CHAPTER III

THE EXTENT OF LIABILITY OF STATE UNDER ARTICLE 300

3.1 The Constitution and background of Article 300

The Indian Constitution was drafted by a Committee under the Chairmanship of Dr. Ambedkar and the Committee submitted its report on 21\textsuperscript{st} Feb 1948.\textsuperscript{1} It was adopted by the Constituent Assembly on 26\textsuperscript{th} November 1949. The new Constitution of India was signed by Dr. Rajendra Prasad as the President of the Constituent Assembly on 26\textsuperscript{th} November 1949\textsuperscript{2} and it came in to force on 26\textsuperscript{th} January 1950. One of the important tasks of the makers of the Constitution was to give special attention between citizens and the State and to provide importance to the Fundamental Rights and Directive Principles of State policy.

The Government of India Act 1935 furnished a model in which necessary alterations enabled the Drafting Committee to introduce reform for the new Constitution of India. The Draft Constitution under Clause 214\textsuperscript{3} dealt with the suits and proceedings against the State which was based on section 176 of the

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  \item \textsuperscript{1} Shiva Rao, \textit{The Framing of Indian Constitution}, 114 (N.M.Tripati, Bombay, Vol – 5, 1965 - 1968)
  \item \textsuperscript{2} V. D. Kulshrestha’s \textit{Landmarks in Indian Legal and Constitutional History}, 415, (Eastern Book Company, 9\textsuperscript{th} Edn., 2009)
  \item \textsuperscript{3} Clause 214 : (1) The federation may sue or be sued by the name of the Federation of India and the Government of a Province may sue or be sued by the name of the Province and, may, subject to any provisions which may be made by Act of the Federal Parliament or a Provincial Legislature enacted by virtue of the 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 Province, might have sued or been sued if this Constitution had not been enacted.
  \item (2) If at the date of the commencement of this Constitution any legal proceedings are pending to which the Dominion of India is a party, the Federation shall be deemed to be substituted for the Dominion in those proceedings.
\end{itemize}
Government of India Act, 1935. But, no where the content of liability of State was defined. Clause 214 was revised as Article 274 of the Draft Constitution and was discussed by the Constituent Assembly of India. On discussion, Dr. Ambedkar explained the difference between the Government of India and Union of India. The Government of India is not a legal entity; the Union of India is a legal entity, a corporate body which possesses rights and obligations. Likewise, each State has been endowed with juristic personality, with power to sue and the liability to be sued. Based on this explanation, the Constituent Assembly adopted the amendment for the words ‘Government of India’ & substituted the words ‘Union of India’ and for the words ‘a Province’ the words ‘or the Indian States’ be inserted. The amended form of Article 274 was adopted and finally it emerged as Article 300 of the Indian Constitution, 1950.

i) The Constitutional Provision of Article 300

Article 300 of the Indian Constitution 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

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4 Article 300(1) and Section 176(1) are mutatis mutandis substantially the same”. B.P.Shina, C.J., in State of Rajasthan v. Vidhyawathi, AIR 1962 SC 933, 936.
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 proceeding. 

Article 300 of the Constitution confirmed the suits and proceedings against Union of India and the Government of State. It intends to provide a right to file a suit against the Union of India and States. This Article also provides the legislative powers of the Union and the States to define their liabilities. But it does not denote the area of the liability either of the Union or of the States. By the provision of the Constitution, the Union of India is a legal person. In State of Punjab v. O.C.B. Syndicate Ltd., the Supreme Court said that it would not be correct to say that the Government is not a Constitutional or even juristic entity for the reason that it does not partake the characteristics or satisfy in whole, the definition of a Corporation. The State is an organized political institution which has several of the attributes of a Corporation.

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7 AIR 1964 SC 669 at 669.
In *Union of India v. Mohin Chandra*,\(^8\) where Ram Labhaya C.J. stated that Article 300 clothes the Government of India with status of a juristic person. It, therefore, could be sued. The only immunity that the Government of India enjoys, is for acts done in the exercise of sovereign functions. *Mahajan J. in provinces of Bombay v. Kushaldas Advani*\(^9\) defined the word ‘sue’ as follows:

“The expression ‘sue’ means, “the enforcement of a claim or a civil right by means of legal proceedings.” When a right is in jeopardy, then any proceedings that can be adopted to put it out of jeopardy, falls within the expression ‘sue’. Any remedy that can be taken to vindicate the right is included within the expressions.”

It is noticed that Article 300(1) consists of three parts. The first part deals with question about the form and the cause title, for a suit intended to be filed by or against the Union of India or the Government of a State. The second part provides *interalia*, that the Union of India or a State may sue or be sued in relation to its affairs in cases like those in which the Dominion of India or a corresponding Provinces or an Indian State as the case may be, might have sued or been sued if the Constitution had not been enacted. The third part provides that it would be competent for the Parliament or Legislature of a State to make appropriate provisions in regard to the topic covered by the Article 300(1).\(^{10}\)

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\(^8\) A.I.R.1952 Ass.159 at 166.
\(^9\) AIR 1950 SC 222.
\(^{10}\) State of Rajasthan v. Vidhyawati, AIR 1962 SC 933 at 966.
ii) Position of Union Territory

Article 300 of the Indian Constitution, provides for the suits and proceedings by and against the Union of India and its States. But, it does not refer anything about Union Territories. The administration of Union Territory is vested in the President under Article 239 of the Constitution of India, which empowers the president to administer it to such extent as he thinks fit through a Chief Commissioner. But in doing so, the President does not function as the head of the Central Government but as the head of Union Territory and his position under article 239 is analogous to that of a Governor of a State. Hence, for the purpose of suits and proceedings, Union Territory cannot be merged with the Central Government even though it is centrally administrated.

In *Satya Dev v. Padma Dev*,\(^\text{11}\) it was held that the Union Territory is a separate entity and the Government of a Union Territory and the Central Government are not identical. A suit by or against a Union Territory must therefore, be brought by or against the Government of the Union Territory and not in the name of the Central Government. In *Tripura Administration* case where an application for winding up the Bank was filed on behalf of the administration of Tripura, it was held that the expressions of Tripura Administration included both the President and the Chief Commissioner and it was in that name that the petition was filed, so the application for winding up the bank was quite competent.

\(^{11}\) AIR 1959 Tri. 41.
As provided in Article 300, Parliament is empowered to make suitable legislation to deal the subject matter. But it prolonged till 1965 for legislative action. The Government (Liability in Tort) Bill 1967,\textsuperscript{12} was introduced in the House of Parliament. But unfortunately it has not been enacted as an Act to deal the suits and proceedings by and against the State because there is no provision for fixing liability and immunity of State. The Supreme Court and High Courts approved the principles applied in Peninsular Case\textsuperscript{13} to decide the subject matter of vicarious liability of the State. The dictum of Peninsular Case settled the matter without any doubt and accordingly the State is liable for the negligence of its servants, if the negligence is such as would render an ordinary employer. A suit will be against the State in regards to acts done in the course of activities of private nature. Non sovereign and commercial functions of the State are considered as acts which can be carried out by private individuals. The following are different grounds by which the State was held liable for the tortious acts of its servants as decided by the judiciary in various cases.

3.2 Grounds for fixing liability of State under Judicial interpretations

A. Non Sovereign Functions

i) Negligent driving

The State is liable for negligent driving of its servants while discharging non- sovereign functions. After the commencement of Indian Constitution, the rule

\textsuperscript{12} Bill no.43 of 1967(as introduced in Loksabha on 22.5.1967)
\textsuperscript{13} Peninsular and Orientation Steam Navigation Company v. Secretary of State for India, (1861)5 Bombay H.C.R. App1.
in Peninsular case was first applied in *State of Rajasthan v. Vidyawathi*,\(^{14}\) where the extent of liability of State was clearly analysed and decided. Here the Jeep driver was a temporary employee of the State of Rajasthan, engaged to drive the Udaipur Collector’s State Jeep. The Jeep had been sent to a workshop for necessary repairs. After correcting all the repairs the driver was driving the jeep from workshop to Collector’s residence. On the way, due to his rash and negligent driving, he knocked down one Jagadishlal who was walking at the foot path of Udaipur city, thereby causing severe injuries to him and he was admitted to the hospital, where he died. The wife of Jagadishlal sued the driver and State of Rajasthan. The Supreme Court held that the State was liable and was directed to pay damages. The Court found that the accident took place while the driver was bringing the jeep back from workshop to the Collector’s residence. It cannot be said that he was employed on a task which was based on delegation of sovereign or State powers of the State. His act was not an act in exercise of sovereign function. The Court said that the employment of driver of a jeep for the use of a civil servant was an activity which was not connected in any manner with the sovereign power of the State. Thus, while deciding the case, the Supreme Court accepting the proposition laid down in the Peninsular case approved the distinction between sovereign function and the non-sovereign function of the State. By delivering this judgment the Supreme Court expanded the responsibility of the

\(^{14}\) AIR 1962 SC 933.
State to protect the interest of an affected individual due to the negligent act of its servants.\textsuperscript{15}

The judgment in \textit{Vidyawathi’s case},\textsuperscript{16} fixed the foot print on the extent of liability of State under Article 300 of the Indian Constitution. But the progress was prevented and confused by \textit{Kasturilal v. State of U.P.}\textsuperscript{17} It was stated that the watertight compartmentalization of the State function into ‘sovereign’ and ‘non sovereign’ is highly reminiscent of the laissez faire era,\textsuperscript{18} while the decision is hailed on the one hand for applying Sir Barnes Peacock’s dictum rightly and thus clearing dead wood that hitherto blocked the way of progress.\textsuperscript{19} It has been criticized that even after the commencement of the Indian Constitution, the doctrine is based on sovereign – non sovereign distinction\textsuperscript{20}. In another similar case\textsuperscript{21}, the plaintiff’s husband was killed due to the rash and negligent driving of a police van. The Orissa High Court held that the State was vicariously liable for the tortious act committed by its servant.

\textsuperscript{15} The Supreme Court observed that the State should be as much liable for tort in respect of a tortious act committed by its servant within the scope of his employment and functioning as such, as any other employer. The immunity of the Crown in the United kingdom was based on the old feudalistic notions of justice, namely, that the King was incapable of doing a wrong, and, therefore, of authorising or instigating one, and that he could not be sued in his own Courts. Now we have, our Constitution, established a Republic form of State, and one of its objectives is to establish a socialistic State with its varied industrial and other activities, employing a large army of servants, there is no justification, in principle, or in public interest, that the State should not be held liable vicariously for the tortious acts of its servants.


\textsuperscript{17} AIR 1965 SC 1039.

\textsuperscript{18} Alice Jacob, “Vicarious Liability of State in Torts”, 7 \textit{JILI} 247 (1965).


Also in *Pushpinder Kaur v. Corporal Sharma*, a military truck was parked on the road negligently without parking light or other signals. A car passing through, dashed in to the military truck. As a result, the driver and his wife were injured and his child died. The Punjab High Court directed the State to pay reasonable compensation for the negligent act of military driver. In another case, the Kerala High Court directed the State of Kerala to pay Rs.20000/- as damages, for the injuries sustained by the plaintiff, on account of the negligence of an employee of the police department of the State. The Indian Courts are more lenient on the claims of affected individuals. In *Usha Agarwal* case an Indo-Tibetan Border Police Force Truck was engaged in carrying arms (on normal peace time), from railway station to the unit. The truck met with an accident due to rash and negligent driving which resulted the death of plaintiff’s husband. The defense of sovereign immunity failed to act as a shield against tortious liability of the State.

**ii) Malicious Prosecution**

In *Maharaja Bose v. Governor General in Council*, the plaintiff was a passenger of the defendant’s railway. He stopped the train by pulling the emergency chain, when the soldiers in the compartment threatened him. On his failure to disclose his name and address on demand, he was abused in filthy language and was assaulted by the defendant’s servant. He was then arrested and

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22 AIR 1985 P&H 81.
24 AIR 1952 Cal. 242.
was handed over in the custody of the railway police. The plaintiff was later tried and acquitted. He sued the defendant Governor General for damages for malicious prosecution. The Calcutta High Court held that the acts complained of were only incidental to the running of a railway and were not done in the exercise of sovereign powers. Hence Governor General was held liable to pay damages for the malicious prosecution of his servant.

*Secretary of State v. Sheoramjee Hanumantrao,*\(^{25}\) is another case, where the respondent claimed Rs. 2,500 against the Secretary of State for the wrongful act of defendant. In this case the respondent purchased certain forest coup at an auction sale held by the Divisional Forest Officer of Bilaspur. But the forest range officer hampered and interfered with the removal of timber, thereby causing loss to him. The Nagpur High Court held that where the Forest Range Officer wrongfully interfered with the removal of timber by the purchaser of the forest coup, the wrongful act of the Range Officer arose out of the exercise of commercial or mercantile functions and not in the exercise of sovereign powers and the Secretary of State for India was held liable for the acts of the Range Officer\(^{26}\).

In *Union of India v. Sat Pal,*\(^{27}\) where goods belonging to the plaintiffs were seized by the Land Customs Authorities maliciously and without sufficient cause under Section 7 of the land Customs Act read with Section 167 of the Sea customs

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25 AIR 1952 Nag. 213.
26 But the same High Court held in Laxmichand v. Dominion of India (AIR 1955 Nag. 265) where an Assistant Station Master prosecuted a person under Sec. 113 of Railways Act, though he was not empowered to do so and charges under Section 121 and 122 of the said Act were later on added at his instance out of private malice, held that the Dominion of India was not liable for the tortious act of the Assistant Station Master.
Act. The act of seizure was not authorized by law and it was beyond the Scope of the law. It inflicted injuries to the plaintiff. The goods so seized having been converted into money and the sale proceeds were laying with Union of India. The High Court of Jammu and Kashmir, held that the Union of India should refund the amount to the plaintiff. This case clearly fixes liability of State for the malicious prosecution by State officials.

iii) Conversion of Property

In *Union of India v. Muralidhar*,\(^{28}\) where a large quantity of earth from land belonging to plaintiff was removed and placed on the railway track under construction was held that the Union of India was liable in conversion for the value of the earth belonging to the plaintiff even if the latter had made no demand for the return of the earth.

B. Commercial Functions

The advent of Welfare State Philosophy, engages State in various commercial functions. The potentiality of injury to individual interest increased. There is no real and marked distinction between sovereign functions of the State and those which are not sovereign and some of the functions that fall in the later category, are those connected with trade, commerce, business and industrial undertakings. The State is vicariously liable, when the wrong committed by the servant is in the course of and out of commercial functions. Profit element is not a

\(^{28}\) AIR 1952 Ass. 141.
necessary ingredient of carrying on business, though usually business is carried on for profit. Articles 298 and 19(6)(ii) of Indian Constitution expressly refers the nature of commercial functions of the State.

i) Banking Business

Any private individual could run a banking business, by employing accountants and treasurers to receive money being credited to the accounts of other individuals or even of State departments by an agreement with them. This was held in *State of Uttar Pradesh v. Hindustan Lever,* where the State of Uttar Pradesh was running a sub-treasury, which received money from private individuals for being credited to the account of the Departments of the Central Government. The plaintiffs, Hindustan Lever Limited deposited some money in the treasury to the credit of the Central Excise. But the money was embezzled by the treasury officials. The plaintiff demanded the money with future interest as damages till payment. The High Court of Allahabad held that the State was liable to make good the loss caused to the respondent. The Court took the view that, the sub-treasury conducted ordinary banking business which any private individual could run and which was not referable to any activity involving the exercise of any sovereign function.

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29 Union of India v. Ladulal Jain AIR 1963 SC 1681.
30 Article 19(6)(ii) of the Constitution permits State to undertake, own or control directly or through a corporation any trade business and industry or services.
31 Article 19(6) of the Constitution provides reasonable restrictions on trade or business.
32 AIR 1972 All. 486.
ii) Railways

The Department of Railway is discharging non sovereign functions of the State. Running Railway is one of the businesses carried out by Union of India. It is immaterial to see whether the business is run for profit or loss. But the Railway authorities must take reasonable care to avoid injury to members of the general public. Chapter XI of Indian Railways Act provides provisions related to responsibilities of the Railway administration as carrier of goods. Section 93 says that a railway administration shall be responsible for loss, destruction, damage or deterioration, in transit, a non – delivery of any consignment, arising from any cause except the following (i.e.,) act of God, arrest, restrain or seizure under legal process, orders of restriction imposed by the Central Government or State by an officer or authority subordinate to the Central Government or State Government authorized by it in this loyalty act or omission or negligence of the consignor or the consignee or the endorsee or the agent or servant of the consignor or consignee or endorsee, natural deterioration or wastage in bulk or weight due to inherent defect, quality or vice of the goods, latent defects , fire, explosion or any unforeseen risk.

The Supreme Court held in State of Kerala v. G.M.S. Railway, that a suit for damages for non-delivery of goods, sent through the railway owned by the

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34 AIR 1976 SC 2538.
Government of India must be brought against the Union of India and not against the General Manager of the concerned railway.

The railway administration is not a separate legal entity having a juristic personality capable of being sued as such. In *Union of India v. S.S. Works*, the Supreme Court stated that, when consignments are booked at railway risk, the liability of the railway is that of a bailee. The onus of proving that the railway employees took the necessary amount of care and that they were not guilty of negligence rests on the railway authorities. In the instant case, damages were awarded to the respondents.

It is to be presumed that the Railways are run on a profit, though it may be occasionally that they are run at a loss. This was held in *Union of India v. Sri Ladulal Jain*, where a suit for damages by the plaintiff, was allowed against the Union of India and the Northern Frontier Railway related to a claim for recovery of a sum of Rs. 8, 250/- on account of non-delivery of the goods which had been consigned to the plaintiff firm run under the name of Ladu Lal Jain.

In *Ramesh v. Union of India*, the State was held liable for an accident, which took place because of the negligence of the Railway administration. Also in *Pratap Chandra’s case* the suit was allowed in the view that the State was

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35 AIR 1976 SC 1414.
36 AIR 1963 SC 1681.
37 AIR 1965 Pat. 167.
38 Pratap Chandra Biswas v. Union of India, (AIR 1956 Ass. 85), the respondent, railway engineer undertook to facilitate transport of labourers by rail through a prohibited area. But he failed to do so and consequently the plaintiff suffered loss and he, in turn, sued the State for damages.
carrying on business, when it was providing transport of all description in a country as vast as India.

It is the duty of the railway to engage sufficient employees to watch the railway crossing to avoid unnecessary accidents. Proper danger signal must be displayed. The person engaged at the gate at level crossing must take care. In *M/s. Krishna Goods Carriers (P) Ltd. v. Union of India*,\(^{39}\) the question of tortious liability of the railways was raised. In this case the gate at a level crossing was open. There was no danger signal to warn the public of the danger of any approaching train. A truck driver crossed the railway line and collided against a goods train running at full speed. As a result of the collision, the truck was damaged. The truck owner sued the railway for damages on account of negligence. The Delhi High Court decreed the suit, and held that the law was well settled that where a railway line crosses a high way or public path, reasonable precaution must be taken, to reduce danger to the public to a minimum. The nature of the precautions depending on the nature and circumstances. When the train is approaching, it is the practice of railway authorities to keep the gates at a level crossing closed. Any neglect of this customary precaution, is evidence of negligence which may render the authority liable to any person who is hit or hurt when the gate is open, the public is reasonably entitled to assume that no train is approaching and that the line may be crossed with safety, a *Commissioner for

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\(^{39}\) AIR 1980 Del, 92.
railway v. Mc Dermitt.\textsuperscript{40} The Court said that open gates amount to an invitation that the plaintiff could safely pass and if he was injured, he was entitled to recover. In the instant case, the defendant gave an express invitation, and that it was in consequence of his acting upon it that the plaintiff came to grief. The Court rejected the defense of contributory negligence raised by the railways with the following observation.

“Railway authorities must take reasonable care, to avoid injuring members of the public at a level crossing. If their servants do something which would lead a reasonable man to believe, that it is safe to cross the line and the plaintiff there upon attempts to cross and is run into by a train, there is evidence of negligence against the railway authorities”

In Prag ice and Oil Mills Firm, Aligarh v. Union of India,\textsuperscript{41} the driver of the plaintiff’s tractor, while attempting to cross the railway line at an unmanned level crossing, got his tractor stuck up between the rails and despite efforts of the driver the tractor could not be cleared from the railway track, before the arrival of the train. As a result the tractor was thrown off by the impact of the railway engine, causing damage to the tractor, although the driver of the train stopped it as quickly as he could be in the circumstances. No effort was made by the tractor driver to give some signal to the train. The level crossing was away from any town or village. The road was not a busy one. The railway administration had provided

\textsuperscript{40} (1967) AC 169.
\textsuperscript{41} AIR 1980 All 168.
chains to be hung on each side and had also put sign boards on each side, warning the public of the danger of passing trains.

The owner of the damaged truck, filed a suit for damages against the Union of India. The High Court held that the railway administration was not liable, as the damage caused to the tractor was of the plaintiff’s own making. The Court held that while the land beneath the railway is railway property and the public have a right to cross the railway line at the point where a level crossing is provided, that does not necessarily imply a corresponding obligation on the railway to close all such level crossing by gates or other devices when a train passes that way. The public while crossing the railway line must be on the look out for trains coming from either direction. The fact that the level crossing, carried a warning of the danger of coming trains was sufficient and a member of the public who crosses a railway line does so at his own risk.

Thus, it is clear that in a case of accident at railway level crossing, where the gate is open and there is no train schedule to pass at that time, the driver would have justification on driving the vehicle to the level crossing. If an accident takes place, in such a case, it would be a case of unavoidable accident because of the negligence of the gateman in keeping the gate open and inviting the vehicles to pass. In Union of India v. Hindustan Lever, the accident occurred because the gates were left open at the time of the passing of the train. The Court characterized

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43 AIR 1975 P&H 259.
this as ‘statutory negligence’ on the part of the railway employees and on the principle of vicarious liability, the Union of India was held liable to pay damages to the plaintiff due to the aforesaid negligence.

The problem in safeguarding the level crossing was observed by the Supreme Court in *Union of India v. Lalman* as follows:

“A level crossing is on the one hand a dangerous spot in view of the possible movement of trains, and on the other is an invitation to passerby. This is a public crossing and not merely one by private accommodation. Therefore, it is the legal duty of the railway to assure reasonable safety. The most obvious way of doing it is to provide gates of chain barriers and to post a watchman who should close them shortly, before the train passes. But failure to do so is not by itself an act of negligence provided that the railway had taken other steps sufficient in those circumstances, to caution effectively a passerby of average alertness and prudence”.

The above observation was approved by the Supreme Court while deciding *Union of India v. United India Assurance Co. Ltd.*, and the Court said “applying the common law principles, the railway must be deemed to be negligent in not converting the unmanned level crossing into manned one with gates having regard to the volume of rail and road traffic at the point.

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44 Under S/R issued under Railways Act, as such having the force of law, it is made obligation that the gates at level crossing must be kept closed when the train is due to pass.
45 AIR 1975 SC 1265
46 AIR 1998 SC 640.
The railway is responsible for convenient and safe travelling of the passengers, inside the premises and precinct of the railway station and trains. It has to take reasonable care, to regulate the crowd on the platforms. In this regard section 124-A of the Railway Act, 1989, the railway administration cannot escape from liability having regard to the facts and circumstances of the case. In *Sumati Devi M. Dhanwatey v. Union of India*, the petitioner was travelling in a train and was assaulted by an unruly crowd and forcibly deprived of taking her jewels and other valuables. It was held that since the railway administration did not take any reasonable steps to avoid such accident despite past experience, it was rightly saddled with the liability to pay compensation by the State Commission.

In another case, the appellant’s husband was knocked down by a goods train at a railway station. He was a bonafide passenger having purchased a ticket for his destination; he was passing over the railway track as there was an over bridge provided to reach the platform to catch the train. The goods train was passing the station in a high speed which was in excess of the permissible limit and neither was any warning given by the station staff nor any whistle given by the train driver. In these circumstances, the Court held the railways liable for damages and account of negligence.

It is the duty of the State, to protect the life and dignity of a human being. When it fails to do so, the responsibility shall be fixed on it. In this context, the

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47 AIR 2004 SC 2368.
48 Imam v. India. AIR 1976 All 85.
Union of India or the railway administration is tortiously liable to compensate a foreigner who was raped by an employee of the railways.

In *Chairman Railway Board v. Chandrima Das*, a foreigner, a Bangladeshi lady came to Howrah Railway Station to catch a train for Ajmer. One of the Railway employees booked a room in railway managed Yatri Nivas for her and she was raped by four employees. Again she was removed from Yatri Nivas and put in a rented house where she was raped. After having a long struggle for life, she was rescued by the Howrah police. Chandrima Das, an Advocate of Calcutta High Court filed a writ petition claiming compensation. The High Court awarded Rs.10 Lakh to the victim, holding the Railway vicariously liable for it. While deciding this case on appeal the Supreme Court held that an advocate can approach the Court for the citizens as well as non citizens. These decisions shows that Article 300 applies for citizens and non citizens.

**iii) Postal Service**

In 1866 the Post Office Act, was enacted which was subsequently amended by Act III of 1882 and Act XVI of 1896. Later on number of defects were brought to the notice of the State. It was also found that express provisions of law, as contained in the Act, in respect of various matters were not suited to the then prevailing requirements of Postal work. In order to rectify the defects, the Indian

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49 AIR 2000 SCC 988.

50 Traditionally this type of claim could be made under private law and the individual employee is personally liable. It was contended that the fundamental rights are not guaranteed to foreign and she has no local standi to claim compensation under public law. On appeal the Supreme Court allowed the petition as public interest litigation and held that it is maintainable under public law.
Post Office Bill was introduced in the Legislature and was enacted as an Act in 1898. It came into force on July 1898 as the Indian Post Office Act 1898. The Act extends to the whole of India and it also applies to all citizens of India and outside India.

Under Section 6 of the Indian Post Office Act, 1898 the State shall not incur any liability by reason of the loss, misdelivery or delay of or damage to any postal article in course of transmission by post, except in so far as such liability may in express forms be undertaken by the Central Government as herein after provided, and no officer of the Post Office shall incur any liability by return of any such loss, misdelivery, delay or damage, unless he has caused the same fraudulently or by his willful act or default.

The extent of liability of the Post office was discussed in an important case Union of India v. Mohd. Nazim. In this case, the Supreme Court of India has ruled that post office has been established under the provisions of statute enacted by the Parliament. It is not an agent of the sender of the postal article for reaching it to the addressee. It is not a common carrier. It is really a branch of the public service providing postal services subject to the provisions of the Post Office Act and the rules made there under.

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51 AIR 1980 SC 431.
52 The Post Office Act, 1898.
The Post Office is not discharging sovereign functions of the State. It is evident from the observation given by Lord Mansfield in *Whitefield v. Lord Le Despenser*, the Post Master has no hire, enters into no contract, carries on no merchandize or commerce. But the Post Office is a branch of revenue and a branch of Police, created by the Act of Parliament. As a branch of revenue, there are great receipts; but there is likewise a great surplus of benefit and advantage to the public, arising from the fund. As a branch of Police it puts the whole correspondence of the Kingdom under State, and entrusts the management and direction of it to the Crown, and officers appointed by the crown. There is no analogy therefore between the case of the Post Master and a common carrier.

In *Union of India v. Amarsingh*, the respondent booked certain goods in September 1947 with the N.W. Railway at Oata in Pakistan to New Delhi. The Wagon containing the goods was received at the Indian border station of Khem Karan on November 1, 1947 from where the E.P. Railway took over. The wagon reached New Delhi on February 13, 1948. The respondent going to take delivery of the goods, found a major portion of the goods not traceable. In a suit for compensation for non delivery of goods against the Union of India, it was held on the facts of the case that N.W. Railway had implied authority of appoint the E.P. Railway to act for the consignor during the journey of goods by the E.P. Railway and by force of section 194 of the Indian Contract Act, the E.P. Railway

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54 (1778) 2 COWP 754: 98 ER 1344
became an agent of the consignor. It was also held that, even an agency could not be implied from the facts; a contract of bailment could be inferred between the E.P. Railway and the respondent.

In *Union of India v. Mohd. Nazim*, 56 a suit was filed against the Union of India for a recovery of sum of Rs.1606.50 on the allegation that he had dispatched some parcels by V.P.P. to addressees who had received the parcels and paid the value but that the Union of India had not paid the sum to him. In their Written Statement, the Union of India contended that though the value of the articles had been recovered in Pakistan, the sum had not been made over to it by the Pakistan State as the money order service between the two countries remained suspended from 1949. They further claimed exemption from liability by virtue of section 34 57 of the Indian Post Office Act of 1898, which provides inter-alia that the Central Government shall not incur any liability in respect of the V.P.P. amount unless and until that sum has been received from the addressee. It was further claimed that the claim was time barred under Rule 102.

It was held that, the provisions of the Indian Post Office Act did not apply beyond the territorial limits of India except to citizens of India outside India.

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56 AIR 1980 SC 431.
57 Section 34 of the Indian Post Office Act 1898 reads as; the Central Government may, by notification in the Official Gazette, direct that, subject to the other provisions of this Act and to the payment of fees at such rates as may be fixed by the notification, a sum of money specified in writing at the time of posting by the sender of postal article shall be recoverable on the delivery thereof from the addressee, and that the sum, so recovered, shall be paid to the sender.
Provided (that the Central Government shall not) incur any liability in respect of the sum specified for recovery, unless and until that sum has been received from the addressee.
Explanation - Postal articles sent in accordance with the provisions of this section may be described as “valuable – payable” postal articles.
Postal Communication between different countries is established by postal treaties concluded among them. The exchange of value payable articles between India and Pakistan is governed by an agreement. When two sovereign powers enter into such an agreement, neither of them can be described as an agent of the other. Neither can be said to be employed or acting under the control of the other, as required of the sub-agent under section 191 of the Indian Contract Act. Under such an agreement the Pakistan Administration decided to suspend the V.P.P. Services temporarily and did not make over the money realized from the addressees, it cannot be said that the Union of India had received the money but failed to pay. Therefore the provision under Section 34 of the Post Office Act, is attracted and the Central Government is absolved from liability.

C. Carried out by Private individuals

India as a welfare State is carrying out the services of welfare functions. It provides welfare measures for the betterment of its citizens. These measures are done not to keep its dignity, but to get appreciation from its subjects. Welfare acts are carried out by the servants of the State or departments established by the State. These welfare functions are acts which can be carried out by private individuals. This principle is the recent growth molded by Courts in independent India to strengthen and protect the reasonable claim of individuals against the oppressive acts of the State or its officials and to shrink the shield of immunity.

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58 Section 191 of the Indian Contracts Act, 1872 defines “Sub – agent” as “a person employed by, and acting under the control of, the original agent in the business of the agency”.

i) Maintenance of Hospitals

In Mohamed Shafi Suleman Kazi v. Dr. Vidas Dhondu Kavishwar\textsuperscript{59}, the plaintiff’s wife was admitted in the State Hospital for child birth. Inspite her delivery and sterilization operation, as per the instruction given by the doctor, she died. It was found that her death was attributed to the negligence of the doctor who shuttered the wound without removing the cotton swab inserted during the operation. On the suit filed by the plaintiff against State, it was held that the State was liable for the negligence committed by its employee in the course of employment. The running of hospitals was characterized as a welfare function which could be performed by private individuals as well as by the State. The Madras High Court in Etti v. Secretary of State,\textsuperscript{60} differed from the above view. There the plaintiffs took the infant son and admitted to the State Hospital for women and Children, Egmore Madras, for treatment. When the plaintiffs went back to the hospital they were informed by the nurse that the child had been taken away by someone else. On the report of plaintiffs, the police were unable to find the child. On these facts, it was alleged that the loss of the child was due to the negligence of the hospital authorities: it was held by Barn. J. that maintaining hospital for the benefit of the public at the expense of the public revenues the State is discharging a sovereign functions and therefore the secretary of State was not liable for the torts of his servants employed in the hospital.

\textsuperscript{59} AIR 1982 Bom. 27.
\textsuperscript{60} AIR 1939 Mad. 663
ii) Acts Carried on by P.W.D.

The Welfare works of an enduring nature like the construction of roads, canals, bridges, public buildings etc., are within the purview of the public works department. The constructions and its expenditure are incurred by State from the public revenue. These are done for the welfare of the people and which could be carried on by private contractors. Thus, P.W.D. cannot be said to discharge traditional sovereign functions.

In *State of Madhya Pradesh v. Ram Pratap*, the plaintiff was injured by the negligent driving of a truck belonging to the State Public Works Department. The State’s claimed immunity on the ground that the functions being discharged by P.W.D. were Sovereign functions. The Madhya Pradesh High Court rejected the State is argument and expounded the view that most of the activities are carried by private contractors. In that sense, it ruled that it cannot be said that the department carries a sovereign function, which cannot be carried on by a private individual without delegation of sovereign power. The State was thus held liable, for damages arising out of the tortious act of the truck driver.

In *Rup Ram v. The Punjab State*, the plaintiff, a motor cyclist was struck, resulting in serious injuries, by a truck belonging to the Public Works Department of the Punjab State and driven by an employee of the Department. The plaintiff brought a suit to recover compensation, on the allegation that the injuries were

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caused by rash and negligent driving of the motor truck by its driver and the State as the master should also be liable for the negligence of its employee. The Punjab High Court held that, there was nothing peculiar about the driving of a P.W.D. truck so as to immune the State from liability.

iii) Construction of Reservoir

The nature of construction of reservoir is purely a function which would be carried out by a private individual. In *Andhra Pradesh v. Padma Rani*, the driver employed by State Government driving a tipper vehicle loaded with jelly stones and was proceeding towards Sri Sailam Dam site it collided negligently with a jeep resulting in the death of engineer of P.W.D., travelling in the jeep. The tribunal rejected the contention of State and found that “the construction of the project is an undertaking (or activity entered into) by the State in pursuit of its welfare ideal and as such is not an activity in which the exercise of sovereign power is involved”. The High Court of Andhra Pradesh, upheld the tribunal’s view and the State was held liable.

In *State of Mysore v. Ramachandra*, where in the State constructed a reservoir for drinking water facilities for the villagers of Nipani. The incomplete channel caused considerable damage both to the land and to the crops of the plaintiffs due to the overflow of water from the reservoir. The State was sued vicariously for the tort of its servants in charge of the work who were negligent in

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63 AIR 1976 A.P. 122.
64 AIR 1972 Bom. 93.
taking proper precautions to guard against the overflow. Wagle, J. of the Bombay High Court dismissed the appeal filed by the State and directed the State to pay damages to the plaintiff characterizing the construction of the reservoir for drinking water supply as a welfare act undertaken by the State for the betterment of the people, and not an act in the sovereign capacity.

iv) Medical relief work

In *Indian Insurance Company Association Pool Bombay v. Radha Bai,*\(^6\) the medical relief work undertaken by the State, through the Primary Health Centre Nainpur, in which the vehicle in question was engaged at the time when the accident happened, is not a sovereign function in the traditional sense. The defence of immunity must therefore fail. While rejecting the appellant’s contention, the Madhya Pradesh High Court, by referring some decisions\(^6\) had observed:-

> “These cases show that traditional sovereign functions are the making of laws, the administration of Justice, the maintenance of order, the repression of crime, carrying on of war, the making of treaties of peace and other consequential functions. Whether this list be exhaustive or not, it is at least clear that the social economic and welfare activities undertaken by a modern State are not included in the traditional sovereign functions.”

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\(^6\)AIR 1976 M.P. 164.

iv) Famine Relief Work

Helping the deserving subjects, is the duty of a Welfare State. Famine Relief as a welfare work could be undertaken by private individuals also. In *Shyam Sunder v. State of Rajasthan*, a State employee, the plaintiff’s husband was travelling by a State truck in connection with famine relief work undertaken by the P.W.D. On the way, when the truck engine caught fire, the occupant jumped out of the truck and his head was struck against a stone lying on the side of the road and died instantaneously. His widow sued the State for damages. Upholding the widow’s claim, the trial Court found that the accident was the result of the driver’s negligence, as the truck was not road worth and was held that the State was vicariously liable for the tort committed by its servant. The High Court dismissed the first appeal. On the second appeal to the Supreme Court, K.K. Mathew, J, rejected the contention of the appellant and pointed out that famine relief work was not a sovereign function of the State as it has been traditionally understood. This was a work, which could be undertaken by private individuals and there was nothing peculiar about it so as to predicate that the State alone can undertake the work. So the Supreme Court refused to accept the broader subject of immunity and upheld the plaintiff’s claim.

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67 AIR 1974 SC 890.
68 The Supreme Court, through Mathew J. critically remarked: we do not pause to consider the question whether the immunity of the State for injuries on its citizens committed in the exercise of what are called sovereign functions has any moral justification today or whether there exists any rational dividing line between the so called ‘Sovereign’ and ‘Proprietary’ or ‘Commercial’ functions for determining State liability.
vi) Fire Service

A Welfare State, as a protector, may undertake many beneficial measures but that cannot make every such work undertaken by the State a sovereign function. In *State of Tamil Nadu v. P.K.Shamsudeen*, the Madras Fire Service Ambulance van owned by the State of Tamil Nadu, driven by the State’s servant carried a person who had been stabbed. While taking him for emergency treatment in the State Hospital he hit against a motor cyclist violently and was seriously injured. The widow of the deceased motor cyclist filed the claim petition. The Madras High Court, rejected the contention of the State and held that the transporting of a patient to the hospital can be carried even by private individuals and when it is not the case of the State the transport of patients can only be done by the State in their vehicles, it cannot be said that the work of transporting a person who had been stabbed, to the hospital is a sovereign function. Having regard to these it cannot be said that the State is immune from liability in respect of the accident caused by the driver of the Fire Service Ambulance van by his rash and negligent driving.

D. Liability based on Nature of the work

Traditionally, acts of military employees done in the discharge of their duties were held to be sovereign functions and no liability was imposed on the State for such acts. That, this criterion is very unsatisfactory and unjust has often

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pointed out on a number of occasions. The modern reform of the law on the subject is to impose liability on State based on nature of the work rather than purpose of the work. The Courts have been adopting a liberal approach in this matter. More and more functions are now being brought within the field of “non-sovereign” functions and expanding the sphere of State liability.

In *Satyawati v. Union of India*,\(^70\) one Shiam Narain Singh was killed in an accident by the rash and negligent act of a driver, who was driving a military vehicle, which was used for carrying hockey and basket ball teams to an Indian Air Force Station. On the claim petition against the Union of India by the appellant Satyawati, the Delhi High Court speaking through S.K. Kapur, J. held that, it is the nature of the activity that has to be seen in such cases, truly be called the exercise of sovereign power. So, carrying hockey and basket ball teams to play a match can by no process of extension be termed as exercise of sovereign powers. Therefore, the Union of India was held liable for the damage suffered by the plaintiff.

The Bombay High Court upheld the above case and held in *Union of India v. Sugrabai*,\(^71\) that no sovereign function was discharged by the State when records, sound ranging machine and other equipments were transported from the workshop to the School of Artillery through a military truck. In *Union of India v.*

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\(^{70}\) AIR 1967 Del. 98.

\(^{71}\) AIR 1969 Bom. 13. The judgment was delivered by Tarkunde, J.
Smt. Jasso, coal was carried by a military truck from a place to the army unit head quarters building at Simla, driven by an army driver. On the way, the vehicle met with an accident resulting in the death of one Rakha Ram. His dependants claimed damages against Union of India. The Full Bench of the Punjab High Court took the view that the transport of coal from some depot or store to the Head quarters building of the army at Shimla could be undertaken even by a contractor or by a private individual and that the mere fact that the State had chosen to undertake the transport by its army truck and the driver of the military vehicle cannot make any difference to the liability of the State for damages for the tortious acts of the driver.

In *Roop Lal v. Union of India*, the military Jawans in the employment of the Union of India lifted the drift wood belonging to a third party and carried it through military vehicles for the purpose of campfire and the fuel was used by them for their requirements. The High Court of Jammu and Kashmir, found that the carrying of the driftwood by the Jawans is not an act done in the course of their performance of military duties or for the purpose of any sovereign function and therefore, no immunity can be claimed in respect of such a tortious act.

In *Union of India v. Savita Sharma*, a military truck was proceeding to the railway station for picking up the Jawans. At that stage, the vehicle met with an accident resulting in the occupant of the tempo being injured. The Jammu and

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72 AIR 1962 Punj. 315.
73 AIR 1972 J&K 22.
74 AIR 1979 J&K 6.
Kashmir High Court held that the Jawans could have been transported even in a private bus or in a truck or in any other vehicle and that even if the driver is taken to have performed a statutory duty in transporting the Jawans from the railway station to the army unit head quarters, that alone cannot entitle the Union of India to claim that the act was performed in exercise of the delegated sovereign powers. Also in *Iqbal Kaur v. Chief of Army Staff*,\(^7\)\(^5\) where an accident occurred due to the negligent driving by a Sepoy of State truck and he was going with truck for imparting training in motor driving to new M.T. Recruits, it was held that, it will not constitute an act in exercise of sovereign power, therefore, the driver and Union of India were held liable for damages.

In *Union of India v. Kumari Neelam*,\(^7\)\(^6\) a military truck was going for bringing vegetables for prisoners of war. It caused injury to a girl aged six years by the negligent act of the driver. The Madhya Pradesh High Court held that, where the work in question can be and is undertaken by private individuals, there is nothing peculiar about it to be called a “sovereign activity”. The Union of India could not, therefore, be absolved from liability. Also, in *Nandram Heeralal v. Union of India*,\(^7\)\(^7\) the act of driving a military vehicle in bringing back the officers from the place of exercise to the College of Combat was held to be a non-sovereign function and the liability of the State was affirmed.

\(^{75}\) AIR 1978 All. 417.
\(^{76}\) AIR 1980 MP 60.
\(^{77}\) AIR 1978 MP 209.
In *Union of India v. Sadashive Vinayak Vaikar*,\(^{78}\) the plaintiff’s son was knocked down while military crane belonging to defense department was being towed away for repairs by army personnel. Vaze. J. applied the same principle evolved in *Vidyawati case*\(^ {79}\) and held, the crane could have been towed away for the purposes of repairs by any other private agency and the function of towing away like the function of driving a jeep back from the repairer’s workshop cannot be said to bear the imprint of any sovereign function. Hence Union of India could not claim sovereign immunity.

Most of the cases in these categories are decided to suit with the changing trends in the present day society. But the Courts in some decisions, found inconvenience in applying the traditional dictum of immunity.\(^ {80}\) This is confusing the present development of law.

### 3.3 The Diminishing Trend of Principle of Dichotomy

Most of the earlier cases were decided by applying the ratio laid down in Peninsular case, “sovereign functions and non sovereign functions”. In the modern welfare State, there is no dispute about the proposition that the victim of a wrongful act of a public servant committed in the course of his official duty should be indemnified.\(^ {81}\)

\(^{78}\) AIR 1985 Bom. 345.

\(^{79}\) AIR 1962 SC 933


It is the legal obligation of the State to indemnify the citizens whose rights are infringed through an unlawful act on its part. In the interest of social security the victim must be compensated by the State irrespective of the nature of fault. While the protection of freedom of action dictates that the wrong doer can be compelled to pay only if his activity was intentionally wrongful or negligent.\textsuperscript{82} \textit{Saheli v. Commissioner of Police}\textsuperscript{83} was an important case in the evaluation of compensation. The State was held liable for the death of a nine year old child by police assault and beating. This writ petition was filed by the Women’s and Civil Rights Organisation known as Saheli, a women’s resources centre on behalf of two women Maya Devi and Kamlesh Kumari, who have been residing in one room tenement each on the ground floor of the house. There was dispute over the ownership of the house. The landlord threatened to vacate the room. The tenant Kamlesh Kumari refused it on the ground that her children were studying in the near by school. Kamlesh Kumari went to consult her lawyer. On coming back she found her children missing and all her belongings were thrown out. She was informed that the Sub-Inspector of Police of Anand Parbat police station had come and had taken away her children. With the help of lawyer, the three children were released from the police station.

Two days later, the landlord accompanied by a Sub-Inspector entered into the residence of Kamlesh Kumari, ill treated and brutally attacked her. Her son

\textsuperscript{82} Joseph Minatur, \textit{The Indian Legal System}, 7 (ILI Publication, New Delhi, 1978).
\textsuperscript{83} AIR 1992 SC 513.
Naresh was thrown away and later he died in the hospital. No medico-legal case was registered. With the assistance of Peoples’ Union for Democratic Rights several writ petitions were filed for directing the respondent State to award exemplary damages for the death of her son. The Supreme Court held in this case that action for damages lies for bodily injury which includes battery, assault false imprisonment, physical injuries and death. The Court confirmed that the death of Naresh was due to beating by the Sub Inspector. The State was made liable for the act of its employee and directed the Delhi Administration to pay compensation. In this case, the Court did not apply the sovereign, non sovereign ratio\(^\text{84}\) and directed the Delhi Administration to pay Rs 75,000/- as compensation and permitted the Delhi Administration to take appropriate steps to recover the same from the employees who were responsible for the death of Naresh.

In modern times, the distinction between ‘sovereign’ and ‘non sovereign’ functions has almost been obliterated. Although the principle which determines the extent of the vicarious liability of the State for the torts committed by its servant is thus well settled, it is by no means easy to apply the principle to particular case. In *Union of India v. Sugrabai*\(^\text{85}\), the Court rejected the argument that every act which is necessary for the discharge of a sovereign function involves an exercise of sovereign power. Many of these acts do not require to be

\(^{84}\) In Joginder Kaur v. State of Punjab 1968 Punj 28, it has been observed “In the matter of liability of the State for the torts committed by its employees, it is now the settled law that the State is liable for tortious acts committed by its employees in the course of their employment”

\(^{85}\) AIR 1969 Bom. 13.
done by the State through its servants. For example, supply of food to army may be transported in trucks belonging to private persons. The Court said that though the transportation of the machine from the workshop to military school was necessary for the training of army personnel it was not necessary to transport it through a military truck driven by defense personnel. The machine could have been carried through a private carrier. The increased activities of the State have made a deep impact on all facets of an individual’s life, and therefore, the liability of the State should accordingly be made co-extensive with its modern role of a welfare State and not be confined to the laissez-faire era.

In *Bhimsingh v. State of Rajastan*, the principle laid down in Rudul Shah was further extended to cover cases of unlawful detention. In a petition under Art. 32 of the Indian Constitution, the Supreme Court awarded Rs.50,000/- by way of compensation for wrongful arrest and detention. In *Nilabati Behera v. State of Orissa* also Supreme Court directed to pay compensation to the mother of the boy who died in police custody. In this case the petitioner’s son, aged 22, was arrested by an assistant sub inspector of police in connection with investigation of the offence of theft in a village in Orissa. He was handcuffed, tied and kept in the police station. On the next day his body was found with multiple injuries by the side of railway track. The mother of the deceased sent a letter alleging custodial

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86 AIR 1986 SC 494.
87 AIR 1993 SC 2979.
88 The Court held that the principle of sovereign immunity does not apply to the public law remedies under Art 32 & Art 226 for the enforcement of Fundamental Rights.
death of her son. She claimed compensation on the ground of violation of article 21. The Court treated the letter as a writ petition Article 32. The State of Orissa and its police officers including the said inspector were impleaded as respondents. Two questions were raised for discussion before the Court. The Court decided both questions in favour of the petitioner. The Court, relying on earlier decisions, awarded one lakh and fifty thousand rupees by way of exemplary damages. The Court observed that any claim in public law for compensation for contravention of human rights and fundamental freedoms, the protection of which is guaranteed in the constitution, is an acknowledged remedy for enforcement and protection of such rights. It further said that such claim is based on strict liability and enforced through constitutional remedy for enforcement of fundamental rights. This remedy is distinct from and in addition to the remedy in private law for damages for the tort. The defense of sovereign immunity being inapplicable, and alien to the concept of guarantee of fundamental right not available as a defense in the constitutional remedy. The Court further said that it is this principle which justifies award of monetary compensation for contravention of fundamental rights guaranteed by the constitution. Thus, the decision conclusively establishes the liability of state in cases of infraction of fundamental right to life and liberty. It would not hesitate in harsh cases to go a step further to create new reliefs for correcting the abuse of public power and preserving the rule of law.
N. Nagendra Rao & Co v. State of Andhra Pradesh,\textsuperscript{89} is another landmark case to show the extent of liability of the State. In this case, the appellant was carrying on business in fertilizer and food grains under license issued by appropriate authorities. His premises were visited by the police Inspector, Vigilance Cell. Later, huge quantity of stocks of fertilizers and food grains were seized. This was a case arising out of seizure of huge stocks of fertilizers, food grains and other non-essential goods under the Essential Commodities Act, 1955. In the absence of any material to prove that the appellant was guilty of any serious infringement of the control orders made under the Essential Commodities Act, the Collector justified the confiscation of a nominal part of the stock, and directed to release remaining in favour of the appellant. The seizure was effected on 11-8-1975 and it was on March 1977, without any notice to the appellant, asked him to take delivery of the released stock. It was found out that the authority made no effort to dispose the stock, despite the applicant having made application that the stock would deteriorate, and that it should be diverted for sale to places mentioned by the appellant or be handed over to the appellant for disposal and sale. When the applicant went to take delivery, he found the stock had been spoilt both in quantity and quality. The appellant demanded for value of the stock released by way of compensation, when no response came, he gave notices and filed the suit for recovery of the amount. The State claimed immunity on the grounds of sovereign function of the State. It also contended that the servants of

\textsuperscript{89} AIR 1994 S.C.2663.
the State discharged statutory duty on good faith and absence of any right to claim damages when seizure has been found to be valid for part of the goods. The only right of the owner is to get back the stock irrespective of its conditions etc. The trial Court did not accept the defense and held that the servants acted negligently in not disposing of the stock in time. Accordingly the trial Court decreed the suit in part for the loss suffered by the applicant.

The State filed an appeal before the Andhra Pradesh High Court. The findings recorded by the trial Court on negligence was not interfered with by the High Court, but the decree was set aside as a matter of law relying on the ratio of Kasturilal case90 that denied the claim for damages and negative the vicarious liability of the State for negligence of its servants in the performance of statutory duties.

On appeal before the Supreme Court, the order of the High Court was set aside and held that by virtue of Article 300 if a competent legislature enacts a law for compensation or damage for any act done by it or its officers in discharge of their statutory duty, then a suit against it would be maintainable. The Essential Commodities Act itself provides for return of the goods, if they are not confiscated for any reason. And if the goods cannot be returned for any reason, then the owner is entitled for value of the goods with interest. The Court also held;

\[90\] AIR 1965 SC 1039
‘When due to the negligent act of the officers of State a citizen suffers any damage the State will be liable to pay compensation and the principle of sovereign immunity of State will not absolve him from this liability’. In the context of modern concept of sovereignty, the doctrine of sovereign immunity stands diluted and the distinction between sovereign and non-sovereign functions no longer exists. The Court noted the dissatisfactory condition of the law in this regard and suggested for enacting appropriate legislation to remove the uncertainty in this area. The Supreme Court held that, the State was liable vicariously for the negligence committed by its officers in discharge of public duty conferred on them under a statute. As regards the immunity of State on the ground of sovereign function; the Court held that the traditional concept of sovereignty has undergone a considerable change in the modern times and the line of distinction between sovereign and non-sovereign powers no longer survives’.

The Court also observed that no civilized system can permit an executive action to be exempted from liability as it is sovereign. The concept of public interest has made structural changes in the society. No legal system can place the State above the law as it is unjust and unfair for a citizen to be deprived of his property illegally by negligent act of officers of the State without remedy. The need of the State to have extraordinary powers cannot be doubted. But it cannot be claimed that the claim of the common man be thrown out merely because the act was done by its officer even though it was against law. Need of the
State, duty of its officials and right of the citizens are required to be reconciled so that the rule of law in a welfare State is not shaken. In a welfare State, functions of the State are not only defense of the country or administration of justice or maintaining law and order but it extends to regulating and controlling the activities of the people in almost every sphere, educational, commercial, social, economic, political and even marital. The demarcation between sovereign and non-sovereign powers for which no rational basis survives has largely disappeared. Therefore, barring functions such as administration of justice, maintenance of law and order and repression of crime etc., which are among the primary and inalienable functions of a Constitutional State, the State cannot claim any immunity.

The Court observed that the Sovereignty now vests in the people. The legislature, executive and the judiciary have been created and constituted to serve the people.

In Peoples Union for Democratic Rights v. Police Commissioner, Delhi Police Headquarters, one workman was taken to the police station for doing some work. When he demanded wages he was severely beaten and ultimately he succumbed to the injuries. It was held that the State was liable to pay compensation, to the family of the deceased labourer.

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91 AIR 1990 SC 513 at 516.
In yet another case, *Common Cause, a Registered Society v. Union of India,*\(^2\) the Supreme Court, again examined the whole doctrine and rejected the sovereign immunity rule. The Court held that the rule of State liability as laid down in *Peninsular case* is very outmoded. It said that in modern times when the State activities have been considerably increased it is very difficult to draw a line between its sovereign and non-sovereign functions. The increased activities of the State have made a deep impression on all facets of citizen’s life, and therefore, the liability of the State must be made co-extensive with the modern concept of welfare State. The State must be liable for all tortious acts of its employees, whether done in exercise of sovereign or non-sovereign powers. In the process of judicial interpretation *Kasturilal’s case* has showed insignificance and now no longer has a binding value.

The decisions of the Supreme Court in the cases of personal liberty clearly show that the doctrine of State immunity is not available. In *Bhim Singh v. State of Jammu and Kashmir,*\(^3\) the Supreme Court awarded a sum of Rs. 50,000/- to the petitioner as compensation for violation of his fundamental right of personal liberty under Art. 21 of the Indian Constitution. The petitioner who was an MLA was illegally arrested and detained in police custody and deliberately prevented from attending the session of the Legislative Assembly.

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\(^2\) (1996) 6SCC 593

\(^3\) AIR 1986, SC 496.
In *Satyawati v. Union of India*,\(^94\) an Air Force vehicle was carrying hockey team to Indian Air Force Station to play a match against a team of Indian Air Force. After the match was over, the driver went to park the vehicle where he caused a fatal accident by his negligence. It was argued that, it was one of the functions of the Union of India to keep the army in proper shape and tune and that the hockey team was carried by the vehicle for the physical exercise of the Air Force personnel and therefore the State was not liable. The Court rejected this argument and held that carrying the hockey team to play a match could by no process of extension be termed as exercise of sovereign power and the Union of India was therefore liable for damages caused to the plaintiff.

In *State of A.P. v. Challa Ramakrishna Reddy*,\(^95\) known as prisoners murder case, the Supreme Court held that in the process of judicial advancement of *Kasturilal’s case* has played into insignificance and no longer of any binding value. In this case a prisoner, who had informed the jail authorities that he apprehended danger to his life but no action, was taken on this information and no measures were taken for his safety and he was killed in the prison.

It was also found that a police officer was a party to the conspiracy to kill the prisoner which was hatched in the prison. The Court held that, in case of violation of fundamental right the defense of sovereign immunity which is an old and archaic defense cannot be accepted and the State and the police are liable to compensate the victim.

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\(^{94}\) AIR 1967 Delhi 98.

\(^{95}\) AIR SC 2083.
Conclusion

The rule of liability of the State for torts of its servants as laid down in the *Peninsular and Oriental Steam Navigation case*[^96] is very outmoded. In the modern age, when the activities of the State have widely increased, it is very difficult to draw a distinction between sovereign and non-sovereign functions of the State. The increased activities of the State have made a deep impact on all facets of an individual life and therefore, the liability of the State should accordingly be made co-extensive with its modern role, a welfare State and not be confined to the era of individualism. The judgment in *Nagendra Rao case*[^97] is very significant one in the field of law on tortious liability of State in a Welfare State. This judgment shows that there is no need of the distinction between sovereign and non-sovereign functions while fixing liability of the State. To find out the liability of State in tortious acts of its servant’s one of the test is whether the State is answerable for such actions in Courts of law. State may be exempted from liability only for the functions which are indicative of external sovereignty and are political in nature, such as defense, foreign affairs etc. It is clear that the State is subjected to law, like individuals are subjected to. Immunity of the State ends with political acts. In order to expand the ambit of liability, the demarcating line between ‘sovereign’ and ‘non-sovereign’ powers has largely disappeared. In *Nagendra Rao case*, the Court demarcated the functions of the State in to primary and inalienable

[^96]: (1861) Bombay. HCR App 1.
functions. The need of certain and precise principles of law of universal application in nature is lacking in India. The National Commission to review the working of the Constitution is strongly of the view that there is one area of law where the need for a clear settlement of law in a statutory form, is urgent and undeniable. Jurists may hold different views as to the relative merits of codified and un-codified law. But this is definitely an area where a statutory formulation is urgently needed.

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98 A Consultation paper on “Liability of the State in tort”, Vigyan Bhavan Annexe, New Delhi.