CHAPTER II

HISTORICAL PERSPECTIVE OF THE LIABILITY OF STATE IN INDIA

Introduction

History is the record of past events, developments, trends and traditions resulting out of human activity.\(^1\) It gives us ample information on the gradual development of State liability in India and other countries. Ancient, medieval and modern history gives us tremendous materials to substantiate the development of compensatory jurisprudence in India. The truth is that the traditions of the past have made our legal system what it is, and still live on it. India has a known history over 5000 years, and there were the Hindu and the Muslim periods before the British period, and each of these early periods had a distinctive legal system of its own. One might therefore say that, a comprehensive study of the Indian legal history should comprise the historical process of development of legal institutions in the Hindu and the Muslim periods also. Since law was a part of the overall historical evolution of all human institutions, the historical school is the perfect ideology to understand the present legal system related to the liability of State in torts. The law regarding the extent of liability and immunity of State for the wrongful acts of its servants under Article 300 of the Indian Constitution is in a

\(^1\) K.M. Munshi, *The History and Culture of The Indian People-The Vedic Age*, Foreword (Bharathiya Vidhya Bhavan, Bombay, 6th Edn, Vol.1, 1971).
State of uncertainty. To understand the present position with regard to the extent of State liability in India, it becomes necessary to refer back to certain cases and the legal position before the commencement of the Indian Constitution, 1950.

2.1 Ancient Period

The people of ancient India, considered the State and the Government as basic instruments for promotion of peaceful and civilized life. There are plenty of literatures that also describe the law and the legal institutions, liability and immunity of the King, ideas of the origin of the State, the nature of the society, responsibilities of the sovereign towards its individuals and equitable remedy to the affected persons through Ordeal system etc. The most important amongst the various manuscripts are the Vedas, Sutras, Smritis, Epics, Kautilya’s Arthasashtra and the writings of foreign travelers. They also tell us the responsibilities of the State to compensate the victims, affected by the officials of the King during ancient period.

During Vedic period, the concept of vicarious liability of the State was not so developed like the present day. The King had to safeguard the life and property of the people. If any wrong happened to affect the people, the King was responsible to compensate them from King’s malkhana. According to Manu “where common man would be fined with Karshapana, the King shall be fined one

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2 S.C. Raychoudhary, Social, Cultural and Economic History of India 135 (Surjeet Publications, Delhi, 1983).
3 Rig, Yajur, Sama and Atharva Vedas.
4 Smritis are also called as Dharmasastras. They are Manusmriti, Yajnavalkya, Vishnu and Narada smritis.
5 Ramayana and Mahabharatha.
thousand, which is the settled Law”. Brihaspathi says “where a servant commissioned by his master does any improper act for the benefit of his master, the later shall be held responsible for it”. Thus once, it is established that the servant’s act is for the benefit of the master in the course of his employment, the master becomes liable. ‘Raj dharma’ was an essential path to be followed by the King which defined the powers and obligations of the King. The rule that the King and his servants would be liable for their wrongs was a rule more in theory than in practice as it would have been a very bad taste to those in authority. However with the expansion of the Aryans and the evolution of large Empires, the powers and the responsibilities of the King had enormously increased. The increase in powers of the King did not make them autocrat. His authority was restricted by various religious and legal principles. The King could not go against the sacred customs. By the time of Mauryan Empire, Asoka considered that his only duty was to promote the welfare of all people. The State was also expected to promote ‘dharma’ by developing the sense of morality, and righteousness among the people.

According to Henry Maine, “The Penal law of ancient communities is not the law of crimes. It is the law of wrongs, or to use the technical word of torts.”

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In other words, the idea underlying primitive penal law, was to compensate the victim and not to punish the offender. It is evident that, the compensatory jurisprudence, has been developed from ancient India, but there was no systematic rule governing, the vicarious liability of the State in India.

2.2 Medieval Period

History, it is said, has many lessons to teach us; and there is another saying that history never repeats itself.\textsuperscript{12} The coming of Muslims to India left a deep mark on the Indian legal system. The Muslim invaders had absorbed India into their royal dynasties, & were completely Indianized and they considered India as their motherland\textsuperscript{13}. The principle of “An eye for an eye and tooth for a tooth” was followed by the Muslims in India to satisfy the aggrieved persons in case of wrongful act or crime. The basic notion in the Mohammedan Jurisprudence, was to secure satisfaction for the injured rather than to offer protection to the society at large\textsuperscript{14}. The law was the actual sovereign in Muslim land.\textsuperscript{15} The juristic system of the Mussalmans had its origin in Arabia and has been developed by Arab jurists.\textsuperscript{16} The remedial rights followed by them included the retaliation, compensation, restitution and money compensation in case of death. It seems that, there was no such development of vicarious liability of the State during medieval India also.

\textsuperscript{12} Jawaharlal Nehru *Glimpses of World History*, 952 (Oxford University Press, 2\textsuperscript{nd} Edn, 1983)
\textsuperscript{13} S.A Roy Choudhary, *Socio Cultural and Economic History of India* 3 (Vol. II, Surjeet Publications, Delhi, 1963).
\textsuperscript{14} B.M.Gandhi, V.D.Kulshrestha’s *Landmarks in Indian Legal and Constitutional History*, 262 (Eastern Book Company, Lucknow, 9\textsuperscript{th} Edn., 2009).
\textsuperscript{15} I.M.Qureshi, *Administration of Sultanate of Delhi*, 41(2\textsuperscript{nd} Edn.,)
During the period of Delhi Sultanate, even influential officials and nobles were not permitted to go unpunished for their wrongful acts. Sultans like Balban and Ala-ud-din Khilji, came forward to present themselves as criminals, if they thought they had committed some illegality. Prophet declared that he would not hesitate, in awarding the same punishment to his daughter Fatima, as an ordinary thief when she committed theft. Babur and Humayun, considered it their sacred duty to do justice to all. Humayun established a special drum of Justice Tabal-i-adal. The people would beat this drum once, twice, or thrice according to the gravity of the case and the emperor promptly attended to their case and did everything possible to satisfy their complaints. Akbar used to say, “If I am guilty of an unjust act, I must rise in judgment against myself”. He also arranged a golden chain with belts to be fastened between the Shahburj in the Agra Fort and a stone pillar fixed on the bank of Jamuna. The aggrieved person could obtain redress of their grievance from the emperor by pulling the chain at anytime.

Sultan Feroz had declared the liability of the State for the claims brought and adjudged against it in the Court. Balban, Tugulaq and Shahjahan were very particular in making the servants vicariously liable for the wrongs committed by them. Sometimes, the officers were held liable for the failure of protection of

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property of the owner.\textsuperscript{18} It shows the “King can do no wrong” and the “King cannot be sued in his Court” was not applicable in Islamic law.

2.3 The British Period

There is an acceptable reason for concentrating mainly on the British period, and the present legal system is what the British created, and hardly has any co-relation, continuity or integral relationship with the pre-British institutions. It is not easy to describe the nature of the British impact on the Indian legal system. During the initial stages, the principles of common law came to be followed in India. As per common law, absolute immunity of the Crown was accepted and the Crown could not be sued in torts for wrongs committed by the servants, in the course of employment. The rule was based upon the well known maxim of English law, “the King can do no wrong”. So the Crown enjoyed certain privileges and immunities in England, but the same privilege or immunity was not extended to its servants personally. The liability of the State in India relating to tort claim is governed by public law principles inherited from the British common law. It is necessary to assess the extent of liability and immunity of State in India during British Period. The emergence of the British Empire in India stands out as a unique event in the history of the world.\textsuperscript{19}

A) Position of East India Company

It is clear that the Charter Act 1600 laid down foundation for the establishment of East India Company in India. The development of Constitutional era started from the

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\textsuperscript{18} M.B. Ahmed, \textit{Administration of Justice in Medieval India}, 237 (Edn., 1941).
\textsuperscript{19} M.P. Jain, \textit{Outlines of Indian Legal History} 5 (4\textsuperscript{th} Edn, N.M.Tripathi Private Ltd, Bombay 1981)
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beginning of seventeenth century A.D. At the beginning the company was purely a mercantile body. It began to establish factories in various places. Gradually, it acquired territories in India and also sovereign power to make war and peace and raise armies. As East India Company was an autonomous corporation, having existence of its own, and bearing no relationship of servant or agent to the British Crown, the immunity enjoyed by the crown was never extended to it. By the provision of this Charter\textsuperscript{20} British people came to India as authorized traders. Subsequently, several Charters were issued by the successive English Rulers. The East India Company which administered the British occupied territories in India which had a corporate character and could always be sued. Unlike the King in England, the East India Company or Secretary of State in India was not immune from liability of Government proceedings.\textsuperscript{21}

The Charter Act 1753, expressly recognized the actions against the company for matters relating to the Government. The Regulating Act 1773, empowered the Supreme Court at Calcutta to deal all pleas against the united company of merchants trading to the East Indies\textsuperscript{22}. The East India Company was made vicariously liable for the wrongs of its servants under the Bengal Regulations.\textsuperscript{23}

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\textsuperscript{20} Charter Act, 1600.
\textsuperscript{21} Lord Kingsdown in A.G. of Bengal v. Ranee Surnomoy Dossee (1863) 9 M.I.A; 387, 424, where Englishmen established themselves in an uninhibited or Barbarous Country, and carried with them not only the laws but also the sovereignty.
\textsuperscript{22} M.C.J. Kazzi, \textit{Constitution of India} 1122 (4\textsuperscript{th} Edn., 1984).
\textsuperscript{23} K.C. Joshi, Socio-Legal Implications of vicarious liability for torts committed by its servants with special reference to India, 76 (Research Thesis, Kurukshetra University, 1974) observed that the preamble of the Bengal Regulation 111 of 1793 expressly mentions the desire of the Government that the authority of the laws would extend not only to private disputes, but “the Government would also be precluded from injuring private property” and said that they had determined to submit the claims of the public to be decided by the Courts of Justice in the same manner as the rights of individuals.
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The Charter Act, 1813\textsuperscript{24} declared that the British territories in India which were then in the possession and under the Government of East India Company, together with the revenue thereof, should remain and continue in the possession and under the government of the said company. It is a rule, no doubt, that they were directed to keep books in such a manner to exhibit the accounts of the territorial and political departments separately and distinctly from such as related to the commercial branch of their affairs and that provisions were made as to the appropriation of the commercial profits and receipts in Great Britain and also rents, revenues and profits arising from their territorial acquisitions in India, after defraying the expenses of collecting the same.\textsuperscript{25} It seems clear that the capital stock and commercial assets of the company were liable to satisfy any judgment that might be obtained against them.

**i) East India Company not a sovereign Entity**

By the Charter Act, 1833,\textsuperscript{26} the privileges of the East India Company continued to be regulated by Charter Act, 1813 were stopped. It is clear from Section 2,\textsuperscript{27} of the Charter Act, 1833 that there was no intention on the part of the

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\item \textsuperscript{24} 53\textsuperscript{rd} Geo 111, 155.
\item \textsuperscript{25} Sections 55 to 66 of Charter Act, 1813.
\item \textsuperscript{26} 3\textsuperscript{rd} & 4\textsuperscript{th} Wm. IV. C. 85.
\item \textsuperscript{27} **Section 2 reads as:** “that all and singular the privileges, franchises, abilities, capacities, powers, authorities, whether military or civil rights, remedies, methods of suit, penalties, forfeitures, disabilities, provisions, matters, and things whatsoever, granted to or continued in the said United Company by the said Act of the fifty third year of King George the third, for and during the term limited by the said Act and all other enactments, provisions, matters, and things contained in the said Act, or in any other Act or Acts whatsoever, which are limited, or may be construed to be limited to continue for and during the term granted to the said company by the said act of fifty-third year of King George the Third. So far as the same or any of them are in force, and not repealed by or repugnant to the enactments herein after contained, all powers of alienation and disposition, rights, franchises, and immunities, which the said United Company, now have, shall continue and be in force, and may be exercised and enjoyed, as against all persons whomsoever, subject to the superintendence, direction, and control, hereinbefore, and may be exercised and enjoyed, as against all persons whomsoever, subject to the superintendent, direction, and control, herein before mentioned, until the thirteenth day of April one thousand eight hundred and fifty four.”
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Legislature to which the revenue of India should be subject, for it was expressly
enacted by section 9.28

Section 10 of the Charter Act 1833, provided that “all persons and body
politic shall and may have and take the same suits remedies and proceedings legal
and equitable, against the said company, in respect of such debts and liabilities as
aforesaid and the property vested in the said company, in trust as aforesaid shall be
subject and liable to the same judgments and executions in the same manner and
form respectively as if the said company in their own use”.

In determining the question, whether the East India Company would, under
these circumstances, have been liable to an action, the general principle applicable
to the sovereign and the State, and the reasoning deduced from the maxim of the
English law that the King can do no wrong, would have no force.29 The reason is
that the, position of the East India Company was different from the position of the
Crown in England. East India Company had a dual capacity, commercial and
sovereign, and it was exempted from liability in its sovereign capacity.

28 Section 9 reads as: “that from and after the said twenty second day of April one thousand eight
hundred and thirty-four, all the bond debt of the said company in Great Britain and all the territorial
debts of the said Company in India, and all the other debts which shall on that day be owing by the said
company, and all sums of money it one thousand Eight Hundred costs, charges, and expenses which
after one thousand Eight the hundred and thirty four may become payable by the said company in
respect or by reason of any covenants, contracts, or liabilities then existing, and all debts expenses, and
liabilities whatever which after the same day shall be contracted and incurred on account of the
government of the said territories, and all payments by this Act directed to be made, shall be charged
and chargeable upon the revenues of the said company may hereafter have to their own use, nor the
dividend by this Act secured to them, nor the Directors or proprietors of the said company, shall be
liable to or chargeable with any of the said debts, payments or liabilities.

29 Viscount Canterbury v. The Attorney General (1) Phillips. 327
The East India Company, did not constitute absolute sovereign powers.\textsuperscript{30} It established Railways, marine service, telegraph, not merely of public offices and of government stores, but also of private passengers and private messengers. Thus, it was engaged with partly commercial functions and partly sovereign functions. So its liability was the same as that of an ordinary individual. The Courts established many decisions to confirm the liability of East India Company.

In \textit{Bank of Bengal v. East India Company},\textsuperscript{31} it was held that the company was not sovereign but subject to the control of the Crown and Parliament. This was already explained before the Charter Act of 1833.\textsuperscript{32} Before 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.

In 1840 the Calcutta Supreme Court held in \textit{Gopee Mohan Debs case},\textsuperscript{33} that an action of trespass would lie against the East India Company and that it would even lie against the company for acts done in their public or political capacity by the Governor General or by the Governor and Council, provided, there was a previous order or a subsequent recognition of the act by the company. A clear picture of East India Company’s liability, emerges out of \textit{Dhakjee Dadajee v. The East India Company}.\textsuperscript{34} In this case, a police officer under a warrant from the Governor - in - Council of Bombay, trespassed into a house. A claim for damages

\textsuperscript{30} 53\textsuperscript{rd} Geo. 111 C.155.  
\textsuperscript{31} (1831) 1 Bignwell’s Report at 119-122.  
\textsuperscript{32} Moodalay v. The East India Company. (1785) 1 Bro. CC. 469; 28 E.R. 1245.  
\textsuperscript{33} Gopee Mohan Deb v. The East India Company, (1840) , (Morley’s Digest, Vol. 11. (307-335).  
\textsuperscript{34} (1843) 2 Morley’s Digest 307.
was made against the East India Company. It was argued that a corporation could be liable for trespass committed by its servants or agents. However, Sir Erskine Perry dismissed the claim by observing that there was no distinction, for the purpose of liability between acts done, or authorized, in their political character and commercial character. It was held:

“Whatever political powers were committed to the companies of merchants incorporated by Elizabeth and succeeding monarchs, they were never exonerated from the liability attached to every subject of the Crown, viz., to answer the complaints of every other subject or individual wherever the Courts of the crown were established”.

A series of Statutes carryout the remedy already existing at common law and most clearly provide for action to be brought against the company for the torts & trespass of their servants committed in India.

In the case of “Act of State”, the company got immunity from liability.\(^{35}\) In \textit{Syed Ally case},\(^{36}\) the above immunity was confirmed and held that the company was not liable when the act was an act of sovereign. Thus, it is clear from the above findings, that outside the area of Act of State, the East India Company was vicariously liable, like any corporation, for the torts committed by its servants.

\(^{35}\) Nobob of Carnatic v. East India Company, 4 Bro. CC. 198 (1793).
\(^{36}\) East India Company v. Syed Ally, (1827), 7 MIA. 555.
B) Liability of the Secretary of State in India from 1858 to 1950

The general rule was that the Secretary of State - in - Council for India has the same liability as the East India Company. The extent of liability of the Secretary of State was governed by the Government of India Act, 1858. The Act declared that the company’s territories in India, shall vest in Her Majesty, and the company shall cease to exercise its power and control over all these territories. The administrative affairs of India were directly looked after by England.

i) Position under the Government of India Act 1858

The Secretary of State for India in Council inherited the right to sue and liability to be sued from his predecessor in title, the East India Company. Section 65 of Government of India Act, 1858 reads as follows:

“The Secretary of State - in - Council may sue or be sued as well in India as in England by the name of the Secretary of State - in - Council as a body Corporate; and all persons and bodies politic shall and may have and take the same suits, remedies and proceedings legal and equitable against the said company and the property and effects hereby vested in Her Majesty for the purpose of Government of India or acquired for the said purpose shall be subject and liable to the same judgments and executions as they would, while vested in the said Company, have been liable to in respect of debts and liabilities lawfully contracted and incurred by the said company.”

37 21st & 22nd Vict. C. 106.
Section 66, 38 Section 67 39 and Section 68 40 of the same Act made the position and liabilities of Secretary of State for India and East India Company very clear.

In determining the liability of the Secretary of State for the torts committed by the Servants, the Courts began to inquire whether the East India Company would have been liable under the like circumstances. The question of the State liability in tort came, before the Supreme Court of Calcutta, in 1861 in the Peninsular and Oriental Steam Navigation Company v. Secretary of State for India. 41

In the above case, the Secretary of State engaged some servants in government dockyard at Kidderpore in riveting iron pieces from dockyard to another place. The dockyard was situated partly on the side of the road. They carried iron rods along the centre of the road without any supervision to notice others. On the way, they negligently dropped an iron rod. The noise produced thereby frightened the horses of a coach of the plaintiff company passing by the road at that time, and one of them fell down over the funnel, and was injured. The plaintiff company, sued the Secretary of State to recover damages

38 Section 66: the Secretary of State in Council shall with respect to all actions suits and all proceedings by or against the said company pending at the time of the commencement of this Act, come in the place of the said company and that without the necessity of substituting the name of the Secretary of State in Council for that company.

39 Section 67: all treaties made by the company shall be binding in Her Majesty and all contracts covenants, liabilities and engagements of the said company made, incurred or entered into before the Commencement of the Act may be enforced against the Secretary of State in Council the in like manner and in the same Court as they might have been against the said company if this Act had not been passed.

40 Section 68: Neither the Secretary of State nor any member of the Council shall be personally liable in respect of such contracts, covenants or engagement of the said company as aforesaid, in respect of any contracts entered into under the authority of this Act or other liability of the said Secretary of State or Secretary of States in council in their official capacity but all such liabilities and all costs and damages in respect there of shall be satisfied and laid out of the revenues of India.

41 (1861), 5 Bom. H.C.R. App. 1.
of Rs. 350/-.

The defendant claimed the common law immunity of the Crown and contended that the State cannot be liable for damages occasioned by the negligence of its officers, or of persons employed in its service. The lower Court referred the following question to the Supreme Court of Calcutta; “Whether the Secretary of State was liable for damages occasioned by the negligence of the servants in the service of the government, assuming them to have been guilty of such negligence as would have rendered an ordinary employer liable”.

The Supreme Court answered that an action lay against the Secretary of State, for the damage sustained by the plaintiffs in consequence of the negligence of the workmen employed by the State and immunity also held that the Sovereign shield of the Crown was not available to the Secretary of State for India in council. Making clear that the East India Company was not a sovereign, and therefore, could not claim all the exemptions of a sovereign and pointing out the dual functions of the East India Company, Sir Barnes Peacock\(^{42}\) observed;

“In determining the question the East India Company would, under the circumstances, have been liable to an action, the general principles applicable to the Sovereigns and States, and the reasoning deduced from the maxim of the English Law that the King can do no wrong, would have no force”. The Court pointed out that the company exercised sovereign powers as a delegate of the Crown did not make it a sovereign. Therefore, the Crown immunity could not

\(^{42}\) He agreed with Justice Grey in the Bank of Bengal v. East India Company (Bignell. Rep. p. 120) that the fact of the company having been invested with powers usually called sovereign powers did not constitute them sovereign.
extend to it. As to the scope of actual liability of the company, the Court Stated that where an act was done in the exercise of ‘sovereign powers’, no action would lie against it. The Court also stated the proposition that if the company “were allowed, for the purpose of Government, to engage in undertakings such as the Bullock Train and the conveyance of goods and passengers for hire, it was only reasonable that they should do so, subject to the same liabilities as individuals”. The Court also stated that this is a liability not only within words, but also within the spirit.

In order to clarify the legal status of East India Company, the Supreme Court said; “we are of the opinion that the East India Company was not sovereign, and therefore, could not claim all the exemptions of a sovereign; and they were not the public servants of government, and therefore, did not fall under the cases with regard to the liabilities of such persons; but they were a company to whom sovereign powers were delegated, and who traded on their own account and for their own benefits, and were engaged in transactions partly on their own account, which without any delegation on sovereign rights, might be carried on by private individuals”.

While deciding this case, the Supreme Court cited the observation of Lord Kenyon in Moodalay v. Morton,43 and observed the following,

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43 1Bro.C.C.469.
“But where an act is done, or a contract is entered into, in the exercise of powers usually called sovereign powers, by which we mean powers which cannot be lawfully exercised except by a sovereign or private individual delegated by a sovereign to exercise them, no action will lie”.

The Court observed that the common law immunity rule was found on the basic principle that “the King cannot be guilty of personal negligence or misconduct, and consequently, cannot be responsible for the negligence of misconduct of his servants.” However, the learned Judge took up the opportunity to lay down the following distinction:

“There is a great and clear distinction between acts done in the exercise of what are usually termed sovereign powers, and acts done in the conduct of undertakings which might be carried on by the private individuals without having such powers delegated to them”. The narrow view based on the ratio laid down in this case was that the Secretary of State was liable to the extent of the liability of private persons.

Finally, the Court held in this case that the Secretary of State was liable to pay compensation and concluded with the following reason “the workman were, therefore, lawfully employed to act on behalf of Government, and the business on which they were employed, being an act of a private nature, and not in exercise of

44 The learned Judge also observed: “Where an act is done, or a contract is entered into, in the exercise of powers usually called sovereign powers, by which we mean powers which cannot be lawfully exercised except by a sovereign, or private individual delegated by a sovereign, or private individual delegated by a sovereign to exercise them, no action will lie”
powers usually called the sovereign powers or in the performance of an act of State, we think the Government, by virtue of the Act to which we have adverted, incurred a liability, by their negligence”.

The Court also discussed the sovereign functions of the East India Company as observed in the following, “It is clear that the East India Company would not have been liable for any act done by any of its officers or soldiers in carrying on hostilities, or for the act of any of its naval officers in seizing as prize property of a subject, under the supposition that it was the property of an enemy, or for any act done by a military or naval officer or by any soldier or sailor, whilst engaged in military or naval duty, nor for any acts of any of its officers or servants in the exercise of judicial functions”.

The distinction like “Sovereign” and “non-sovereign” or “commercial” and “non-commercial” became stand points as the test to lay down the liability of State for wrongful acts. But the decision in the above case was differently understood.45

After twenty years, the Madras High Court expressed certain views, on the larger question of the liability of the Secretary of State to be sued, discounting Sir

45 In Nobin Chunder Dev. v. Secretary of State for India (1875) 1 Cal. P. 11: it was held that a breach of contract by the Government could not be enforced in the Court, because auction for sale of excise shops was an act which could be performed only by the sovereign according to the Court. In Thomas v. Reg (1875) 4 St. Tr. (U.S.) the Court held that whether the company enjoyed the same immunity as the crown with regard to tort is, of course, a very different matter. In Grant v. The Secretary of State for India. (1887) 2 C.P.D. 245, cited in Secretary of State v. Kamachee Boye Sahaba, (1859) VII M.I.A. 547, held that East India Company had Sovereign Powers delegated to it and that the crown has absolute power to dismiss a military officer. Kernan, J., merely refers to the case of Forester v. The Secretary of State (1872) I.A. Sup. Vol. 10, in which the defendant was held liable to pay the plaintiff the value certain arms illegally seized by Government in India with interest at the rate of 12 percent.
Barnes Peacock’s theory in *Peninsular Case*\(^\text{46}\) and the interpretation given in *Nobin Chunder Dey’s case*.\(^\text{47}\) In this case, plaintiff was a licensed retail dealer in ganja and sidhi in Calcutta and this license had to be renewed every year. But the Superintendent of Excise, Calcutta put the right to sell ganja and sidhi for the year 1874-75 to public auction which was the usual way of distributing the yearly license. The plaintiff was the highest bidder and his bids were recorded. He paid the deposit due in respect of license. Subsequently, the excise authorities refused his license and a suit was brought by the plaintiff against the Secretary of the State. He contended that a breach of contract was committed by the State by not granting license to the plaintiff and also for not returning the deposits made thereof by the plaintiff. On appeal against the dismissal of suit on the ground of non-maintainability, the High Court held that on evidence, no breach of contract had been proved, even if there was a contract, the act was done in the exercise of sovereign power and therefore it was not actionable.

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

Some of the later decisions did not accept the ratio laid down by Peacock C.J. in Peninsular Case. According to the principle laid down in this Case, the


\(^{47}\) (1875) 1 Cal. at 11.
Secretary of State can be liable only for the acts of non-sovereign nature, liability will not accrue for sovereign acts.

The Madras High Court took a divergent view, in the leading case *Secretary of State v. Haribanji*. The facts of that case, were that during the course of transit of salt from Bombay to Madras port, due to the enhancement of duty, the plaintiff had to pay excess duty at Madras. The amount was paid under protest and the suit was instituted to recover the amount. Before the Court, two important questions regarding the maintainability of the suit were considered. The first related to the personal status of the defendant *i.e.*, whether the defendant was a sovereign, who could not be sued in his own Courts. The second related to the character of the act in respect of which the relief was sought. For the first question, it was answered that the immunity enjoyed by the Crown in England did not extend to the East India Company, so the suit was maintainable before the municipal Court. For the second question, it was held that the immunity of the East India Company extended only to what are known as “Acts of State” strictly so-called, and the distinction based on sovereign and non-sovereign functions of the East India Company was not well-founded. Thus in *Hari Bhanji’s Case*, it was held that excepting an Act of State, all other claims are actionable against the Government, in the same way as if they were against an ordinary person. In this case the Court also compared the sovereign act with the ‘Act of State’. The Court

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48 (1882) I.L.R. 5 Mad. 273.
confirmed that, there is no immunity for the acts done within the domestic sphere which can be considered as sovereign immunity.

The ‘Act of State,’ is an act of a political sovereign against another political sovereign or against the subjects of another political sovereign and not against its own citizen. The Court also referred the adhoc committee report, in which it was Stated that traditional sovereign functions were the making of laws, administration of justice maintaining law and order, repression of crime and other consequential functions. There are certain functions like making of war, annexation of State, making international treaties amount to ‘Act of State’.

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

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

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

Thus, it was held that all claims except those arising out of “Act of State” could be entertained by the civil Courts and the immunity from liability availed, only to the acts done in the exercise of sovereign power, which do not profess to be justified by the Municipal law.

In *Shiva Bajan v. Secretary of State for India*49, the police officer seized a large number of bundles of hay under statutory authority believing that it was stolen property but actually was the victim’s own property. After his acquittal, he served a notice on the District Superintendent of Police for the delivery of the possession of hay. A small quantity of hay was delivered back to him as the remaining hay was lost. Then he sued the Secretary of the State, on the ground that he had acted as the employee of the government and therefore the government was liable for his act. It was not in obedience to an order of the government that the goods were seized by the police but it was in exercise of statutory function. So it was held that the Secretary was not liable for the negligence of a police officer for the seizure of hay while he was exercising statutory duty, as the Statute expressly granted privilege to the sovereign. In this case the Court applied the theory of

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49 ILR 28 Bom 314(1904).
benefit to see whether the State was benefited out of the act committed by the employee. This principle helped the Court more in protecting the State than protecting the citizens.

The claim for immunity based on statutory duty may be reasonable. However if there is negligence, in carrying out the statutory duty, it is doubtful, whether the State is immune from liability. But the propriety of applying the theory of benefits, to relieve the State from liability depends upon the nature of the act committed by its servants.

In *McInerny v. Secretary of State*,\(^{50}\) Fletcher. J. held that the State liability in case of non-sovereign function could extend, only where there was some benefit or profit to the government out of tortious act of the government employee. On this basis, it was held by the Court that the suit was not maintainable against the State, claiming damages for negligence, in respect of the accident which had happened to the plaintiff on the public high way.

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

\(^{50}\) ILR 38 Cal (1911).
In *Secretary of State for India v. Moment*\(^51\), the question was whether a suit for damages for wrongful interference with the plaintiff’s property could be brought against the Government. The Privy Council observed, “Their Lordships are satisfied that a suit of this character would have laid against the Company. He referred the ratio of the judgment by *Sir. Barnes Peacock*”.\(^52\) This case debarred the Government of India, from taking away by legislation the right of a subject to sue the Secretary of State. Thus the *Moment case* strengthened the liability of Secretary of State.

**ii) Position under the Government of India Act, 1915**

To extend the suability and liability of the Secretary of State and bring the individual claim against the State into uniformity, the Government of India Act, 1915\(^53\) was passed. But there was no change in regard to liability after the Government of India Act, 1858. In section 32(2) of the government of India Act 1915, instead of the Word ‘liability’, the expression ‘same remedies as he might have had against the East India Company’ were used. Section 32 was interpreted

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\(^51\) 40 I.A. 48 (1912): In this case, Section 41 (b) of Lower Burma Town and Village Lands Act, 1898 which provided that ‘No Civil Court shall have Jurisdiction to determine any claims to any right over land as against the Government’ was declared ultra virus of section 65 of Government of India Act, 1858.


\(^53\) 5 & 6 Geo V.C. 61: Section 32 (1) and (2) are in these words: The following are important provisions related to the rights and Liabilities of the Secretary of State in Council:

“(1) The Secretary of State in Council may sue and be Sued by the name of the Secretary of State in Council, as a body Corporate.

(2) Every person shall have the same remedies against the Secretary of State in Council as he might have had against the East India Company is the Government of India Act, 1858, and this Act had not been passed.”
in Venkata Rao v. Secretary of State,\textsuperscript{54} to mean only providing for suability. Lord Roche, delivering the opinion of the judicial committee observed: “Their Lordships are not disposed to think that this section, which is a section relating to parties and procedure, has an effect to limit or bar the right of action of a person entitled to a right against the Government, which would otherwise be enforceable by action against it, merely because an identical right of action did not exist at the date when the East India Company was the body, if any, to be sued”.

iii) \textbf{Position under the Government of India Act, 1919}

After the Government of India Act 1919, it was realized that in the course of time the just demands of Indian people for a large share in the Government of their country would be satisfied. The English also changed its policy. The Defence of India Act, 1915 empowered the Government to take necessary efforts to suppress the political awakening of the Indians, with a view to prepare a scheme of reforms. Montague came to India in November 1917. With the consultation of top Indian leaders the reforms were introduced. On the basis of the reforms of Montague Chelmsford, the Government of India Act was passed in the year 1919. There was no change in the Government of India Act, 1919 in respect of rights and liabilities of Secretary of State in Council. Despite the fact for over sixty years the Government of India Act, 1858,\textsuperscript{55} the Government was exercising sovereign and political powers and was carrying on the business of governing the country.

\textsuperscript{54} AIR 1937 P.C. 31.

directly under the British Crown, the remedy given even after 1915, to the British Indian subjects was the same as they had against the East India Company before 1858. The individuals could not seek proper remedy, when these rights were infringed by the State officials.

It was accepted that Section 32 (2)\textsuperscript{56} of the Government of India Act 1915 has made a very significant distinction between procedural aspect of suability and the substantive aspect of liability.\textsuperscript{57} In \textit{Kessoream Poddar & Co. v. Secretary of State},\textsuperscript{58} the plaintiff company sued the Secretary of State to recover damages for the injury sustained by them by reason of the defendant’s failure to take delivery and pay for certain goods bought by the defendant from it by commando ring orders. Rejecting the claim, Chotznar J, held that the commandeering order was one which no one but the Government could make and being an act of the sovereign power, the secretary of State could not be sued in respect of it. In \textit{Secretary of State v. Srigobinda},\textsuperscript{59} the plaintiff’s state was released from the management of the Court of Wards complaining that the manager appointed by the Courts of Wards has not done his duty by realizing all money with diligence. He has also not accounted to the Courts of Wards for certain money which he collected. It is not a case in which the plaintiff can make the Secretary of State or the revenue of India liable.

\textsuperscript{56} Section 32 (2) of Government of India Act, 1915. Provides, “Every person shall have the same remedies against the Secretary of State in council as he might have had against the East India Company if the Government of India Act 1858 had; this Act had not been passed”.

\textsuperscript{57} Ishwara Bhat, \textit{Administrative Liability of the Government and Public Servant} 36 Eastern Law House, New Delhi, 1\textsuperscript{st} Edn, (1983).

\textsuperscript{58} A.I.R. 1928 Cal.74.

\textsuperscript{59} A.I.R. 1932 Cal. 834.
In *Mata Prasad V. Secretary of State*, the plaintiff was convicted and imprisoned for four and half years for dacoity. He has also to pay a fine of Rs.500/- But for his good conduct he was released after 2½ years. The plaintiff claimed damages against the secretary of State for wrongful conviction of his officials. The court held that a person who has been charged by a competent court and punished for that offence is not, therefore, entitled to sue the secretary of State for India in council for damages in respect of the act of the Government in exercise of its sovereign powers.

iv) Rights and Liabilities of Secretary of State under the Government of India Act, 1935

After the Act of 1919, the Government of India Act, 1935 was the second important milestone on the road to a fully responsible Government in India. It played a vital role in shaping and molding the new Constitution of India in 1950. The Act strengthened the supremacy of British Parliament. The Act introduced a federal form of government in India. The Act also introduced partial responsibility at the centre, established provincial autonomy and was aimed at forming All India Federation. Some changes were made in this Act with regards to the rights and liabilities of Secretary of State. For the first time, a right was conferred on the Federal and Provincial Legislature to make laws which either took away or conferred a right to sue Federal and Provincial Governments.

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60 A.I.R. 1931 Oudh. 29.
61 26Geo. V& LEdw VIII C. 2 of 2nd August 1935
Section: 176 of the Government of India Act, 1935 reads as:

“The Federation may sue or be sued by the name of the Federation of India and a Provincial Government may sue or be sued by the name of the Province, and without prejudice to the subsequent provisions of this chapter, may subject to any provisions which may be made by Act of the Federal or Provincial Legislature by this Act, sue or be sued in relation to their respective affairs in the like cases as the Secretary of State in Council might have the power to sue or be sued if this Act had not been passed.”

Thus under section 176(1) of the Act, the Legislature was given a right to make any law in this respect to exempt the Secretary of State from liability. The restriction imposed by *Moments case*, was removed by Section 176, of The Government of India Act, 1935. It is true that Article 300 of the Constitution is molded with necessary modifications of section 176 of Government of India Act, 1935. The above analogy may be referred back to the early statutory provisions and cases to the root of liability of union of India and of States under Article 300 of the Indian Constitution. The following are its abstract.63

1. That, apart from special statutory provisions, suits could have been brought against the East India Company and consequently against the Secretary of State as successor to the company, in respect of acts done in the conduct of

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63 The first two Principles are laid down by Sir Barnes Peacock in P & O Case (1861) 5 Bom. H.C.R. App. 1, which were continuously adopted by the Judges in the post-Constitutional period.
undertakings which might be carried on by private individuals without sovereign powers;

2. That, the Secretary of State was not liable for anything done in the exercise of sovereign powers.

3. Accepting the above two principles, Union of India and State can be sued as an ordinary person and is vicariously liable for the torts committed by its servants. It is not liable for anything done in the exercise of sovereign powers.

   In *Etti v The Secretary of State*, when the plaintiff claimed compensation for the refusal to discharge his son after treatment on the ground that his son had been taken away by some other person, the court exempted the State from liability by stating that maintaining hospital from the revenue fund is for the benefit of the public. Actually the loss of the child was due to the negligence of the hospital authorities, amounting to breach of contract and there was no justification in applying the theory of benefit. There is also no rationale in telling the plaintiff that the State is exempted from the liability because the maintenance of the hospital is from the revenue fund. Here the court failed to note that liabilities attached to the State can be satisfied out of the revenues of India as stated in Peninsular case and so this fund can be used for compensating the aggrieved.

   Similarly *In Gurucharan Kaur v. Madras Province*\(^64\) the D.S.P instructed the police Sub- Inspector, to go over to station and prevent certain Maharaja from

\(^{64}\) AIR 1942 Mad. 539.2MLJ 14.
leaving that station. The fact however was that it was not the Maharaja but his wife, the Maharani and his daughter alone were awaiting the arrival of the train in her own car. On the arrival of the train, the Sub-Inspector acting under a bonafide, though erroneous belief, that he was to detain the Maharani, not only prevented the Maharani from boarding the train but also got the gate in the iron fencing closed and posted two constables near it. A suit was brought by the Maharani and her daughter for wrongful confinement. It was held that the Government could not be held liable for the acts of police done in discharge of their statutory duty in “good faith” Thus if the wrongful restraint by the government servant is made in “good faith,” the State is not liable.

The training provided by the State for the purpose of defence is to secure the general public and it is the sovereign function. In Secretary of State v. Nagerao Limbaji,\textsuperscript{65} the plaintiff brought a suit against the Secretary of State for damages for the loss of his finger due to the explosion of an ignition sot lying near the area which was used as a practice bombing ground by the military authorities. It was held that the provision of facilities for bombing practice was a public duty undertaken by the State in order to provide training for the army. Such duties are not exercised by the State for its own benefit, but for the protection of the entire population.

\textsuperscript{65} AIR 1943 Nag. 287.
Conclusion

In Ancient Law, King never accepted absolutism. The Vedic period witnessed for the emergence of State for the protection of the people. From the Aryan period onwards, the King was subjected to Rule of law and will of the people. They considered protecting the people, their property, and maintaining law and order as primary duty. While discharging this duty, the King was not immune from liability to compensate his subjects even in miscarriage of justice. Similarly, when the King was unable to recover the stolen property from the thief; he came forward to pay compensation to the owner of the property. Though law was not certain, some foundation was laid down by the ancient Kings for the development of vicarious liability of the State. During the period of Delhi Sultanate and Mughals, the rulers were not immune from liability since they considered the holy Quran as supreme law of the land. They were also subjected to the ordinary law of the land.

However the obligation to pay compensation on the part of the King, during ancient and medieval India was absent under English legal system. The fact was that, in India, the immunity available to British Crown did not extend to the East India Company or the Secretary of the State in India. At the time of British rule in India neither Section 65 of the Government of India Act, 1858, which was re-enacted as section 32 of Government of India Act, 1915 nor section 176 of Government of India Act, 1935 extended immunity to the company or the
Secretary of State which the Crown in England enjoyed in respect of torts committed by its servants.\textsuperscript{66} The doctrine of sovereign immunity in India is purely a judicial creation having its origin in judicial pronouncements, which can be traced back to 1861 when the question of State liability in tort came before the Supreme Court of Calcutta in the \textit{Peninsular} case. This is a case of historical importance in which Lord Peacock refused to extend the maxim “the King can do no wrong,” in case where a tortious act is committed by the servant of Secretary of State in India. It was made clear that East India Company was not engaged in any sovereign function. The functions of the State were divided into sovereign and non-sovereign to determine tortious liability of the State. Till the commencement of the Indian Constitution the following were the principles applied by the Courts to determine the liability of State.

(a) The State was not liable for the wrongful act of servants, when he was engaged in sovereign functions.

(b) The State was not liable for the “act of State.”

(c) The State was liable for the wrongful acts of the servants if they were engaged in commercial or non sovereign functions of the State.

\textsuperscript{66} Dhakjee Dadajee v. The East India Company, 307(1843) 2 Morley’s Digest.