2008).
\textsuperscript{75} S.P.Sathe, Administrative Law (Lexis Nexis Butter Worths, 7\textsuperscript{th} Edn., 2007).
\end{flushleft}
proceedings was different from awarding compensation in tort cases. Abhe Singh Yadav, Law of Writs Jurisdiction and its Efficacy,\textsuperscript{76} envisages the compensatory remedies for tortious acts of servants of the State through writs under Articles 32 and 226 of the Indian Constitution. H.W.R. Wade in his book Administrative law\textsuperscript{77} deals with the position of the Crown of England before and after the enactment of the Crown Proceedings Act 1447. Arvind P. Datar, Commentary on the Constitution of India,\textsuperscript{78} discussed the legislative history of liability of State in torts. Durga Das Basu, Shorter Constitution of India,\textsuperscript{79} discussed the scope of Article 300 of the Constitution and widening the area of State liability in torts. Durga Das Basu, Case Book on Indian Constitutional Law,\textsuperscript{80} provides Indian cases to deal with the liability and immunity of State under Article 300 of the Indian Constitution.

The following books reveal the development of political authority of East India Company and the historical perspective of State Liability in India. V.D. Kulshreshtha’s Indian Legal and Constitutional History,\textsuperscript{81} Nilakshi Jatar Laxmi Paranjape, Legal History & Evolution of Indian Legal System\textsuperscript{82} V.D. Mahajan

\textsuperscript{77} H.W.R. Wade, \textit{Administrative Law}, (Oxford University Press, 9\textsuperscript{th} Edn., 2004).
\textsuperscript{78} Arvind P. Datar, \textit{Commentary on the Constitution of India} (Vol.2, Wadhwa Publications, Nagpur, 7\textsuperscript{th} Edn., 2007).
\textsuperscript{79} Durga Das Basu, \textit{Shorter Constitution of India} (Vol. 2, Butter Worths, 14\textsuperscript{th} Edn., 2011).
\textsuperscript{80} Durga Das Basu, \textit{Case Book on Indian Constitutional Law} (Kamal Law House, Kolkata, 2\textsuperscript{nd} Edn., 2007).
\textsuperscript{81} V.D. Kulshreshtha’s \textit{Indian Legal and Constitutional History}, (Eastern Book Company 9\textsuperscript{th} Edn 2009)
\textsuperscript{82} Nilakshi Jatar Laxmi Paranjape, \textit{Legal History Evolution of Indian Legal System}, (Eastern Book Company, 2012).
Constitutional History of India,\textsuperscript{83} Walker, The Oxford Companion of Law\textsuperscript{84} and Shiva Rao, Framing of the India’s Constitution.\textsuperscript{85}

The consultation paper\textsuperscript{86} on ‘Liability of the State in Tort’ prepared by National Commission to review the working of the Constitution expressed the views and suggestions for the purpose of generating public awareness on liability of the State in tort in India. V.R. Dinker\textsuperscript{87} in his article ‘the tort of misfeasance in public law: A precedential overview’ has explored damages for misfeasance committed by public authorities. In this article the writer seeks to shed some light on the scope of the wrong, ‘misfeasance of public authorities’ in public law and specifically the vital rudiments for establishing it. Bindumol V.C, in ‘Liability for Medical Negligence: Need for Reform’, stressed for the necessity of standard of care to be taken by the medical practitioners. The author suggested for the creation of fund by the State for compensating medical negligent cases and no fault medical malpractice system may be introduced in India.\textsuperscript{88} Rajeev Joshi,\textsuperscript{89} in ‘Sovereign powers and liability of State in tort’ analyzed the report of the national commission to review the working of the Constitutional provision Article 300.

\textsuperscript{83} V.D. Mahajan, Constitutional History of India, (S.Chand & Co (Pvt) Ltd, New Delhi 9\textsuperscript{th} Edn 1976)
\textsuperscript{84} Walker, The Oxford Companion of Law (Oxford University Press, 1st Edn 1980)
\textsuperscript{85} Shiva Rao, Framing of the India’s Constitution, (Vol.5, N.M. Tripati, Bombay, 1966-1968)
\textsuperscript{86} National Commission to review the working of the Constitution, A Consultation Paper on ‘Liability of the State in Tort’, 2001.
Seema Choudhary and Shailendera Kishore Singh,\textsuperscript{90} in their article, ‘Constitutional Tort of Negligence: Liability of Public Authorities; ‘has explored the applicability of principles of foreseeability, proximity and assumption of responsibilities in State liability. Vikram Raghavan\textsuperscript{91} in his article, ‘the Compensating Victims of Constitutional Torts: Learning from the Irish Experience’, discussed the procedures need to be streamlined, and also suggested for using Irish experience in Indian Courts to provide compensation to the victims. Girish\textsuperscript{92} in Compensating the Victims of the Human Rights Violations ‘Need for Legislation’, discussed the modern trend of extending State liability by judicial activism which lead for diminishing trend of the dichotomy of sovereign, non sovereign functions. Justice P.Sathasivam, in ‘Role of Courts in Profession of Human Rights,\textsuperscript{93} emphasized that the judiciary must not limit its activity to the traditional role of deciding dispute between two parties, but must also contribute to the progress of the nation. V.V.S.Raju, in ‘Sovereign Immunity: New trends’,\textsuperscript{94} discussed the scope of judgment delivered by the Supreme Court in Rudulsha case and other similar cases with field of awarding compensation under article 32 of the Indian Constitution. The Articles of P.Leelakrishnan, Compensation for Governmental

\textsuperscript{90} Seema Choudhary and Shailendera Kishore Singh, “Constitutional Tort of Negligence: Liability of Public Authorities” 105 AIR (Jour) (2012).
\textsuperscript{93} Justice P. Sathasivam, “Role of Judiciary in Protection of Human Rights of Woman in India”, 65 AIR (Jour) (2012).
Law lessness\textsuperscript{95} K.C.Joshi, ‘Compensation through writs’\textsuperscript{96} S.N.Jain, Monetary Compensation for Administrative Wrongs through Article 300\textsuperscript{97} R.Ramachandran, Constitutional Tort,\textsuperscript{98} J.C.Love, Damages: ‘A remedy for Violation of Constitutional Rights’,\textsuperscript{99} highlight how the remedy of compensation for redressing the violation of fundamental rights was firmly established in India and Indian Courts have now been frequently dispensing compensation in many cases where the fundamental rights have been shown to have been infringed.

Thus, in none of the research, Art. 300 is compared with Art. 21 along with the proposed Bill of 1967. This makes the higher judiciary continuously engage in various cases relating to Constitutional tort. Hence, a detailed first hand analysis and elaborated study is made in order to bring out the extent of liability and immunity of the State under Art. 300 along with Art. 21.

1.13 Scope and Limitations

The analysis of liability and immunity of State for the torts committed by its servants under Art. 300 of the Indian Constitution and the innovation of ‘Constitutional tort’ by expanding Art. 21 of the Indian Constitution through Constitutional remedies are very broad. Here, the researcher would like to confine the remedial action of aggrieved persons for tortious act of the servants of State

\textsuperscript{95} P. Leelakrishnan, “Compensating for Governmental Lawlessness”, \textit{CULR} 27 (1992).
\textsuperscript{96} K.C.Joshi, “Compensation through Writs”, 30 JILI 69 (1988).
under Constitutional remedies and dilution of Art. 300 of the Indian Constitution in respect of the same and the feasibility of bringing up of comprehensive legislation are analyzed. Article 12 of the Indian Constitution also discussed the definition ‘State’. But it is very elaborate. It covers several organs of the State. So the researcher confined the study only on Article 21 and 300.

1.14 Aim and Objectives

With the above limitations, the following objectives have been formulated. To determine the liability and immunity of the State under Art. 300 of the Indian Constitution.

a) To analyze the existing statutory provisions with regard to liability of State for torts of its servants.

b) A detailed comparative study is made regarding the Constitutional and Statutory provisions of State liability for torts of its servants in U.K., U.S.A, France, Canada and Australia.

c) To bring out the judicial decisions to demarcate over sovereign and non-sovereign functions.

d) To examine the nature of judicial function in expanding Art. 21 to provide compensation for Constitutional Tort and diluting Art. 300 in the guise of Sovereign function.

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100 Art. 226 of the Constitution provide Remedies for the Enforcement of Fundamental Righst in High Court and Art. 32 of the Constitution Provides Remedies for the Enforcement of Fundamental Righst in the Supreme Court.
e) To critically analyze the report of Law Commission in bringing a comprehensive bill to make the State liable for the torts committed by its servants.

f) To discover the lacunae in the proposed Bill ‘Government (Liability on Tort) Bill, 1967’.

g) To examine the demand for a comprehensive legislation in order to bring uniform legal measures for speedy disposal of litigation and to provide reasonable compensation to the affected person for the tort committed by the servants of the State.

1.15 Research Questions

With the above objectives, the following matters are discussed elaborately.

a) Does Art. 300 of the Indian Constitution cover liability and immunity of the State for the torts committed by its servants?

b) Does the distinction between sovereign and non-sovereign functions arrived by Supreme Court of Calcutta, in *Peninsular and Orientation Steam Navigation Company v. Secretary of State for India* irrational in modern context?

c) Has Art. 300 of the Indian Constitution became redundant after the innovation of Constitutional tort by expanding Art. 21 through Constitutional remedies?

d) Do we need a comprehensive legislation for making the State liable for the tort committed by its servants?

e) Whether the role of judiciary is satisfactory in making the State liable for the torts committed by its servants?
1.16 Methodology

It is a doctrinal research by which the provisions of the Indian Constitution & various statutory provisions in India along with judicial decisions are discussed. For the purpose of the comparative study, the laws prevailing in United State of America & United Kingdom, France, Canada and Australia are also analyzed. The study is based on Analytical, Historical and Comparative methods. In this research, for the purpose of exploring and identifying various Judicial decisions and statutory provisions web based legal data bases were relied apart from law journals and Law Commission reports. The Indian Law Institute rules of footnoting have been adopted uniformly.

1.17 Plan of Study

The present study is divided into Seven Chapters.

The First Chapter is “Introduction”, which deals with the State and Social Order, Role of Law in an Ideal State, Police State to Responsible State, State and Concept of liability, Vicarious liability of State, Expansion of State actions in Constitutional Era, State liability and Rule of Law, Constitution and Modern Welfare State, State liability and Right to Personal Liberty, Human Rights and Sovereign Immunity, It also covers the Scope of Article 300 of the Indian

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101 According to S.N.Jain, Doctrinal Research involves Analysis of Case Laws, Arranging, Ordering and Systematizing Legal Propositions and Study of Legal Institutions through Legal Reason of Rational Detection.
102 www.Manupatra.Com
Constitution. In this chapter, Review of literatures, Scope and limitations, Aims and objectives, Research questions and Methodology adopted for this research are explained.

The Second Chapter is titled as “Historical Perspective of the Liability of State in India”, which explores the development of State responsibility during, ancient periods, medieval period and British period till the commencement of Indian Constitution. The liability of East India Company from 1600 to 1858 under various Charters was clearly analyzed and the position of East India Company and Crown of England were clearly determined. The situation changed after the enactment of Government of India Act 1858. The Liability of Secretary of State in India from 1858 to 1950 and his responsibilities were also discussed with the help of historical decision pronounced by the Supreme Court of Calcutta in Peninsular case. The determination of Liability of State for the wrongful act of its servant by applying the principles of sovereign, non sovereign functions or commercial and non commercial functions was pointed out. The Position of State Liability under the Government of India Act 1858, the Government of India Act 1915, and the Government of India Act 1919 and the Rights and Responsibilities of Secretary of State under the Government of India Act 1935 were also clearly analyzed.

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104 The Charter of 1600 incorporated the East India Company in India. The Suits and Proceedings Against the East India Company was maintainable before the Court of Law.
105 The Government of India Act 1858 – the Political Power of the East India Company was directly taken over by the British Crown. The Secretary of State for India was appointed and Suits and Proceedings lay against the Secretary of the State.
The **Third Chapter** elaborate the **“The Extent of Liability of State under Article 300”** thereby making a study on the Constitutional Background and Scope of Article 300. It also highlights the Grounds for Fixing Liability of State under Judicial Interpretations. The basis of liability as envisaged by Article 300, is vicarious liability which was explained in the *State of Rajasthan v. Vidyawati*,\(^{106}\) by the Supreme Court with the help of the ratio of *Peninsular case* which was also decided by the Hon’ble Supreme Court. This was the first post Constitutional judgment on this subject. Application of the traditional principle enumerated by the Calcutta Supreme Court before 100 years even after the commencement of the Constitution was felt uncomfortable. It enumerates grounds on which the Courts are giving immunity to the State from liability, the various interpretations given by the Court while deciding immunity of the State. The implications of the judgment in *Kasturilal v. State of U.P*\(^{107}\) are in no way a good law. The Third chapter, also highlights the problem seen in all these cases where the judiciary faces difficulty with the principle of sovereign immunity which is one of the judicial creation, and was introduced while deciding *P & O case*, they could not abrogate it by their creativity. It also reveals the pressure upon the judiciary to find out ways towards new rules and principles to fix the liability of the State for the wrongful acts of its servants. To bring a proper conclusion, Diminishing Trend of Principle of

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\(^{106}\) AIR 1962 SC 933

\(^{107}\) AIR1965 SC 1039
Dichotomy is analyzed with the help of *Nagendra Rao & Co. v. State of A.P.*

and *State of Tamil Nadu v. Ganesan.*

The **Fourth Chapter** discusses about “**Doctrine of Act of State and Sovereign functions vis-à-vis Art. 300.**” In this chapter, a detailed discussion is made to point out the sovereign functions of the State, Exemption from State Liability under Protective clauses. Various tests to identify the nature of functions of the State are also explained. The chapter also explains how to reduce the application of sovereign immunity rule and safeguard the interest of affected individual. Further, it also deals with the immunity of State under the Doctrine of ‘Act of State’. The differences between ‘Sovereign Function’ and ‘Act of State’ and instances of ‘Act of State’ have been thoroughly discussed in the light of decided cases in order to avoid confusion.

The **Fifth Chapter** deals with “**Comparative Study Regarding State Liability**”. To understand the problems of State liability and to find out proper remedial solution, the study of liability of State in various countries is necessary. So, in this chapter, the position of State liability for the torts committed by its servants in various countries like United Kingdom, United States of America, France, Canada and Australia has been analyzed with their corresponding Constitutional and Statutory provisions. This chapter highlights how the Crown of England was made vicariously liable in respect of tort committed by its servants

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108 AIR 1994 SC 2663
109 (2013) 7 MLJ 297
under the provisions of the Crown Proceedings Act 1947 and the limitations provided in this Act. The suitable provisions for privileges and exceptions in this Act are clearly pointed out. The Courts also apply uniform procedure to fix liability of public authorities. It is true that the sovereign immunity rule was deeply rooted in United States of America. In 1942, Franklin Roosevelt in his message suggested a change in law relating to Governmental liability in tort. The Federal Tort Claims Act, 1946,\(^{110}\) authorized tort suits to be brought against it. This part examines the working of the legislation and points out the advantages and disadvantages with reference to case laws. Similarly, the relevant position prevailing in France, Canada and Australia is also analyzed.

India as a Welfare State took measures to expand the responsibility of State for the wrongs of its servants. The First Law Commission, in its report recommended for dispensing with the distinction between sovereign and non sovereign powers.\(^{111}\) The Commission also suggested the making of suitable law on this subject. A Bill titled, the Government (Liability in Tort) Bill drafted on the lines recommended by the Law Commission was introduced and tabled before the Parliament in the year 1965 and 1967 respectively. Later, it was reintroduced with some modifications suggested by the Joint Committee of Parliament in 1969. But, till now it is in the shape of a Bill and yet to be enacted as a legislation. The features of the Bill are also clearly discussed in this chapter.

\(^{110}\) 60, State, 842, (1946).
\(^{111}\) Law Commission of India, 1\(^{st}\) Report on Liability of the State in Tort, 1956.
The Sixth Chapter presents an analysis of “Dilution of Art. 300 and Innovation of Constitutional Tort under Art. 21 of the Indian Constitution”. In this chapter, the Constitutional tort has been defined operationally. In the modern welfare State, the State is barred from claiming sovereign immunity as a defence. In various litigations, the Courts found difficulties in applying traditional tort law to meet the changing conditions of the society. Thus, it is evident that the Constitutional tort has been devised as a public law remedy for violation of fundamental rights, generally infringed by the servants of the State. From the year 1977, several cases of unlawful detention, custodial death and torture in police custody, medical negligence and harassment by public authorities, riot cases, and atrocities against women reached by way of writ petitions in Supreme Court under Article 32 of the Indian Constitution or by the way of appeal against the decisions of the High Court under Article 226. Wherever it was found that the act had occurred on account of ill treatment or gross negligence on the part of the police officers or public authorities, compensation has been awarded to the aggrieved parties. Rudul Shah is a shift from the traditional tort law, and with this decision the Constitutional tort was recognized by the judiciary.112

The flexible approach of the Supreme Court in various cases like Rudul Shah v. State of Bihar,113 Nilabati Behera alias Lalitha Behera v. State of

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113 AIR 1983 S.C.1086.
Orissa and others,\textsuperscript{114} Sebastian M. Hongray v. Union of India,\textsuperscript{115} Bhimsingh v. State of Jammu & Kashmir,\textsuperscript{116} Saheli v. Commissioner of Police,\textsuperscript{117} D.K. Basu v. State of West Bengal,\textsuperscript{118} Sanusaikai v. Union of India,\textsuperscript{119} State of Andhra Pradesh v. Chella Rama Krishna Reddy and others,\textsuperscript{120} State of Jammu and Kashmir v. Zarinabegum and others,\textsuperscript{121} Visaka v. State of Rajasthan,\textsuperscript{122} State of Tamilnadu v. Ganesan\textsuperscript{123} etc, are thoroughly examined and the developing trend of the Constitutional tort to protect the interest of common people is explained along with the diluting trend of Art. 300 and its non-use because of availability of Constitutional remedies.

The \textbf{Seventh Chapter} is “\textit{Conclusion and Suggestions}”, which summarizes the findings and offers various suggestions that have emerged from the entire study.

\textsuperscript{114} AIR 1993 S.C. 1960.
\textsuperscript{115} AIR 1984 S.C. 1026.
\textsuperscript{116} AIR 1986 S.C. 494.
\textsuperscript{117} AIR 1990 S.C. 513.
\textsuperscript{118} AIR 1997 S.C. 610.
\textsuperscript{119} (2003) Cri.L.J.(Guj)515.
\textsuperscript{120} AIR 2000 S.C. 2083.
\textsuperscript{121} AIR 2004 J&K 23.
\textsuperscript{122} AIR 1997 SC 3011.
\textsuperscript{123} (2013)7 MLJ 297.