NATIONAL COMMISSION TO REVIEW THE WORKING OF THE CONSTITUTION

A

Consultation Paper*

on

LIABILITY OF THE STATE IN TORT

* Theviews expressed and the suggestions contained in this paper are intendedfor the sole purpose of generating public debate and eliciting publicresponse.

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AdvisoryPanel

on

Strengthening of the institutions of Parliamentary Democracy;

(Working of the Legislature, Executive and Judiciary; their accountability; problems of Administrative, Social and Economic Cost of Political Instability; Exploring the possibilities of stability within the discipline of Parliamentary Democracy)

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CHAPTER 1

"Law is the great civilizing machinery. It liberates the desire to build and subdues the desire to destroy. And if war can tear us apart, Law can unite us – out of fear, or love or reason, or all three. Law is the greatest human invention. All the rest, give man mastery over his world. Law gives him mastery over himself". Lyndon B. Johnson, TIME September 24, 1965 page 48.

INTRODUCTION

1.1 Justice: the end and the means

Justice has been regarded as one of the greatest concerns of mankind on this planet. Edmund Burke said, that justice is itself the "great standing policy of civil society". Scholars of political science and legal theory tell us, that the administration of justice is one of the primary objects for which society was formed. Our Constitution, in its very preamble, speaks of justice as one of the great values which its makers have cherished.

It is for these reasons, that this Commission, entrusted with the task of reviewing the working of the Constitution, has taken up, on a priority basis, a study of the law relating to liability of the State in tort. Aristotle said that the law is a pledge, that the citizens of a State will do justice to one another. Our Constitution goes much beyond that. It takes a pledge, that justice shall inform all institutions of the national life.

1.2 Unsatisfactory state of the law

It follows, that the law that contains the principles that will govern the liability of the State, for torts committed by its agencies, should be just in its substance, reasonably certain in its form and fairly predictable in its working. This Commission, as a result of its studies, found that the law on the subject-matter of this Report fails to satisfy these criteria. It traces its source to an archaic provision, which is almost two centuries old. It is found to be suffering from conflicting views, owing to the loose and imprecise criteria that have come to be adopted. It deserves a close second look in the present century, in the larger interests of society.

1.3 Role of the State tort law

In any modern society, interactions between the State and the citizens are large in their number, frequent in their periodicity and important from the point of view of their effect on the lives and fortunes of citizens. Such interactions often raise legal problems, whose solution requires an application of various provisions and doctrines. A large number of the problems so arising fall within the area of the law of torts. This is because, where relief through a civil court is desired, the tort law figures much more frequently, than any other branch of law. By definition, a tort is a civil wrong, (not being a breach of contract or a breach of trust or other wrong) for which the remedy is unliquidated damages. It thus encompasses all wrongs for which a legal remedy is considered appropriate. It is the vast reservoir from which jurisprudence can still draw its nourishing streams. Given this importance of tort law, and given the vast role that the State performs in modern times, one would reasonably expect that the legal principles relating to an important area of tort law, namely, liability of the State in tort, would be easily ascertainable.

However, at present, this ideal is not at all achieved, in reality, in India. It is for this reason that we have considered it necessary to consider the subject and to suggest certain reforms.

1.4 Scheme of discussion

In India, the provisions on the subject are so shaped, that one has necessarily to go to the past, in order to understand the present. For this reason, it has been considered desirable in this Report, to deal, in the beginning, with certain historical aspects and to examine what was the position before the Constitution. This involves a study of a few important pre-Constitution decisions. How far the situation has changed (if at all) after the Constitution, would be the next logical inquiry. The ultimate object, of course, has been to evolve a solution that can pave the way towards the drafting of a satisfactory statute on the subject.

CHAPTER 2

CONSTITUTIONAL PROVISIONS

2.1 Article 300 of the Constitution Law

The law in India with respect to the liability of the State for the tortious acts of its servants has become entangled with the nature and character of the role of the East India Company prior to 1858. It is therefore necessary to trace the course of development of the law on this subject, as contained in article 300 of the Constitution.

Clause (1) of Article 300 of the Constitution provides first, that 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; secondly, that the Government of India or the Government of a State may sue or be sued in relation to their respective affairs in the like cases as the Dominion of India and the corresponding Provinces or the corresponding Indian States might have sued or be sued, "if this Constitution had not been enacted", and thirdly, that the second mentioned rule shall be subject to any provisions which may be made by an Act of Parliament or of the Legislature of such State, enacted by virtue of powers conferred by the Constitution.

Even though more than 50 years have elapsed since the commencement of the Constitution, no law has so far been made by Parliament as contemplated by article 300, notwithstanding the fact that the legal position emerging from the article has given rise to a good amount of confusion. Even the judgments of the Supreme Court have not been uniform and have not helped to remove the confusion on the subject, as would be evident from what is stated hereinafter.

2.2 Act of 1833

Under the Act of 1833 (3 and 4 William IV ch. 85), enacted by the British Parliament, the governance of India was entrusted to the East India Company. The Act declared that the Company held the territories in trust for His Majesty, his heirs and successors. When the governance of India was taken over by the British Crown in 1858, an Act was passed in that year (Act 21 and 22 Vic. ch.106), entitled the Government of India Act, 1858, Section 65 of that Act declared that the Government's liability in this behalf shall be the same as that of the Company. It would be appropriate to set out the section in full:

> "The Secretary of State in Council shall and may sue and 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 Secretary of State in Council of India, as they could have done against the said Company; and the property and effects hereby vested in Her Majesty for the purposes of to Government of India, or acquired for the said purposes, 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."

2.3 Act of 1915

This very provision, contained in the Act of 1858, was practically continued by section 32 of the Government of India Act, 1915. Sub-sections (1) and (2) of that section read as follows:

> "(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, if the Government of India Act 1858, and this Act had not been passed."

2.4 Act of 1935

Even when the Government of India Act, 1935, was enacted, (replacing the Act of 1915), the same legal position was continued by section 176(1) of the Act, which read as follows:

> "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 an Act of the Federal or a Provincial Legislature enacted by virtue of powers conferred on that 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 sued or been sued if this Act had not been passed."

2.5 Resultant position

Thus, article 300 of the Constitution practically takes us back to the Act of 1858, which, in its turn, leads us to a consideration of the nature and extent of the liability of the East India Company.

CHAPTER 3

PRE-CONSTITUTION JUDICIAL DECISIONS

3.1 Scope of the Chapter

Several important judicial decisions dealing with the liability of the State in tort were pronounced in India in the period before the Constitution; and we propose to refer to a few of them, confining ourselves to the most important of those decisions.

3.2 The Calcutta view: P & O Case

A consideration of the pre-Constitution cases (as to Government's liability in tort) begins with the a judgment of the Supreme Court of Calcutta in the case. *P. & O. Steam Navigation Co. Vs. Secretary of State.* The case was actually reported as an Appendix to one of the Bombay High Court Reports – 5 B. H. C. R. App. P. 1. A servant of the plaintiff-company was proceeding on a highway in Calcutta, driving a carriage which was drawn by a pair of horses belonging to the plaintiff. He met with an accident, caused by negligence of the servants of the Government. For the loss cased by the accident, the plaintiff claimed damages against the Secretary of State for India. Sir Barnes Peacock C. J. (of the Supreme Court) observed that the doctrine that the "King can done wrong", had not application to the East India Company. The company would have been liable in such cases and the Secretary of State was thereafter also liable (He was interpreting section 65, Government of India Act, 1858, which equated the liability of the Secretary of State for India with that of the East India Company). On this holding, it was not necessary for Peacock C.J. to discuss the distinction between sovereign and non-sovereign functions. But he made a distinction between the two and observed, that if a tort were committed by a public servant in the discharge of sovereign functions, no action would lie against the Government – e.g. if the tort was committed while carrying on hostilities or seizing enemy property as prize.

The doctrine of immunity for acts done in the exercise of "sovereign functions", enunciated in the *P & O case*, was applied by the Calcutta High Court in *Nobin Chander Dey Vs. Secretary of State*, (1873) ILR 1 Cal. 1. In that case, the plaintiff contended that the Government had made a contract with him for the issue of a licence for the sale of ganja and had committed breach of the contract. The High Court held as under:

(i) On the evidence, no breach of contract had been proved.
(ii) Even if there was a contract, the act was done in exercise of sovereign power and, therefore it was not actionable. The High Court expressly followed the P & O ruling (discussed supra).

3.3 The Madras and Allahabad view: Immunity confined to acts of State

In *Secretary of State Vs. Hari Bhanji*, (1882) ILR 5 Mad. 273, the Madras High Court held that State immunity was confined to acts of State. Turner CJ, in coming to this conclusion, pointed out that in the P & O Case (Supreme Court, Calcutta), Peacock CJ did not go beyond acts of State, while giving illustrations of situations where the immunity was available. The position was thus explained (in the Madras case):

> "The act of State, of which the municipal courts of British India are debarred from taking cognisance, are acts done in the exercise of sovereign power, which do not profess to be justified by municipal law ……where an act complained of is professedly done under the sanction of municipal law, and in exercise of powers conferred by that law, the fact that it is done by the sovereign powers and is not an act which could possibly be done by a private individual does not oust the jurisdiction of the civil court".

It should, however, be mentioned that the Madras judgment in Hari Bhanji (supra) also adds, that the Government may not be liable for acts connected with public safety (even though they are not acts of State).

The Madras High Court re-iterated this view in *Ross Vs. Secretary of State*, AIR 1915 Mad. 434.

The Allahabad High Court took a similar view in *Kishanchand Vs. Secretary of State*, (1881), ILR 2 All 829.

However, in Secretary of *State Vs. Cockraft*, AIR 1915 Mad 993; ILR 39 Mad. 35, making or repairing a military road was held to be a sovereign function and the Government was held to be not liable, for the negligence of its servants in the stacking of gravel on a road resulting in a carriage accident injuring the plaintiff. (The more liberal approach of Hari Bhanji was thus slightly modified).

3.4 The Bombay view: Immunity available, only for acts of State

In the Bombay case of 1949 – *Rao Vs. Advani*, AIR 1949 Bom. 277, 51 Bom LR 342, Chagla CJ and Tendolkar J., held that the Madras view (Hari Bhanji case) was correct. The Bombay case was not one of a claim to damages for tort, but related to a petition for certiorari to quash a Government order for the requisitioning of property, as proper notice had not been given. On appeal, the Supreme Court – *State of Bombay Vs. Khushaldas Advani*, AIR 1950 SC 222; (1950) SCR 621, reversed the High Court, holding that natural justice was not required to be observed, before requisitioning any property. B K. Mukherjea J. (as he then was), approved the Madras view and accepted the definition of "act of State given in *Eshugbayi Vs. Government of Nigerla*¸ (1931) AC 662, 671 (Privy Council). Other judges of the Supreme Court did not express any views on this point. Mukherjea J. took care to point out, that in the P & O case, the question at issue was, whether the Secretary of State for India could be sued for a tort committed in the course of a business. Whether he could be sued for cases not connected with business, was not at issue, in the P & O case.

3.5 Other cases

There are several other rulings of the pre-Constitution era on the subject of liability of the State in tort. However, for the purpose of the present Report, it is considered unnecessary to go into them, since they mostly follow one or other of the cases cited in this Chapter.

CHAPTER 4

POST-CONSTITUTION JUDICIAL RULINGS

4.1 Scope of the Chapter

In this Chapter, we propose to examine some of the important rulings during the post-Constitution period on the subject under consideration. The survey is not intended to be exhaustive. But we hope, that the representative decisions illustrating the principal conflicting approaches, will find adequate reflection in this Chapter.

4.2 Vidyawati case – A broad appraoch

So far as the Supreme Court is concerned, *State of Rajasthan Vs. Vidyawati*, AIR 1962 SC 933 is the first post-Constitution judgment on the subject under consideration.

That was a case where the driver of a Government jeep, which was being used by the Collector of Udaipur, knocked down a person walking on the footpath by the side of a public road. The injured person died three days later, in the hospital. The legal representatives of the deceased sued the State of Rajasthan and the driver for compensation / damages for the tortious act committed by the driver. It was found by the court, as a fact, that the driver was rash and negligent in driving the jeep and that the accident was the result of such driving on his part. The suit was decreed by the trial court, and also by the High Court. The appeal against the High Court judgment was dismissed by the Supreme Court.

4.3 Supreme Court view

The position of law, obtaining both prior and subsequent to 1858, the position obtaining under article 300 of the Constitution and the facts and circumstances leading to the formation of the State of Rajasthan, were all reviewed by the Supreme Court in *State of Rajasthan Vs. Vidyawati*, (supra), which held as under:

"The State of Rajasthan has not shown that the Rajasthan Union, its predecessor, was not liable by any rule of positive enactment or by Common Law. It is clear from what has been said above, that the Dominion of India, or any constituent Province of the Dominion, would have been liable in view of the provisions aforesaid of the Government of India Act, 1858. We have not been shown any provision of law, statutory or otherwise, which would exonerate the Rajasthan Union form vicarious liability for the acts of its servants, analogous to the Common Law of England. It was impossible, by reason of the maxim "The King can do no wrong", to sue the Crown for the tortious act of its servant. But it was realised in the United Kingdom, that that rule had become outmoded in the context of modern developments in statecraft, and Parliament intervened by enacting the Crown Proceedings Act, 1947, which came into force on January 1, 1948. Hence the very citadel of the absolute rule of immunity of the sovereign has now been blown up. Section 2 (1) of the Act provides that the "Crown shall be subject to all those liabilities, in tort, to which it would be subject, if it were a private person of full age and capacity, in respect of torts committed by its servants or agents, subject to the other provisions of this Act. As already pointed out, the law applicable to India in respect of torts committed by a servant of the Government was very much in advance of the Common law, before the enactment of the Crown Proceedings Act, 1947, which has revolutionised the law in the United Kingdom, also. It has not been claimed before us, that the common law of the United Kingdom, before it was altered by the said Act with effect from 1948, applied to the Rajasthan Union in 1949, or even earlier. It must, therefore, be held that the State of Rajasthan has failed to discharge the burden of establishing the case raised in Issue No. 9, set out above.

"Viewing the case from the point of view of first principles, there should be no difficulty in holding that the State should be as much liable for tort in respect of tortious acts 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. In India, ever since the time of

the East India Company, the sovereign has been held liable to "be sued in tort or in contract, and the Common law immunity never operated in India. Now that we have, by our Constitution, established a Republican form of Government, and one of the 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 tortious acts of its servant. This Court has deliberately departed from the Common Law rule that a civil servant cannot maintain a suit against the Crown. In the case of *State of Bihar Vs. Abdul Majid*, (1954) SCR 786: (AIR 1954 SC 245), this Court has recognised the right of a Government servant to sue the Government for recovery of arrears of salary. When the rule of immunity in favour of the Crown, based on Common Law in the United Kingdom, has disappeared from the land of its birth, there is no legal warrant for holding that it has any validity in this country, particularly after the Constitution. As the cause in this case arose after the coming into effect of the Constitution, in our opinion, it would be only recognising the old established rule, going back to more than 100 years at least, if we uphold the vicarious liability of the State. Article 300 of the Constitution itself has saved the right of Parliament or the Legislature of a State to enact such law as it may think fit and proper in this behalf. But, so long as the Legislature has not expressed its intention to the contrary, it must be held that the law is what it has been, ever since the days of the East India Company. "

4.4 Kasturi Lal case

However, a different note was struck by the Supreme Court itself in *Kasturi Lal Vs. State of UP*, AIR 1965 SC 1039. In that case, the plaintiff had been arrested by the police officers on a suspicion of possessing stolen property. On a search of his person, a large quantity of gold was found and was seized under the provisions of the Code of Criminal Procedure. Ultimately, he was released, but the gold was not returned, as the Head Constable in charge of the malkhana (wherein the said gold was stored) had absconded with the gold. The plaintiff thereupon brought a suit against the State of UP for the return of the gold (or in the alternative) for damages for the loss caused to him. It was found by the courts below, that the concerned police officers had failed to take the requisite care of the gold seized from the plaintiff, as provided by the UP Police Regulations. The trial court decreed the suit, but the decree was reversed on appeal by the High Court. When the matter was taken to the Supreme Court, the court found, on an appreciation of the relevant evidence, that the police officers were negligent in dealing with the plaintiff's property and also, that they had also not complied with the provisions of the UP Police Regulations in that behalf. In spite of the said holding, the Supreme Court rejected the plaintiff's claim, on the ground that "the act of negligence was committed by the police officers while dealing with the property of Ralia Ram, which they had seized in exercise of their statutory powers. The power to arrest a person, to search him and to seize property found with him, are powers conferred on the specified officers by statute and in the last analysis, they are powers which can be properly categorized as sovereign powers; and so, there is no difficulty in holding that the act which gave rise to the present claim for damages has been committed by the employee of the respondent during the course of its employment; but the employment in question being of the category which can claim the special characteristic of sovereign power, the claim cannot be sustained."

4.5 Suggestion in Kasturi Lal's case

Having thus rejected the claim, the Supreme Court made the following pertinent observations in *Kasturi Lal Vs. State of UP* (AIR 1965 SC 1039, *supra*):

> "Before we part with this appeal, however, we ought to add that it is time that the Legislatures in India seriously consider whether they should not pass legislative enactments to regulate and control their claim from immunity in cases like this, on the same lines as has been done in England by the Crown Proceedings Act, 1947. It will be recalled that this doctrine of immunity is based on the common law principle that the King commits no wrong and that he cannot be guilty of personal

negligence or misconduct, and, as such, cannot be responsible for the negligence or misconduct of his servants. Another "aspect of this doctrine was that it was an attribute of sovereignty that a State cannot be sued in its own courts without its consent. This legal position has been substantially altered by the Crown Proceedings Act, 1947 (10 and 11 Geo. 6 c. 44). As Halsbury points out, "Claims against the Crown which might, before 1st January, 1948, have been enforced, subject to the grant of the royal fiat, by petition of right may be enforced, as of right and without a fiat, by legal proceedings taken against the Crown. That is the effect of S. 1 of the said Act. Section 2 provides for the liability of the Crown in tort in six classes of cases covered by its clauses (1) to (6). Clause (3), for instance, provides that where any functions are conferred or imposed upon an officer of the Crown as such either by any rule of the common law or by statute, and that officer commits a tort while performing or purporting to perform those functions, the liabilities of the Crown in respect of the tort shall be such as they would have been, if those functions had been conferred or imposed solely by virtue of instructions lawfully given by the Crown. Section 11 provides for saving in respect of acts done under prerogative and statutory powers. It is unnecessary to refer to the other provisions of this Act. Our only point in mentioning this Act is to indicate that the doctrine of immunity which has been borrowed in India in dealing with the question of the immunity of the State, in regard to claims made against it for tortious acts committed by its servants, was really based on the common law principle which prevailed in England; and that principle has now been substantially modified by the Crown Proceedings Act. In dealing with the present appeal, we have ourselves been disturbed by the thought that a citizen whose property was seized by process of law, has to be told, when he seeks a remedy in a court of law on the ground that his property has not been returned to him, that he can make no claim against the State. That, we think, is not a very satisfactory position in law. The remedy to cure this position, however, lies in the hands of the Legislature."

4.6 Basis of the judgment in Kasturi Lal

Reverting to the basis of the judgment in Kasturi Lal (supra), we find that the basis was two-fold:-

(a) The act was done in the purported exercise of a statutory power.
(b) The act was done in the exercise of a sovereign function.

4.7 Sham Sunder and other cases

The question of tort liability of the State has arisen in other cases also – including Shyam Sunder's case1[1]. But we do not think it necessary to encumber this Chapter with a discussion thereof. The two judgments of the Supreme Court which have been dealt with above – namely, *Vidyawati* and *Kasturi Lal*, – should suffice, to illustrate the competing approaches.

4.8 Nagendra Rao case

In 1994, an important judgment2[2], directly relating to the subject under consideration, was pronounced by the Supreme Court. We propose to deal with it in the next Chapter, as it raises a number of theoretical and practical issues, which deserve a Chapter unto themselves.

4.9 Seizure under the Customs Act

1[1] *Sham Sunder Vs. State of Rajasthan*, AIR 1974 SC 590: (1974) 3 SCR 849.

2[2] *N. Nagendra Rao Vs. State of A.P.*, AIR 1994 SC 2663.

There are post – *Kasturilal* rulings which have reached a result different from *Kasturilal*. Certain goods were seized under the Sea Customs Act. They were not properly kept and were disposed of, by an order of the Magistrate. On the owner suing the State for value of the goods, it was held that as the seizure was illegal because –

(i) a bailment arose;
(ii) a statutory obligation to return the goods arose; and hence
(iii) a suit was maintainable against the State

State of Gujarat Vs. Memon Mohamed, AIR 1967 SC 1885; (1968) 1 SC J 273.

4.10 Articles seized by police

Articles seized by the police were produced before a Magistrate, who directed the Sub-Inspector to keep them in his safe custody and to get them verified and valued by a goldsmith. The articles were lost, while they were kept in the police guard room. In a proceeding for the restoration of the goods, it was held that when there was no prima facie defence made out, that due care had been taken by officers of the State to protect the property, the court can order the State to pay the value of the property to the owner. *Basava Kom Dyamgonde Patil Vs. State of Mysore*, AIR 1977 SC 1749; (1977) 2 SCJ 289.

CHAPTER 5

SOVEREIGN AND NON-SOVEREIGN FUNCTIONS

5.1 Distinction between sovereign and non sovereign functions – Nagendra Rao case

This distinction between sovereign and non-sovereign functions was considered at some length in *N. Nagendra Rao Vs. State of AP* (AIR 1994 SC 2663); (1994) 6 SCC 205. All the earlier Indian decisions on the subject were referred to. The court enunciated the following legal principles, in its judgment:

> "In the modern sense, the distinction between sovereign or non-sovereign power thus does not exist. It all depends on the nature of the power and manner of its exercise. Legislative supremacy under the Constitution arises out of constitutional provisions. The legislature is free to legislate on topics and subjects carved out for it. Similarly, the executive is free to implement and administer the law. A law made by a legislature may be bad or may be *ultra vires*, but, since it is an exercise of legislative power, a person affected by it may challenge its validity but he cannot approach a court of law for negligence in making the law. Nor can the Government, in exercise of its executive action, be sued for its decision on political or policy matters. It is in (the) public interest that for acts performed by the State, either in its legislative or executive capacity, it should not be answerable in torts. That would be illogical and impracticable. It would be in conflict with even modern notions of sovereignty".

The court in the above case suggested the following tests –

> "One of the tests to determine if the legislative or executive function is sovereign in nature is, whether the State is answerable for such actions in courts of law. For instance, acts such as defence of the country, raising (the) armed forces and

> maintaining it, making peace or war, foreign affairs, power to acquire and retain territory, are functions which are indicative of external sovereignty and are political in nature. Therefore, they are not amenable to jurisdiction of ordinary civil court. No suit under Civil Procedure Code would lie in respect of it. The State is immune from being sued, as the jurisdiction of the courts in such matters is impliedly barred."

The court proceeded further, as under:

> "But there the immunity ends. No civilized system can permit an executive to play with the people of its county and claim that it is entitled to act in any manner, as it is sovereign. The concept of public interest has changed with structural change in the society. No legal or political system today 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 any remedy. From sincerity, efficiency and dignity of (the) State as a juristic person, propounded in nineteenth century as sound sociological basis for State immunity, the circle has gone round and the emphasis now is more on liberty, equality and the rule of law. The modern social thinking of progressive societies and the judicial approach is to do away with archaic State protection and place the State or the Government on a par with any other juristic legal entity. Any watertight compartmentalization of the functions of the State as "sovereign and non-sovereign" or "governmental and non-governmental" is not sound. It is contrary to modern jurisprudential thinking. The need of the State to have extraordinary powers cannot be doubted. But with the conceptual change of statutory power being statutory duty for (the) sake of society and the people, the claim of a common man or ordinary citizen cannot be thrown out, merely because it was done by an officer 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".

The court emphasised the element of Welfare State in these words:

> "In (a) Welfare State, functions of the State are not only defence of the country or administration of justice or maintaining law and order, but it extends to regulating and controlling the activities of people in almost every sphere, educational, commercial, social, economic, political and even marital. The demarcating line 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 Government, the State cannot claim any immunity."

The Court linked together the State and the officers:

> "The determination of vicarious liability of the State being linked with (the) negligence of its officers, if they can be sued personally for which there is no dearth of authority and the law of misfeasance in discharge of public duty having marched ahead, there is no rationale for the proposition that even if the officer is liable, the State cannot be sued."

The court also distinguished the judgment in Kasturi Lal3[3], in these words:

> "Ratio of Kasturi Lal is available to those rare and limited cases where the statutory authority acts as a delegate of such functions for which it cannot be sued in court of law. In Kasturi Lal case, the property for damages of which the suit was filed was seized by the police officers while exercising the power of arrest under section 54(1) (iv) of the Criminal Procedure Code. The power to search and apprehend a suspect under Criminal Procedure Code is one of the inalienable powers of State. It was probably for this reason that the principle of sovereign immunity in the conservative sense was extended by the Court. But the same principle would not be available in large number of other activities carried on by the State by enacting a law in its legislative competence."

In this context, the court (in *Nagendra Rao*) offered the following distinction. "A law may be made to carry out the primary or inalienable functions of the State. Criminal Procedure Code is one such law. A search or seizure effected under such law could be taken to be an exercise of power which may be in domain of inalienable function. Whether the authority to whom this power is delegated is liable for negligence in discharge of duties while performing such functions, is a different matter. But, when similar powers are conferred under the other statute as incidental or ancillary power to carry out the purpose and objective of the Act, then, it being an exercise of such State "function which is not primary or inalienable, an officer acting negligently is liable personally and the State vicariously. Maintenance of law and order or repression of crime may be inalienable functions, for (the) proper exercise of which, the State may enact a law and may delegate its functions, the violation of which may not be sueable in torts, unless it trenches into and encroaches on the fundamental rights of life and liberty guaranteed by the Constitution. But that principle would not be attracted where similar powers are conferred on officers who exercise statutory powers which are otherwise than sovereign powers as understood in the modern sense. The Act (Essential Commodities Act) deals with persons indulging in hoarding and black marketing. Any power for regulating and controlling the essential commodities and the delegation of power to authorized officers to inspect, search and seize the property for carrying out the object of the statute cannot be a power, for (the) negligent exercise of which the State can claim immunity. No constitutional system can, either on State necessity or public policy, condone negligent functioning of the State or its officers."

5.2 Analysis of judgment in Nagendra Rao Case

We would like to point outs, with respect, that from a reading of the judgment in *Nagendra Rao4[4],* one can discern the following strands:

(a) Non-existence of the distinction.

"In the modern sense, the distinction between sovereign or non-sovereign functions does not exist".

(b) *Non-liability for political acts*

3[3] *Kasturi Lal Vs. State of U.P.,* AIR 1995 SC 1039.

4[4] Para 5.1, supra.

One of the tests is, whether the State is answerable for such actions in courts of law. Examples of non-liability are-functions which are indicative of external sovereignty and are political in nature, (such as) defence, foreign affairs, etc.

(c) *Immunity ends with political acts*

Immunity ends with political acts, described above. "No legal or political 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 (the) negligent act of officers of the State without any remedy".

Statutory power is to be viewed as a statutory duty.

(d) *The demarcating line – primary and inalienable functions*

The demarcating line between "sovereign" and "non-sovereign" powers, has largerly 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 Government, the State cannot claim any immunity."
[See also (f), infra].

(e) *Misfeasance doctrine*

Vicarious liability of the State is linked with the negligence of its officers. "The law of misfeasance in discharge of public duty having marched ahead, there is no rationale for the proposition that even if the officer is liable, the State cannot be sued."

(f) *Kasturi Lal's case – inalienable functions*

Kasturi Lal case was related to powers of arrest, search etc. "The power to search and apprehend a suspect under the Criminal Procedure Code is one of the inalienable powers of the State."

[As to inalienable functions – see under sub-paragraph (d) above].

5.3 Uncertainty of the law

It would be evident from the Nagendra Rao and other case law on the subject, that definiteness of the precise contours and certainty of principles of universal application are lacking. While holding that the distinction between sovereign powers and non-sovereign powers has become academic in the present day Welfare State, the court in *Nagendra Rao* (with respect) again affirms and accepts the theory of "primary and inalienable functions". One can understand the difficulty faced by the Bench in *Nagendra Rao's* case. It was a Bench of two judges, whereas *Kasturi Lal's* case was decided by a Constitution Bench of five judges. (Of course, Vidyawati was also decided by a Constitution Bench of five judges).

5.4 Obscurity in application

We may add that there is considerable obscurity as to the way in which the distinction between sovereign and non-sovereign functions is applied in practice.

(a) Thus, (for example), it has been held that the following are sovereign functions.

(i) Commandeering goods during war,
Kesoram Vs. Secretary of State, (1928) ILR 54 Cal. 969;

(ii) making or repairing a military road,

Secretary of State Vs. Cockraft, ILR 39 Mad. 351;

(iii) administration of justice,
Mata Prasad Vs. Secretary of State, ILR 5 Luck. 157;

(iv) improper arrest, negligence or trespass by police officers,
Kedar Vs. Secretary of State, ILR 9 Rang. 375;

(v) removal of an agent, by the labour supplying association under an ordinance, ILR 37 Mad. 55;

(vi) negligence of officers of the court of wards, in the administration of estate in their charge,
Secretary of State Vs. Sreegovinda, (1932) 36 Cal. WN 606;

(vii) removal of a child by the authorities of a hospital, maintained out of the revenues of the state,
Etti Vs. Secretary of State, AIR 1939 Mad. 663;

(viii) negligence of the chief Constable, in seizing hay under a statutory power – ILR 28 Bom. 314;

(b) On the other hand, in the following cases the State has been held liable, on the ground that the tortious act was committed in the exercise of non-sovereign functions of the State.

(i) *Kailash Vs. Secretary of State*, (1912) ILR 40 Cal. 452;
(ii) *Wasappa Vs. Secretary of State*, (1915) ILR 40 Bom. 200;
(iii) *Jehangir Vs. Secretary of State*, (1904) 6 Bom. LR 131. (Concept of act of State, discussed).

(iv) *Roop Ram Vs. State of Punjab*, AIR 1961 Punj. 336.

(v) Negligence in the seizure of goods under a statutory, power. *Shivabhajan Durga Prasad Vs. Secretary of State*, ILR 28 Bom 314; 6 Bom LR 65.

(vi) Torts committed by the police, while making a lathi charge on a procession, are not actionable against the State, as the police are performing functions concerning law and order, delegated to them under section 30, Police Act, *State of MP Vs. Chirojilal*, AIR 1981 MP 65.

(vii) State is not liable, where the police assault a member of a mob, for dispersing, it when there was apprehension of attack on the office of the S.D.O., *State of Orissa Vs. Padmalochani*, AIR 1975 Orissa 41. [*Contrast State of Punjab Vs. Lal Chand Sabharval* – case at (b)(v) infra].

However, the State may agree to grant compensation to the victims of such acts, AIR 1987 SC 355.

Moreover, the position may be different, where a person's constitutional right to trade is involved and he seeks relief through writ, *P. Gangadharan Pillai Vs. State of Kerala*, AIR 1996 Ker 71.

(b) On the other hand, in the following cases, the function was held to be non-sovereign.

(i) Accident caused by a driver of the Public Works Department, while carrying materials for building a road bridge, is a non-sovereign function, *Rup Ram Vs. Punjab State*, AIR 1961 Punj 336. [*Contrast Secretary of State Vs. Cockraft*, AIR 1915 Mad 993].

(ii) Doctor in a Government hospital. performing sterilisation operation of a lady patient, left a mop inside her abdomen. She developed peritonitis as a consequence and died. Government was held liable, *A. H. Khodwa Vs. State of Maharashtra*, (1996) ACJ 505 (SC). (It is a non-sovereign function).

(iii) Taking ailing children to a primary health centre is not a sovereign function, *Indian Insurance Co. Association Vs. Radhabai*, AIR 1978 MP 164.

(iv) Famine relief is not a sovereign function, *Shyam Sunder Vs, State of Rajasthan*, AIR 1964 SC 890.

(v) Carrying away detenues, in order to prevent them from indulging in a riot, is not a sovereign function, *State of Punjab Vs. Lal Chand Sabharwal*, AIR 1975 P&H 294; [Contrast *State of Orissa Vs. Padmalochani*, AIR 1975 Orissa 41 – case a (vii) above].

(vi) Maintaining a treasury, where excise duties are to be deposited, is not a sovereign function. Maintaining a treasury is an ordinary banking business *State of UP Vs. Hindustan Lever Ltd.*, AIR 1972 All 456, 442.

(vii) Where vehicles are seized by a Government officer under statutory powers, Government is a bailee and is liable for negligence in looking after them, *State of Gujarat Vs. Memon Mohamed*, AIR 1967 SC 1885; [Compare *Basava Vs. State of Mysore*, AIR 1977 SC 1749].

CHAPTER 6

NEED FOR LEGISLATION

6.1 The present state of the law

From the brief discussion of the present state of the law relating to liability of the State in tort in India, it is apparent that the law is neither just in its substance, nor satisfactory in its form. It denies relief to citizens injured by a wrongful act of the State, on the basis of the exercise of sovereign functions – a concept which itself carries a flavour of autocracy and high-handedness. One would have thought, that if the State exists for the people, this ought not to be the position in law. A political organisation which is set up to protect its citizens and to promote their welfare, should, as a rule, accept legal liability for its wrongful acts, rather them denounce such

liability. Exceptions can be made for exceptional cases – but the exceptions should be confined to genuinely extraordinary situations.

6.2 Article 300, a weak foundation

Keeping aside the injustice, in point of substance, of the existing law, there are several other serious defects in the present position. The foundation of the present law is article 300 of the Constitution. Its language necessarily takes one, through successive steps of (what may be called) tracing back of the genealogy of the law, to a moment of time residing in the 19th Century – that too, to a moment when the country was governed or dominated by alien rulers. The law is, in effect, based upon archaic provisions. In this sense, article 300 has turned out to be a weak foundation, on which to build up an edifice of the law on the subject.

6.3 The test of corresponding state or province

In another respect also, a test resting on article 300 has become unworkable. In so far as the article incorporates the test of the law of "corresponding Province" or "corresponding Indian State", the test has become practically unworkable, for the following reasons.

(a) The political map of India, as drawn in 1950, has been re-drawn again and again in the post – 1950 period. The process began in 1953. It assumed greater importance in 1956, as a result of the enactment of the States Reorganisation Act. It was continued when the (erstwhile) State of Bombay was bifurcated. It is needless to mention subsequent developments, whereby the boundaries of the units of the Indian Union have been re-drawn from time to time. And the process of re-drawing the boundaries has not yet ended. A time will come, when only an assiduous historical researcher will be able to locate the "corresponding Province" or Indian State. The power of the President under article 366(7) of the Constitution (to determine the corresponding State) will itself be difficult to exercise.

(b) The areas comprised within the erstwhile princely States of India present yet another difficulty. These States (as is well known) had varying grades of political development. While some of them had well-established systems of law reporting, the same could not be said of the rest. So far as is known, none of them had a statutory provision on the subject of State liability in tort. Thus, in the absence of availability of satisfactory material, having its source either in statute or in case law, it is difficult to find out what was the legal position in a particular Indian State, on the subject under consideration.

Take, for example, the picturesque city of Udaipur. Before 1950, it formed part of the Rajasthan Union, which had acceded to the Indian Dominion. But this (bigger) Rajasthan, was structured (through the process of "Covenant) out of the Covenanting States of (former) Rajasthan, Jaipur, Jodhpur Bikaner, Matsya, Union etc. The former Rajasthan Union itself had been formed, through a similar process of Covenant, out of the merger of several Rajput States (Mewar, Kotah, Dungarpur etc.). Hence, if a tort is committed today, in Udaipur, by a State Government officer, and the question arises of the liability of the State Government for the same, it would become necessary to examine the constitutional law governing the (erstwhile) State of Mewar (with Udaipur as its capital). Incidentally, for a short while, that State (Mewar) happened to have a written Constitution – happily, a Constitution guaranteeing fundamental rights. But very few persons can, at the present day, manage to have access to a copy of that Constitution or to the rulings of the (erstwhile) High Court of Mewar on that Constitution.

(c) Thus, the law in the areas concerned becomes inaccessible, not only to the common man, but (perhaps) also to an ordinary lawyer, who does not have an army of research scholars under his command.

6.4 Post Constitution decisions.

Besides this, even if one keeps one's researches limited strictly to post-Constitution decisions, the picture is equally confusing. There is a manifest conflict of judicial decisions. In theory, the dividing line between sovereign and non-sovereign functions is the criterion of liability. But there are serious disparities in the stance adopted by various courts in this regard. Courts themselves have expressed their uneasiness about this test and about the difficulties in its practical application5[5] - particularly in Kasturi Lal case and N. Nagendra Rao case.

6.5 Need for certainty and codification

This Commission is strongly of the view, that this is one area of the law where the need for a clear statement of the 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 badly needed, in the light of the considerations set out in the preceding paragraphs. We consider it desirable that the general should be reduced to particular. Abstract doctrines must be converted into concrete propositions; and the law should present itself in legislation that is at least easily accessible and conveniently readable. So far as the subject under consideration is concerned, the legal maxim. *Ubi jus incertum, ibi jus nullum* (where the law is uncertain, there is no law), can be applied, with great force.

CHAPTER 7

CASES INVOLVING FUNDAMENTAL RIGHTS

7.1 The constitutional jurisdiction as to fundamental rights

At this stage, it would be appropriate to refer to a development which is parallel to the evolution of the law applicable to actions in tort. This is the development concerning the violation of fundamental rights. As is a apparent from certain comparatively recent decisions, where monetary redress is sought by a person against the State for the violation of fundamental rights, courts now do not approach the matter purely from the point of view adopted in the traditional tort litigation. Since the Constitution guarantees not only fundamental rights, but also the right to seek a remedy for the violation of such rights, the redress cannot be curtailed or thwarted by fetters applicable to ordinary litigation. That has been the judicial trend.

7.2 Two levels

In this way, as of date, the Indian legal system, (so far as is relevant to wrongs amounting to a breach of fundamental rights, committed by or on behalf of the Government), operates on two parallel levels:

(a) The aggrieved person can sue in the ordinary courts, through an action in tort. In such suits, the ordinary law relating to State liability in tort (discussed in the preceding Chapters) applies.

5[5] See Chapters 4 and 5, supra.

(b) The aggrieved person can file a writ petition. In that case, the constraints operating in ordinary actions – (a) above – do not apply. The distinction between sovereign and non-sovereign functions has no relevance to writ proceedings.

One can put the matter in an analytical form:

(i) The wrong complained of, is not a tort, in the traditional sense. It is a breach of the Constitution. Thus, the substantive law is different. The expression "Constitutional tort" is often employed in legal literature for this purpose. The expression may be convenient; but one should not equate it totally with traditional torts.

(ii) The forum is also different, because writ jurisdiction is confined to the higher judiciary (and, by statutory extension, to the Central Administrative Tribunal).

(iii) The procedure is different. The Code of Civil Procedure, 1908, does not apply, *proprio vigore*, to proceedings for writ [Section 141, Code of Civil Procedure, 1908, as amended in 1976].

Thus, we have a parallel substantive law and parallel procedural rules, in the region of civil wrongs amounting to violations of the Constitution.

We propose to deal in the next paragraph with some of the important judicial decisions, relevant to the above theme.

7.3 Origin and evolution

Subsequent to 1977, several cases of unlawful detention and custodial death reached the Supreme Court by way of writ petitions under article 32 of the Constitution, or in appeal against the decisions of the High Courts under article 226. Wherever the arrest was found unlawful or wherever it was found that the custodial death had occurred on account of ill-treatment by, or gross negligence on the part of, the police officers, compensation was awarded to the injured person (or to his legal representatives).

When a question arose as to the legality of such awards, it was clarified by the Supreme Court in *Nilabati Behera Vs. State of Orissa*, (1993) 2 SCC 746, that it is always open to the Supreme Court (under article 32 of the Constitution) and to the High Court (under article 226 of the Constitution), to award compensation in the exercise of its constitutional power. It was clarified that such an award did not finally specify, or put an end to, the claim for damages and that such an award is only a provisional award, which shall be taken into account by the civil court, while awarding the damages according to law. In this case, however, the distinction between sovereign and non-sovereign functions and liability of the State for the tortious acts of its servants was not gone into.

7.4 Andhra Case, and its approval by the Supreme Court

In the judgment of the High Court of Andhra Pradesh in *Challa Ramkonda Reddy Vs. State of AP*, AIR 1989 AP 235, it was held that the plea of sovereign immunity was not available, where there was a violation of the fundamental rights of the citizens. It was a case where a person arrested by the police was lodged in a cell in the jail. He expressed his apprehension to the authority in charge of the jail, that his enemies were likely to attack and kill him in the jail. This apprehension was not given any consideration by the authorities. During the particular night, there were only two persons guarding the jail, instead of the usual six. The enemies of the

arrested person entered the jail during the night and shot him dead. The legal representatives of the deceased filed a suit for damages. The trial court found that the authorities were negligent in guarding the jail and that the death of the deceased was attributable to such negligence. However, the suit was dismissed on the ground that the arrest and detention of the deceased in jail was in exercise of sovereign functions of the State. During the hearing of the plaintiff's appeal, the State relied upon the decision of the Supreme Court in *Kasturi Lal*. The High Court, however, held, applying the principle of a decision of the Privy Council in *Maharaj Vs. AG for Trinidad and Tobago*, (1978) 2 All ER 670, that where the fundamental rights of the citizens are violated, the plea of sovereign immunity, which is (assumed to be) continued by article 300 of the Constitution, cannot be put forward.

The view taken by the High Court of Andhra Pradesh in *Challa Ramkonda Reddy Vs. State of AP*, AIR 1989 AP 235 (supra), has been approved by the Supreme Court in AIR 2000 SC 2083. [State of A.P. v. Chella Ramakrishna Reddy}.

7.5 Violation of article 19(1)(g)

In a Kerala case, the petitioner's hotel was ransacked in a mob attack, causing damage to the property of the writ petitioner. Police had sufficient warning of the likelihood of an attack by the rioters. The State was held liable for failure to protect the petitioner's hotel, which failure had resulted in infringement of the petitioner's right to carry on business and trade, as contained in article 19(1)(g) of the Constitution. *(P. Gangadharan Pillai Vs. State of Kerala*, AIR 1996 Ker. 71.

Cf. C. Ramkonda Reddy Vs. State of AP, AIR 1989 A.P. 235 - 247 (Negligence in guarding the jail, resulting in the death of a prisoner. The negligence violated article 21 of the Constitution).

CHAPTER 8

EXERCISE OF STATUTORY FUNCTIONS

8.1 Acts done in exercise of statutory functions

According to some rulings, where an act is done in the purported exercise of statutory powers, and the act is alleged to be wrongful, then the aggrieved person has no remedy against the State, as such. The rationale underlying this approach is that the State does not, in such cases, act as an employer. The public servant concerned acts under the statute; and his action is not subject to the control of the State. Hence, the principle of vicarious liability of the master (for the wrongs committed by the servant in the course of his employment) does not apply.

In fact, this was one of the rationales briefly mentioned in the well known case *Kasturi Lal Ratan Ram Jain Vs. State of UP*, AIR 1965 SC 1039, although the judgment is also based on the reasoning, that the function exercised by the public servant in the particular case was a sovereign one, for which the Sate could not be held liable.

8.2 An Allahabad cases

Illustrative of the above approach, is the Allahabad case of *Ram Ghulam Vs. Government of UP*, AIR 1950 All 206. The police had recovered some stolen property and deposited it in the Malkhana. The property was again stolen from the Malkhana. The plaintiff (owner of the property) sued for damages, the suit being against the State of UP. It was held that the

Government was not liable, as its servant was performing his duty in the discharge of obligations imposed on him by law.

Another case is also from Allahabad. *Mohammed Murad Vs. Government of UP*, AIR 1956 All 75. Under an order of the District Judge, certain jewellery belonging to a minor was entrusted to the Nazir, for safe custody. The duty of the Nazir, [as laid down in para 2 of rule 9 of Chapter XII of the General Rules (Civil) of 1926, Volume 1] was to place the jewellery in a box and this box was to be sent every evening to the treasury (or to the Imperial Bank) for safe custody and was to be brought back, every morning, from there. One evening, the Nazir failed to perform his statutory duty of sending the cash box to the treasury. As a result, the jewellery was stolen. On attaining majority, the minor filed a suit against the Uttar Pradesh Government for the return of the ornaments, or (in the alternative) for their value. The Government was held to be not liable. It was observed that "where the servant acts in performance of the duties imposed upon him by law, the master has no right to control him, nor (the right) to give him any instruction. He is obeying the law and not the master and naturally the master should not be held liable for anything which the servant does while carrying out the – aforesaid duties"

The assumption here is that, in such cases the State is not the master, as it cannot control the performance of the function in question, which is imposed by statute.

8.3 Other illustrative cases

Similar approach is to be found in a few other rulings:

(i) *V. M. Vaid Vs. Vijayawadi Muncipality*, AIR 1963 AP 435.
(ii) *S. P. Shubhajan Durga Prasad Vs. Secretary of State of India*, ILR 28 Bom. 213; 6 Bom LR 65.
(iii) *Secretary of State Vs. Ram*, (1932) 37 CW N 957.
(iv) *State of MP Vs. Singhai Kapoorchand*, AIR 1961 MP 316.
(v) *District Board of Bhagaph Vs. Province of Bihar*, AIR 1954 Pat. 529.

8.4 Our approach

We do not share the above approach and do not consider it necessary to provide that the State shall not be liable in such cases.6[6] It must be remembered that the entity sought to be made liable is not the government but the State. So far as the government is concerned, it may well say that the statutory authority is not accountable to or subordinate to it and hence the government cannot be visited with the consequences flowing from a wrong order made by a statutory authority. This the government may be able to say even where it happens to be the appellate/ revisional authority over such statutory authority since the power to rectify the order in appeal/revision does not make such appellate/revisional authority an administrative superior. But so far as the State is concerned, it cannot put forward any such plea inasmuch as the statute is enacted by it (by its Legislature) and the appointment of the authority is also done either by the Statute itself or by such authority as may be authorised by the Statute. The act of the statutory authority in such a case is an act done for and on behalf of the State. Hence the liability of the State. As the High Court of Andhra Pradesh has observed in C. Rama Konda Reddy v. State (1989 A.P. 245 at 251) "the officials of the government act in the name of …….does the Sate become liable for compensation."

But it is necessary to clarify at the same time that State's liability for the acts or omissions of statutory authorities arises only in cases where (a) the statutory authority acts outside his legal

6[6] Para 10.2 *infra*.

authority while purporting to act pursuant to the legal authority conferred upon him and (b) the act or omission, which causes or results in damage to a person, is not within the ambit of the statutory protection, if any, contained in such enactments. This rule is evolved for the obvious reason that an act done under a statute and in accordance with the statute can never amount to a tort as was said by the Supreme Court in Martin Burn Ltd. Vs. Calcutta Corporation (AIR 1966 SC 529 at 535). The Court said "A result flowing from a statutory provision is never an evil".

There is, however, a class of cases which have to be dealt with separately. A quasi-judicial act or order pertains to the judicial function of the State. The fact that such power is not exercised by a Judge/Magistrate but by an administrative authority should make no difference inasmuch as what is material is the nature of the function and not the person who performs that function. We do not wish to disturb the position obtaining under the Judges (Protection) Act, 1985, which not only defines the expression "Judge" to take in 'every person who is empowered by law to give in any legal proceeding a definite judgment….. or who is one of a body of persons which body of persons is empowered by law to give such a judgment……" but also contains an immunity clause. There is also the Judicial Officers Protection Act, 1850.

We must also clarify at this stage that the liability of the State in cases of deprivation of life and liberty in violation of the guarantee in Article 21 by an official of a State, even while purporting to act in exercise of judicial functions/powers, may have to be examined in greater depth.

CHAPTER 9

ANALYSIS OF THE PRESENT POSITION

9.1 Scope of the Chapter

We propose, in this Chapter, to attempt a very brief analysis of the present position on the subject of liability of the State in tort, on the basis of the selective material that has been presented in the preceding Chapters of this Report.

9.2 Basis of the various propositions

In the next paragraph, we propose to present an analytical statement of the present position in the form of certain propositions. The basis of these propositions may be briefly explained.

(a) The distinction between sovereign and non-sovereign functions, in the context of vicarious liability of the State in tort, originated as a result of the reading (by various courts) of the judgment (of the erstwhile Supreme Court at Calcutta) in the P & O case. This distinction came to occupy a central place in this area.

(b) No doubt, in course of time, the scope of the expression "sovereign functions" came to be considerably narrowed down and there was greater readiness, on the part of various courts, to regard many Governmental acts as "non sovereign".

This has considerably reduced the practical importance of this distinction, which, however, still continues to survive, in theory.

(c) The defence of sovereign functions yet subsists. For example, defence of the state, maintenance of law and order and public order, security of the state, judicial functions, etc.

(d) Where the fundamental right of a citizen guaranteed by Article 21 is violated, it is evident, the defence of sovereign immunity shall not be available.

(e) Where, however, the tortuous is committed by an official of the state purporting to act in discharge of statutory functions, the liability for damages arises only in cases where (a) the statutory authority acts outside its legal authority while purporting to act pursuant to the legal authority conferred upon him and (b) the act or omission which causes or results in damages to a person is not within the purview of the statutory protection, if any, contained in such enactment (vide para 8.4).

(f) We must, of course, note that there is no liability of the State, for "acts of State", as properly understood.

(g) Finally, notice has also to be taken of the fact that statutes in India often contain "protection clauses", granting immunity to various actions of the State and its officers, for acts done or "intended to be done" (in good faith) in pursuance of a particular enactment. Of course, such protection clauses must be constitutionally valid.

With these observations, we shall proceed, in the next paragraph, to set out, in the form of propositions, an analysis of the present position on the subject under consideration.

CHAPTER 10

"Existing rules and principles can give us our present location, our bearings, our latitude and longitude. The inn that shelters for the night is not the journey's end. The law, like the traveller, must be ready for the morrow. It must have a principle of growth." (Benjamin Cardozo: The Growth of Law (1924) Pages 19-20).

RECOMMENDATIONS

10.1The case for enactment of legislation

It is now time for us, to make our concrete recommendations on the subject of liability of the State in tort. In an earlier Chapter7[7], we have already stressed the need for the enactment of legislation on the subject. We now proceed to make our suggestions in that regard.

10. 2 Statutory and non-statutory functions

So far as the statutory functions are concerned, it is necessary to point out that if any act is done by a statutory authority in accordance with a statute, or where a statutory function is discharged according to and consistent with the statute, such acts can never amount to or give rise to a tort. Situations may however arise where an authority purporting to act in discharge of his statutory functions, actually acts outside his statutory authority and causes injury resulting in loss or damage. In such cases, the state is liable unless the protective clause provides an immunity. If the immunity is available to the official, the state cannot also be made liable in damages.

10.3 As stated in the preceding Chapter, violation of the fundamental right guaranteed by article 21 stands on a different footing.

10.4The law Commission Report and connected Bill

At this stage, we would like to mention that the Law Commission of India, in its very First Report (Liability of the State in tort), forwarded to Government in April 1956, took the trouble of presenting certain general outlines of the proposals for legislation (though not an actual draft Bill). A Bill which was intended to implement that Report was introduced in the Lok Sabha in 1967, and was even referred to a Joint Committee. However, with the dissolution of the Lok Sabha in 1971, the Bill lapsed. It does not seem to have been revived thereafter.

10. 5 The concrete recommendaton

We do not intend to propose any draft legislation as such, in this Report. But we think that the draftsman may like to consider the general principles as given in the First Report of the Law Commission in para 66 of that Report8[8], subject to what we state in the next few paragraphs.

10.6Exceptions to liability, as suggested by Law Commision

With reference to the proposals made in the Law Commission Report (to which we have made a reference above9[9]), we would like to record our views as to some of the "Exceptions" proposed in that Report10[10]. Those exceptions (as proposed in that Report) are placed under the following heads:

(i) Acts of State;
(ii) Judicial functions and execution of judicial functions;

7[7] Chapter 6, supra.

8[8] See Appendix to this Report

9[9] Para 10. 5 supra.

10[10] Law Commission of India, First Report, pages 40-42, para V.

(iii) Acts done in the exercise of political functions of the State (Ten examples are given);

(iv) Acts done in relation to Defence Forces (Three types of acts are enumerated. It is not clear, if the enumeration is intended to be illustrative or exhaustive);

(v) Miscellaneous.

Four types of acts are enumerated under the head of "Miscellaneous", as under:

(a) any claim arising out of defamation, malicious prosecution and malicious arrest;

(b) any claim arising out of the operation of quarantine law;

(c) existing immunity under the Indian Telegraph Act, 1885 and Indian Post Office Act, 1898;

(d) foreign torts (the English provision may be adopted).

10. 7 Comments as to Acts of State

We would like to offer a few comments on the exceptions to liability, proposed by the Law Commission in its First Report11[11]. The first such exception relates to acts of State and is expressed in that Report in these words:

"(i) Acts of State"

The defence of "Act of State should be made available to the State for "any act neglect or default of its servant or agents". "Act of state means an act of the sovereign power, directed against another sovereign power or the subjects of another sovereign power, not owing temporary allegiance, in pursuance of sovereign rights".

We would like to comment, that the act of State should not have been committed on the Indian soil. The reason is, that for an illegal act committed in India towards a foreigner, there should not be an exemption from liability. It may be mentioned that articles 14, 19 and 300A of the Constitution, use the wide word "person" and not the narrow word "citizen". [The words "not owing temporary allegiance" may not suffice for the purpose].

The above is a point of substance. Some verbal improvements in the Law Commission's formulation can also be thought of. In particular, the word "subjects" should be replaced by the word "citizens".

10. 8 Judicial Acts

The second exception, proposed by the Law Commission in the First Report12[12] reads as under:

"The State shall not be liable for acts done by judicial officers and person executing warrants and orders of judicial officers, in all cases where protection is given to such officers and persons by section 1 of the Judicial Officers Protection Act, 1850".

11[11] Para 10.6, supra.

12[12] Para 10.6, supra.

We agree with this, in substance. But we may mention that the Act of 1850 has been replaced by another Act on the subject of protection of judicial officers. [The judges (Protection) Act, 1985]

This exception is equally applicable in case of quasi-judicial acts as well, as indicated hereinbefore.

10. 9 Political functions

The third exception proposed by the Law Commission in its Report13[13] relates to certain acts done in the exercise of certain political functions of the State. The examples given in the Report mainly comprise the following:

(a) certain acts relatable to the conduct of foreign affairs;
(b) war and peace;
(c) certain acts in the nature of the exercise of specified constitutional functions, performed by the President etc.

[The grouping is ours].

As regards category (a) above, we are of the view that in principle, it is wrong to create an exception for an act, merely because it relates to foreign affairs. For example, if a passport is wrongly refused to an Indian citizen, there is no reason why he should be denied legal redress, on the ground that the act relates to foreign affairs. If an Indian citizen, with valid travel documents, is not allowed to go out of India for a legitimate purpose, he must have legal redress (assuming that there is no court order imposing a restriction).

As to category (b) above – "war and peace" – it is a very wide topic. If, for example, a Defence of India Act is passed and Rules thereunder are notified, and action is taken which is not, in strictness, justified by the Act or the rules, there is no reason why the aggrieved citizen should not have a remedy in tort. It may be mentioned, that even during the British rule, when the Defence of India Act, 1939 and Rules made thereunder were in operation, citizens aggrieved by Government action which was alleged to have gone beyond the rules, or taken under invalid rules, were allowed to seek appropriate legal redress. Law Reports of the years 1940 – 1947 provide ample testimony of this.

As to category (c) above, which relates to certain constitutional orders and proclamations, we do not think that an exception is really needed. In the vast majority of cases, such orders will not cross the limits of the law, as they are very carefully scrutinised. But if they unfortunately cross legal limits, redress in tort should not be barred.

10. 10 Acts done in relation to the Defence forces

The next exception suggested by the Law Commission in the First Report is concerned with "Acts done in relation to the Defence Forces14[14]". The enumeration given under this item (in the Law Commission Report) can be adopted, in substance. But a general and wide exception, worded as "Acts done in relation to the Defence forces", would, we think, be too wide". The exception should be confined to the three activities specifically mentioned by the Law Commission.

13[13] Para 10. 6 supra.

14[14] Para 10. 6, supra.

10. 11 Miscellaneous Exceptions

Finally, under the head of "Miscellaneous"15[15], the Law Commission, in its 1st Report16[16], has proposed exceptions for four categories of situations, namely:

(a) claims arising out of defamation, malicious prosecution and malicious arrest;
(b) any claim arising out of the operation of quarantine;
(c) existing immunity under the Indian Telegraph Act 1885 and Indian Post Office Act, 1898;
(d) foreign torts.

Now, as regards category (a) above, we have not been able to discover any rationale, explaining why an exception should be made for defamation etc. Harm to reputation may often cause more agony, than mere physical assault or mere personal injury caused by an accident. If a Government servant, e.g., a Doordarshan News Announcer, purporting to act in his official capacity, commits the tort of defamation, we see no reason why the State should not be liable.

Regarding category (b) above, again, there is no discernible rationale to justify such an exception.

As regards category (c) above – connected with enactments relating to posts and telegraphs – we think that provisions creating an exception for such specific situations will operate, of their own force. In any case, it would be better not to mention individual Acts.

We now come to category (d), for which an exception has been proposed in the Law Commission Report. This relates to foreign torts. We do not consider it proper to create such an exception. Liability for tort, or immunity from liability, should not depend on the geographical location of the conduct potentially giving rise to such liability. For example, if a Government officer, acting as a delegate to an international conference held in Tokyo, Kathmandu, Singapore or Kuala Lumpur, commits a wrongful act while purporting to discharge official functions, we see no reason why liability of the Government (if it arises on an application of the proposed legislation) should be excluded, merely because the *locus* of the tort is not within India. [We are confining ourselves to the aspect of substantive law and are not discussing here the aspect of jurisdiction of Indian courts]. In sum, we do not consider it desirable to exclude liability for foreign torts.

CHAPTER 11

PROTECTION CLAUSES

11.1Scope of the Chapter

15[15] Para 10. 6 supra.

16[16] Para 10.6 supra.

In this Chapter, we propose to deal with what can be called "protection clauses" – that is to say, statutory provisions which, in substance, provide that a suit etc. shall not lie against the Government for anything which is done or intended to be done under a particular enactment. There are several verbal variations (we shall deal with them, later)17[17]. But the substance is as stated above.

11.2 Relevance of protection clause to the present Report

(a) In order to deal with the relevance of such protection clauses to the subject matter of the present Report, we would, like to quote a sample. This is how section 84 of the Information Technology Act, 2000 (21 of 2000), reads:

> *"84. Protection of action taken in good faith*
> No suit, prosecution or legal proceeding shall lie against the Central Government, the Controller or any person acting on behalf of him, the presiding officer, adjudicating officers and staff o the Cyber Appellate Tribunal, for anything which is in good faith done or intended to be done in pursuance of this Act or any rule or regulation or order made thereunder".

It may be mentioned that under section 28(2) of the Information Technology Act, 2000, the Controller has the same powers as are conferred on Income Tax authorities, under Chapter 13 (sections 131-136) of the Income Tax Act, 1961. Section 132 of the Income Tax Act 1961, confers very wide powers of search and seizure on the officers concerned.

(b) Another model – a simpler one – is supplied by section 37 of the Drugs and Cosmetics Act, 1940, in these terms:

> *"37. Protection of taken in good faith*
> No suit, prosecution or other legal proceeding shall lie against any person for anything which is on good faith done or intended done under this Act".

(c) We shall cite a few other models later18[18]. What we would like to state here is that such protection clauses are directly relevant to the subject matter of the present Report. Under a protection clause, a suit etc. is barred, for anything which is:

"Intended to be done" (under the enactment concerned). Hence action which does not fall strictly within the enactment concerned, but which is (in good faith) regarded by the wrongdoer concerned as taken "under the enactment" in question, would also receive protection (In fact, that is the legislative intention also). Thus, an illegal act, including a tort, would also come to enjoy protection. Such a position is inconsistent with what we have recommended.19[19]

This is the manner in which protection clauses become relevant, for the present purpose.

11.3Various models of protection clauses

17[17] Para 11.2 and 11.3, infra.

18[18] See para 11.3, infra.

19[19] Chapter 10, supra.

Before proceeding to make our own recommendations in this regard, we would like to extract here a few models of protection clauses which one finds, on a random survey of the Indian statute book20[20].

(a) Thus, section 88 of the Chit Funds Act, 1982, provides as under:

> *"88. Protection of action taken under the Act*
> No suit, prosecution or other legal proceeding shall lie against the State Government, the Registrar or other officers of the State Government or the Reserve Bank or any of its officers exercising any powers or discharging any functions under this Act in respect of anything which is in good faith done or intended to be done in pursuance of this Act or the rules made thereunder".

(b) Section 28, Consumer Protection Act, 1986, provides as under:

> *"28. Protection of action taken in good faith*
> No suit, prosecution or other legal proceeding shall lie against the members of the District Forum, or the State Commission or the National Commission or any officer or person acting under the direction of the District Forum, the State Commission or the National Commission or executing any order made by it or in respect of anything which is in good faith done or intended to be done by such member, officer or person under this Act or under any rule or order made thereunder".

(c) Section 22 of the Insurance (*Regulation and Development) Act, 1999 (41 of 1999), provides as under:

> *"22. Protection of action taken in good faith*
> No suit, prosecution or other legal proceedings shall lie against the Central Government or any officer of the Central Government or any member, officer or other employee of the Authority for anything which is in good faith done or intended to be done under this Act or rules or regulations made thereunder".

Provided that nothing in this Act shall exempt any person from any suit or other proceeding which might, apart from this Act, be brought against him".

(d) Section 68 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985), provides as under:

> *"69. Protection of action taken in good faith*
> No suit, prosecution or other legal proceeding shall lie against the Central Government or a State Government or any officer of the Central Government or of the State Government or any person exercing any powers or discharging any functions or performing any duties under this Act, for anything in good faith done or intended to be done under this Act or any rule or order made thereunder"

20[20] See also para 11.2 (a) and (b) supra.

(e) Section 16 of the National Security Act, 1980, (65 of 1980) provides as under:

> *"16. Protection for action taken in good faith*
> No suit or other legal proceeding shall lie against the Central Government or a State Government and no suit, prosecution or other legal proceeding shall lie against any person, for anything in good faith done or intended to be done in pursuance of this Act".

(f) Section 38 of Protection of Human Right Act, 1993 (10 of 1993) provides as under:

> *"38. Protection of action taken in good faith*
> No suit or other legal proceedings shall lie against the Central Government, State Government, Commission21[21], State Commission or any member thereof or any person acting under the direction either of the Central Government, State Government, Commission or the State Commission, in respect of anything which is in good faith done or intended to be done in pursuance of this Act or of any rules or any order made thereunder or in respect of the publication, by or under the authority of the Central Government, State Government, the Commission or the State Commission, of any report, paper or proceedings".

11.4Criticism of protection clauses

Though the models of protection clauses, collected in the preceding paragraph, differ in minor matters of detail, it appears that almost all of them protect (*inter alia*) action "intended to be taken under the enactment in question" (or in some cases, under rules or orders issued thereunder). These clauses have stood the test of time. Any tampering with the principle underlying them may not only unsettle the existing position but would also expose the authorities under the Act to unnecessary litigation and may dampen their initiative.

11.5Law Commission's proposal

We find that a somewhat similar (though milder) approach was recommended by the Law Commission in its First Report22[22]. The Commission recommend as under:

> "Appendix V shows some of the Acts which contain protection clauses. But, under the General Clauses Act, a thing is deemed to be done in good faith, even if it is done negligently. Therefore, by suitable legislation, the protection should be made not to extend to negligent acts, however honestly done and, for this purpose, the relevant clauses in such enactments should be examined."

We have taken due note of this recommendation of the Law Commission. We are of the view that the formulation is quite reasonable and eminently fair. It may be acted upon.

21[21] The single word "Commission", as defined, means the National Human Rights Commission.

22[22] Law Commission of India, 1st Report, page 89, Para II, (IV), Note under "N. B.".

QUESTIONNAIRE

ON

LIABILITY OF THE STATE IN TORT

1. Do you support the suggestion that a tortious act committed by the State/its officials in purported exercise of their administrative powers/functions, be treated on par with a tortious act by a private person/individual?

   Have you any alternative suggestion on this issue?

2. (a) Do you support the suggestion that a tortious act committed by the State/its officials in purported exercise of their statutory powers/functions, be also treated on par with a tortious act by a private person/individual, subject, of course, to protective clauses, if any contained in the concerned enactment?

   Have you any alternative suggestion on this issue?

   (b) Are you in favour of exempting acts done in exercise of judicial and quasi-judicial functions from this rule? If yes, is it because of the inherent nature of the function or because of the Judges (Protection) Act, 1985?

3. Are you in favour of limiting the scope and sweep of the protective clauses, normally found in enactments? If yes, in what manner?

4. (a) Are you in support of providing that the State shall not be liable for any tortious act committed by it/its officials in purported exercise of their sovereign functions and that such a plea should be an exception to the rule stated in Questions 1 and 2?

   (b) In your opinion, is it possible to specify exhaustively which are the sovereign functions of the State?

(c) Can you suggest a principle following which 'sovereign functions' of the State can be distinguished from other functions of the State?

(d) Is it possible for you to specify exhaustively the 'sovereign functions' of the State? If so, please specify them.

5. (a) Are you in favour of the suggestion that where the fundamental rights of a citizen/person are violated by the State, it shall not be open to the State to plead the defence of sovereign functions or to plead the protection of protective clauses?

(b) Do you support the practice of the Supreme Court and the High Courts awarding damages (subject to a final determination of the quantum of damages by a civil court later) for violation of fundamental rights in exercise of their power under Article 32 and Article 226 of the Constitution respectively?

6. Can you suggest any method by which prompt relief can be provided to citizens, without much expense, against the tortious acts committed by the officials of the State in their administrative capacity?

7. Are you in favour of amending Article 300 of the Constitution in such a manner as to specifically lay down in respect of which tortious acts, the State shall be liable or to specify the tortious acts for which it shall not be liable?

8. Have you any other suggestions on any of the issues dealt with in the Consultation Paper? If so, please state them.

23[1] *Sham Sunder Vs. State of Rajasthan*, AIR 1974 SC 590: (1974) 3 SCR 849.

24[2] *N. Nagendra Rao Vs. State of A.P.*, AIR 1994 SC 2663.

25[3] *Kasturi Lal Vs. State of U.P.,* AIR 1995 SC 1039.

26[4] Para 5.1, supra.

27[5] See Chapters 4 and 5, supra.

28[6] Para 10.2 *infra*.

29[7] Chapter 6, supra.

30[8] See Appendix to this Report

31[9] Para 10. 5 supra.

32[10] Law Commission of India, First Report, pages 40-42, para V.

33[11] Para 10.6, supra.

34[12] Para 10.6, supra.

35[13] Para 10. 6 supra.

36[14] Para 10. 6, supra.

37[15] Para 10. 6 supra.

38[16] Para 10.6 supra.

39[17] Para 11.2 and 11.3, infra.

40[18] See para 11.3, infra.

41[19] Chapter 10, supra.

42[20] See also para 11.2 (a) and (b) supra.

43[21] The single word "Commission", as defined, means the National Human Rights Commission.

44[22] Law Commission of India, 1st Report, page 89, Para II, (IV), Note under "N. B.".