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"A Comparative Analysis of Contractual Liability of State Actors in Commonwealth Countries"

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Abstract: In a democratic country, government assumes the role of a 'welfare and service state'. A serious response is evoked by the question of government liability. An intensive form of government needs active participation of State in welfare and service activities and the idea of 'government liability' restricts such participation. Therefore, a feeble balance has to be drawn. With the increase in these governmental powers, there has been a shift from the 'officer's liability' to 'State liability', on whose behalf he acts. This article meanders through various laws that have been enacted to showcase the governmental contracts and liability of the State in India. This article also gives judicial pronouncements to support the same.

Keywords: government, State, liability, India

INTRODUCTION

To execute a policy, the Government may enter into a contract. The government of India has the capacity to enter into a contract. As the governmental power has grown, there has been a shift from the 'officer's liability' to 'State liability' and the main reason for this shift could be the apprehension that the concept of 'officer's liability' may dampen the independence and initiative of the officers[1]. This project gives a comparative analysis of the contractual liability of these state actors and also showcases the recent trend that shows a mix of the above mentioned concepts.

CONSTITUTIONAL PROVISIONS RELATED TO LIABILITY OF THE ADMINISTRATION IN A CONTRACT AND THE DEVELOPMENT OF THE CONCEPT OF LIABILITY IN INDIA

The constitutional code of contractual liability of the government is completed by Articles 294, 298, 299 and 300. Article 294 makes provision for the succession by the present government of the Union and the States to property, assets, rights, liabilities and obligations vested in the former governments. Article 298 tells us that for carrying out the functions of the State, the government can enter into contracts. There are certain essential formalities which a government contract must fulfil. These formalities are contained in Article 299. In case of breach of the contract, the government may institute a suit/proceeding or a suit/proceeding may be initiated with the manner prescribed under Article 300. The constitutional code for public contract is also supplemented by the by the provisions of the Indian Contract Act, 1872 because this constitutional code for public contract is not

[1] Administrative Law by IP Massey, Ninth Edition

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complete. To be valid, a government contract must satisfy not only the requirements of Article 299 but also the requirements mentioned in Section 10 of the Indian Contract Act dealing with the essentials of a valid contract[2]. Sections 73, 74 and 75 of the Indian Contract determine the quantum of damages and are also applicable in case of government contracts[3]. The magnitude or the extent of government liability is in direct succession of the liability of the East India Company in similar situation. Article 300 of the Constitution points out that the extent of the liability of the Union of India and the States will be same as that of Dominion of India and the provinces under the Government of India Act, 1935.

Before 1947, the Crown in England enjoyed immunity from being sued in its own courts. This immunity of the Crown was further fortified by the Doctrine of feudalistic origin signifying that the 'king can do no wrong'. However, during the heyday of Crown immunity, a person could redress against the Crown through a petition of right. In *Bank of Bengal v. United Co.*[4](Bank of Bengal), Sir Charles Grey and Franks J of the Bengal Supreme Court clearly held that the East India Company had no sovereign character to prevent it from being sued for the recovery of interest on three promissory notes on the basis of which the Company borrowed money for the efficient prosecution of war for defending and extending the territories of the Crown in India. Unfortunately, in *Nobin Chunder Dey v. Secy. Of State for India*[5], a doubt was cast on the extent of liability of the East India Company, respecting contract. In this case, a ganja licence was auctioned. Nobin Chunde, the highest bidder, sued for specific performance of the contract. It was held that the suit for specific performance could not succeed because the auction of ganja licence was a method of collecting tax which was a sovereign function. It is gratifying to note that this proposition of immunity of the government from liability arising out of contract entered into in exercise of its sovereign power was not followed by the courts in India. There is no denying the fact that government, because of its special responsibilities and position, cannot be equated with any other individual and, therefore, the Government of India Acts, 1858, 1919 and 1935 made special provisions prescribing the manner in which government contracts are to be made. The formal requirements in these were always considered mandatory and their non-fulfilment rendered the whole contract invalid. Maintaining the same tradition, the Indian Constitution also lays down certain formal requirements for contracts in Article 299 (1). The formal requirements laid down in this Article are as follows:

(1) *The contract must be expressed to be made by the President or the Governor, as the case may be* – In ***Chatturbhuj Vithaldas Jasani v. Moreshwar Parashram***[6], the court held that the constitutional provisions were inserted not merely for the sake of form but to safeguard the safeguard the government against unauthorized contracts. In this case, the

[2] *State of Assam v. Keshab Prasad Singh,* AIR 1953 Sc 509; *Kalyanpur Lime Works Ltd. v. State of Bihar,* AIR 1954 SC 165: 1954 SCR 958; *Govt. of U.P. v. Nanhoo Mal,* AIR 1960 All 420
[3] *Thawardas Pherumal v. Union of India,* AIR 1958 AP 533; *Union of Natabarlal,* AIR 1963 Ori 66
[4] (1831) I Bignall's Reports 87-181
[5] ILR (1875) I Cal II
[6] AIR 1954 SC 236: 1954 SCR 817

question which arose for consideration was whether a person who has entered who has entered into a contract with the government in violation of the form prescribed in Article 299 was the disqualified to be elected to the legislature under Section 7(b) of the Representation of the People Act, 1951. This contract had been entered into by a person authorised in this behalf, but was not expressed in the name of the President. The court held that the contract was void. The Supreme Court maintained the same position in ***Karamshi Jethabhai Somayya v. State of Bombay***[7]. In this case, the appellant entered into a contract with Minister of Public Works Department (PWD) for the irrigation of his landholdings. Subsequently, the contract was repudiated on the ground that it was not expressed in the name of the Governor. A suit was filed for the specific performance of the contract. The court dismissed the appeal holding that the mandatory requirements of Article 299 had not been complied with.

Through the word 'expressed' in Article 299(1) might suggest that the government contract must be in some particular form, the Supreme Court in ***Union of India v. A.L. Rallia Ram***[8] held that no formal document need be executed. In ***State of Madras v. R. Ranganatham Chettiar***[9], the High Court held that in view of a statutory provision requiring formal execution of a deed, the contract as it stood was inchoate, and therefore, unenforceable. In this case, the rule required that a formal contract had to be entered into by the government and the highest bidder at the auction. Though the respondent was the highest bidder and deposited the security amount he did not execute any formal document. Later, when the suit was filed against the government restraining it from holding another auction, which became necessary owing to complaints from the public, the court refused to oblige on the ground that there was no formal contract. A contrary view has been taken by the Patna High Court in ***Chandra Dhan v. State of Bihar***[10].

Article 299 though provides that the government contracts must be expressed in the name of the President or the Governor, as the case may be, yet clause 2 states that they shall not be personally liable in respect of any contract or assurance.

(2) *The contract must be executed on behalf of the President or the Governor, as the case may be.* – Another formality of Article 299(1) is that the competent authority must execute the contract on behalf of the President or the Governor of the State, as the case may be. If such authority by mistake or otherwise does not sign on behalf of the Chief Executive, the contract shall become invalid, as it also belongs to the category of mandatory conditions[11]. However the court has mitigated the harshness of this rule by holding in ***Davecos Garments Factory v. State of Rajasthan***[12] that in the absence of any specific rule, if the competent authority has signed the contract deed in its official

[7] AIR 1964 SC 1714: (1964) 6 SCR 984
[8] AIR 1963 SC 1685: (1964) 3 SCR 164
[9] AIR 1975 Mad 292
[10] AIR 1976 Pat 15
[11] *Chattarbhuj Vithaldas Jasani v. Moreshwar Parashram,* AIR 1954 SC 236: 1954 SCR 817
[12] (1970) 3 SCC 874: AIR 1971 SC 141

capacity, the requirement of the formality of Article 299(1) shall be deemed to have been complied with. In this case, the contract for the supply of police uniforms was signed by the Inspector General of Police who did not write after his signatures 'singed on behalf of the Governor'.

(3) *The contract must be executed by a person authorised by the President or the Governor, as the case may be.*- The condition that government contracts must be signed by 'authorised person' only is certainly very fundamental if State is to be protected from spurious claims made on the strength of unauthorised contracts[13]. Article 299 does not lay down any specific mode of authorisation and, therefore, the normal governmental procedure of notification in the Official Gazette may be considered may be considered as proper authorisation. Lack of proper authority would render the contract invalid[14]. The act of entering into a contract is an executive act, and therefore, if a contract has been entered into not in exercise of executive powers but statutory powers, the requirements of Article 299 (1) of the Constitution shall not apply.

(4) *Ratification.* – The question whether an agreement which does not fulfil the requirements of Article 299(1) can be ratified by the government has been answered in the negative by the Supreme Court in ***Mulamchand v. State of M.P.***[15]. Therefore, the government cannot ratify a contract if it does not comply with the requirements of Article 299(1) as to enable it to enforce as to enable it to enforce it against a private party. However, if the parties to the contract agree to ratification, there seems to be no reason why ratification may not be allowed.

(5) *Enforcement of liability.* – The question that arises that is a government contract is void for its non-compliance with the requirements of Article 299(1) and it cannot be ratified either, can the party claim the benefit of Sections 70, 230 (iii) or 235 of the Contract Act, 1872. Application of Section 70 does not pose much problem. In ***New Marine Coal v. Union of India***[16], the Supreme Court held that government must make compensation for the coal supplied which has been consumed it, even though the contract does not comply with the requirements of Article 299 of the Constitution. Therefore, if a person has done something for government under an invalid contract without doing it gratuitously and the government has obtained any benefit out of it, then the government is bound to make compensation.

(6) *Contractual obligation and the Constitutional power of the government.* – A contract cannot clog the government's constitutional power of eminent domain. In the same manner, the legislature acting within the scope of its legislative competence may vary the terms of a contract. In ***Public Works and Transport Development v. Adoni Ginning***

[13] *State of W.B. v. B.K. Mondal & Sons,* AIR 1962 SC 779: 1962 Supp (1) SCR 876
[14] *Thawardas Pherumal v. Union of India,* AIR 1955 SC 468: (1955) 2 SCR 48
[15] AIR 1968 SC 1218: (1968) 3 SCR 214
[16] AIR 1964 SC 152: (1964) 2 SCR 859

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Factory[17], when the electricity rates were enhanced, contrary to the provision in the contract for the supply of electricity, the court held that the existence of a contract cannot foreclose the authority of the legislature to legislate on subjects within its competence. The courts in England have also held that it is not within the competence of the Crown to make a contract which would have the effect of limiting the executive power in future[18].

(7) *Government contracts and doctrine of waiver.* – 'Waiver' means abandonment of right and it may be either expressed or implied from the conduct, but its basic requirement is that it must be an intentional act with knowledge. Waiver is a question of fact and it must be properly pleaded and proved. No plea of waiver can be allowed to be raised unless it is pleaded and a factual foundation is laid for it. In ***Motilal Padampat Sugar Mills Co. Ltd. v. State of U.P.***[19] , the court did not allow the government to raise the plea of waiver for the first time at the hearing of the writ petition because it had not been taken in its affidavits. In the case, the court also held that in the absence of any substantial evidence to show that the appellant intentionally abandoned the right of a sales tax holiday, mere acceptance of the concessional rate of tax would not amount to waiver of such right.

(8) *Whether a writ can be issued for the enforcement of contractual obligation.* – The jurisdiction of the Supreme Court to issue writs under Article 32 is confined only to enforcement of Fundamental Rights, therefore, the Supreme Court cannot issue writ for the enforcement of a contractual obligation[20]. The power of High Court to issue writs under Article 226 is much wider than that of the Supreme Court. A High Court can issue writ for the enforcement of fundamental rights and also for the enforcement of private rights. Cases involving breach of contractual obligation by the State or its authorities and agencies may be divided into four categories:

i. Where the promissory estoppel applies against the State.

ii. Where breach of a statutory rule or regulation is alleged by the petitioner.

iii. Where public law element is involved which the party seeks to invoke.

iv. Where breach of a contractual obligation is alleged which arises only out of the terms of the contract[21].

In the first three cases, a High Court may exercise its writ jurisdiction. The Supreme Court in ***Gujarat State Financial Corpn. v. Lotus Hotels (P) Ltd.***[22] held that the writ of mandamus

[17] AIR 1959 AP 538
[18] *Rederiaktiebolaget Amphitrite v. R.*, (1921) 3 KB 500
[19] (1979) 2 SCC 409: AIR 1979 SC 621
[20] *Satish Chandra v. Union of India*, AIR 1953 SC 250: 1953 SCR 655
[21] *Joshi Technologies International Inc. v. Union of India*, (2015) 7 SCC 728
[22] (1983) 3 SCC 379: AIR 1983 SC 848

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can be issued against the government or its instrumentalities for the enforcement of contractual obligations because promissory estoppel applies against the government.

In the fourth category of cases, where neither any promissory or estoppel applies against the government nor is there a violation of any statutory rule and the basis of claim is only a term of a contract, the court held that the petitioner cannot invoke the writ jurisdiction under Article 226 for the enforcement of a pure contractual obligation because the proper remedy in such cases is a civil suit. Therefore, in ***Har Shanker v. Excise and Taxation Commr.***[23], when the liquor contractors challenged the demand made by the department through a writ petition under Article 226, the Supreme Court held that the writ jurisdiction of the High Court is not intended to facilitate avoidance of obligations voluntarily incurred. However, the recent trend of cases show that in situations where petitioner alleges arbitrariness, absence of fair play, be invoked. Thus, in ***Mahabir Auto Stores v. Indian Oil Corporation***[24], the Supreme Court observed that even though the rights of the citizens are in nature of contractual rights, the manner, the method and motive of a decision of entering or not entering into a contract are subject to judicial review on the touchstone of relevance and reasonableness, fair play, natural justice, equality and non-discrimination.

In this case, the Indian Oil Corporation had abruptly stopped supply of material, without any notice or hearing, to the petitioner firm which was carrying on business of sale and distribution of lubricants from the last 18 years. In the same manner, normally the contract of personal service cannot be enforced through writ, but when the statutory bodies act in breach of mandatory obligation imposed by a statute, the writ can be issued[25].

LIABILITY OF ADMINISTRATION IN TORT

The term 'administration' is used here synonymously with 'State' or 'Government'. To what extent the administration would be liable for the torts committed by its servants is a complex problem, especially in developing countries with ever widening State activities. The liability of the government in torts is governed by the principles of public law inherited from British common law and the provisions of the Constitution. The whole idea of vicarious liability of the State for torts committed by its servants is based on three principles:

i. *Respondeat superior* (let the principal be liable).

ii. *Quifacit per alium facit per se* (he who acts through another does it himself).

iii. Socialisation of compensation

Article 300 of the Indian Constitution, which deals with the extent of liability of the Union of India and the government of a State, instead of laying down the liability in specific terms,

[23] (1975) 1 SCC 737: AIR 1975 SC 1121
[24] (1990) 3 SCC 752: AIR 1990 SC 1031
[25] *S.R. Tewari v. District Board, Agra,* AIR 1964 SC 1680: (1964) 3 SCR 55

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refers back to Section 176 of the Government of India Act of 1935. This section refers, in turn, to Section 32 of the Government of India Act, 1915 which, in its turn, refers to Section 65 of the Act of 1858. Section 65 of the 1858 laid down that on the assumption of the Government of India by the British Crown, the Secretary of State for India-in-Council would be liable for the same extent as the East India Company was previously liable. Therefore, in order to determine the extent of liability of the government in tort, one has to find out the extent of liability of East India Company. The Law commission recommended a legislation on this subject. Accepting the recommendation, the government introduced two Bills on 'the government liability in tort' in the Lok Sabha in 1965 and 1967 respectively, neither of which emerged as an Act. The government allowed the Bills to lapse on the ground that they would bring an element of rigidity in the determination of the question of liability of the government in tort. The East India Company, in the beginning, was a purely commercial corporation but gradually acquired sovereignty. Therefore, the Company did not enjoy immunity of the Crown in the beginning. It was only when it acquired political powers that a distinction was made between sovereign and non-sovereign function. As a result of this, in *Bank of Bengal*[26], the Supreme Court of Judicature at Calcutta rejected the Company's plea of exemption from suit on the ground of sovereignty. It was an action brought by the Bank of Bengal to recover interest due on promissory notes written by the East India Company to borrow money for the prosecution of war.

After 1833, the East India Company was acting in a dual capacity, exercising commercial function as also the sovereign powers, with respect to the newly-acquired territories as trustees of the Crown. The use of the terms 'sovereign' and 'noon-sovereign' function which created confusion in the later development of the law was made clear by Peacock CJ in the judgement when he said:

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

However, even after such a clear enunciation of law, the judgement in the above case was interpreted in two different ways. In ***Nobin Chunder Dey***[27], the court held that the government is not liable in suit for anything done in exercise of sovereign functions. In this case, the plaintiff sued the government for specific performance of the contract of sale of ganja license as he was the highest bidder at the auction. The court based its decision on the rationale that since the auction of ganja licence was a method of raising revenue, it was a sovereign function which no private individual could undertake and hence, the action was not

[26] (1831) 1 Bignall's Reports 87
[27] ILR (1875) I Cal II

maintainable as the government was immune from any such action. The other interpretation of the ***P & O Steam Navigation Co. case***[28], was that the immunity extended only to cases which may be covered within the definition of the term 'acts of State'. This line of reasoning was adopted by the Court in the case of ***Secy. of State for India-in-Council v. Hari Bhanji***[29]. On the basis of this interpretation, the government could not claim any immunity for its acts done under the colour of municipal law. In this case, a suit was filed to recover the excess excise duty collected by the State on a consignment of salt. Rejecting the plea of immunity, the court held that no immunity attaches to actions done under the colour of municipal laws. The same principle was confirmed in ***Salaman v. Scy. of State-in-Council for India***[30].

The Law Commission of India also accepted the ***Hari Bhanji***[31] view as correct and recommended legislation giving effect to this view. However, the court did not follow this view in later cases. After independence, in ***State of Rajasthan v. Vidyawati***[32], the Supreme Court held the State vicariously liable for the tort committed by its servants.

Only three years later, the development of law in this area suffered a setback in ***Kasturi Lal Ralia Ram Jain v. State of U.P.***[33] . In this case, the plaintiff was going to Meerut to sell gold, silver and other goods. As he was passing through the city, he was taken into custody by three policemen. His person was searched and all the gold and silver was taken into custody, and he was put in the lock-up. On his release, his gold was not returned, though silver was immediately returned. The gold had been misappropriated by the head constable who fled to Pakistan. Kasturi Lal filed a suit against the Government of Uttar Pradesh for the return of the gold or value. There was a clear finding on record of gross negligence on the part of the police authorities in the matter of safe custody of the gold. However, Gajendragadkar CJ reintroduced again the vague distinction of sovereign and non-sovereign functions, and held that the State is not liable because the functions of arrest and seizure of the property are sovereign functions. The court further held that if the act is sovereign, no act of negligence on part of the employees of the State would render the State liable.

COMPARATIVE ANALYSIS OF CONTRACTUAL LIABILITY OF STATE ACTORS IN VARIOUS COMMONWEALTH COUNTRIES.

Position in USA

The law relating to the liability of United States of America, for the wrongs committed by the servants is different from the law relating to State liability under the Crown. The reason was that in USA the sovereign immunity rule was deeply rooted. So the State could not be made vicariously liable during the early days. But there is no source to know the origin of

[28] (1861) 5 Bom HCR I
[29] ILR (1882) 5 Mad 273
[30] (1906) I KB 613 (CA)
[31] Supra
[32] AIR 1962 SC 933: 1962 Supp (2) SCR 989
[33] AIR 1965 SC 1039: (1965) I SCR 375

sovereign immunity in United States of America. The reasonable understanding is "that the English doctrine should have been introduced in to the United States", the makers of the Constitution did not adopt the principle of sovereign immunity. In ***Cohens v. Virginia***[34] it was held that no suit can be commenced or prosecuted against the United States; that the Judiciary Act does not authorize such suits. The Supreme Court in ***Gibbons v. United States***[35] holds that "No State has even held itself liable to individuals for the misfeasance, latches, unauthorized exercise of power, by its officers or agents. In 1907 Holmes .J. explained in ***Kawananakova v. Polyblank***[36], that a sovereign is exempted from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends. Thus, the application of sovereign immunity doctrine to the United States is "one of the, mysteries of legal education."[37] A suit could be brought against the United States, only with its consent which could be signed only by statutory provisions.[38]

The Congress enacted various private laws and the petitions for relief. But this system did not satisfactorily workout. Most of the claims were left out unsettled. In 1798 the Eleventh Constitutional Amendment, was passed to restrain State immunity. In most of the States, judiciary played a vital role in abolishing the doctrine of sovereign immunity. Justice Holmes in 1907, said that the sovereign is exempted from all suits because there can be no legal right against the authority that makes the law on which right depends and also the sovereign cannot exist in the absence of the State and this would be assumed only if some immunity is granted to it. No one was satisfied with the system of immunity. As a result of it, the Congress enacted Court of Claims Act, in 1855. The Act enabled to establish a tribunal consisting of three members. The tribunal acted as a fact finding organ, investigated and reported to the Congress in matters arising out of contracts and not torts. However, people felt some relief due to the implementation of this Act. During 20th century, certain claims regarding marine and admiralty torts, war damages, federal employers‟ compensation, postal claims and claims against Federal Bureau of investigations were settled. Thus compensation was awarded, for the claims on infringement of rights were recognized in U.S.A. This laid the foundation for the enactment of Federal Tort Claims Act, 1946.

The Federal Torts Claims Act is the statute by which the United States authorizes tort suits to be brought against it. With exceptions, it makes the United States liable for injuries caused by the negligent or wrongful act or omission of any federal employee acting within the scope of his employment, in accordance with the law of the State where the act or omission occurred. The Federal Tort Claims Act makes United States liable for the torts of its employees of the

[34] 19 U.S. (6 wheat)264; 5L.Edn 257 (1821)
[35] 75 U.S. (8 wall) 269,19 L.Edn 453 (1868)
[36] 205 US 349 (1907)
[37] Bornard Schwartz and HWR Wade, Administrative Law in Britain and the United States,193 (1972 Edn)
[38] 1US 357 (1788) Repulica v.Sparkhawk is an example. In this case when a city was on fire, the authority did not give direction to pulldown 40 wooden houses or to remove the furniture‟s etc. belonging to the lawyers of the Temple, then on the circuit for fear he should be answerable for a trespas and in consequences of the conduct half of this city was burnt.

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State while acting within the scope of his office or employment to the extent of the private employers.

It is also pointed out that the Federal Tort Claim Act exempts the State not only from liability for committing specific torts, but also exempts the State from liability for any claims arising out of the specific torts. The excerptions are mainly classified into three major categories, they are as follows;

(a) For specific administrative functions or agencies, as well as for all claims arising in foreign countries.

(b) For intentional torts like assault, battery, false imprisonment, false arrest, malicious prosecution abuse of process, libel, slander, misrepresentation, deceit or interference with contract rights.

(c) For acts or omissions of federal officers exercising due care in carrying out statutes or regulations whether they be valid or not and for acts of discretion by State employers in the performance of their duties, whether or not the discretion is abused.

In ***Delehite v. U.S.***[39], a large cargo of ammonium nitrate fertilizer exploded on board a ship docked at Texas city. As a result, more than 500 persons were killed and some 3000 people injured. The loss of property was unaccountable. Several suits were filed against the State, claiming compensation under the provisions of Federal Tort Claims Act, based on negligent handling of the fertilizer by the State. The lower Court had found negligence in the production, transportation, and storage of the fertilizer. But the Supreme Court held that, this did not make the State liable since discretionary authority was involved. The judgment clearly shows that where discretionary authority is involved; neither the State nor the negligent officials may be held liable. In ***Borkovitz v. United States***[40], the Supreme Court held that the United States could be held liable under the Federal Tort Claims Act, because the plaintiffs had proved that the federal employees had failed to follow regulations that specifically prescribed a course of action. The American Court held in ***Dolan v. United States Postal Service***[41] that the postal exception is in applicable to a claim that mail left or the plaintiff's porch caused her to trip and fall, just as it is inapplicable to the negligent operation of postal motor vehicles. The Court also decided that for loss arising directly or consequentially, because mail either fails to arrive at all or arrives late, in damaged condition, or at the wrong address are at least to some degree avoidable or compensatable through postal registration and insurance. The Federal Tort Claims Act also approves immunity under "Act of State" doctrine. In ***Sosa v. Alvarez Machain***[42] the Supreme Court held that the Federal

[39] 346 U.S. 15 (1953)
[40] 486 U.S. 531 (1988). In this case the plaintiff was an infant.
[41] 546 U.S 481 (2006)
[42] 542 U.S. 692, 712 (2004)

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Tort Claims Act foreign country exception, bars all claims based on any injury suffered in a foreign country regardless of where the tortious act or omission.

The Constitution of U.S.A. is the custodian of the rights of the people in U.S.A. Excessive acts of State are subjected to judicial review. It is very common to declare a statute unconstitutional, when individual rights are affected. The Federal Tort Claims Act was the major set towards justice in U.S.A. but due to immunity provisions, it could not achieve much, when compared with the Crown Proceedings Act in United Kingdom. The State of U.S.A. is liable in the same manner as a private individual; but in practice, Courts applied strict principles against the individual when he is a litigant and liberal principles against the State. Recent trend in U.S.A. is to increase the liability of the State and providing compensation to the Litigants. The California Law Revision Commission also reported that the absence of Malice in the torts of States employees, the State has to bear the loss. The term "discretionary powers" has not been clearly defined by the Federal Torts Claims Act 1946. The grounds for sovereign immunity, should be reduced and the basis for State liability to be increased by reasonable modification and amendments in the legislation. Monetary remedy is preferable in all types of damages caused by the State functionaries to achieve social security and individual justice.

Position in Australia

In Australia, Parliament is enabled to make laws conferring rights to proceed against the Commonwealth or State[43]. The Commonwealth of Australia Constitution Act 1900, by Section 73, provided that the legislature of Australia "may make any laws conferring rights to proceed against the Commonwealth or State in respect of matters within the limits of the judicial power." The formula adopted in Australia is that, the rights of the parties shall be nearly as possible, be the same as in a suit between a subject and a subject[44]. It gives a wide scope for judicial interpretation, and it is difficult to say to what extent the State's liability, without distinction between sovereign and non-sovereign functions would be recognized under the Australia formula[45]. Part IX of the Judiciary Act 1908, gave right to sue the Commonwealth both in contract and tort without petition of right. Section 56 of the Act, enables the citizens to bring a suit in tort against the State in the High Court or Supreme Court. In ***Baume v. Commonwealth***[46], it was held that, the Act gave the subject the same rights of action against the State as against a subject in matters of tort as well as contract and that the Commonwealth was therefore responsible and an action was maintainable for tortious acts of its servants in every case in which the gist of the cause of action was infringement of a legal right. If the act complained of is not justified by law and the person doing it is not exercising an independent discretion, conferred on him, by statute but is performing a ministerial duty, the State is not liable. The party, therefore making a claim against a State

[43] The Commonwealth of Australia Constitution Act 1900
[44] Section 64,The Judiciary Act 1908.
[45] Law Commission of India, First Report,(Liability of the State in Tort) p.24.
[46] (1953)2 All ER, 149.

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has to establish his legal right and the infringement there of and would be entitled to a decree for damage of the act complained on is not justified by law and was not done in the course of the exercise of an independent discretion, conferred upon a person by the State. In other words to make the State liable the servant must have performed a ministerial duty and not a discretionary duty.

The Australian Courts have held that the Crown can be made liable in both respects for their wrongful acts or omissions. By the provisions of the Claims against the State and Crown Suits Act 1912, "any person having or deeming himself to have any just claim or demand whatsoever" was authorized to bring his claim before the Court by way of petition. On any such petition the rights of the parties were to be "as nearly as possible is the same as in an ordinary case between subject and subject."

Position in Canada

The consolidation of the State liability in Canada has added another milestone in this topic. Initially the Crown enjoyed immunity from tortious liability. But a suit could be brought as in England so in Canada through the petition of Right which was accorded a statutory base in all the Canadian provinces and also at the Federal level. The English Crown Proceedings Act 1947 served a model for the enactment of such legislation in the provisions of Canada. The rule that the Crown was not liable in tort still applied in the provinces of British Columbia, New – found land and Prince Edward Island.

The Canadian Petition of Right Act 1927[47], the Crown was suitable in a separate Court, the Court of Exchequer, on Petition of Right but so far as liability in tort was concerned that was confined to negligence[48]. In 1953 a Crown Liability Act was passé by the Dominion legislature under which the Crown in right of Canada is made liable for damages in tort an much the same lines as those of Crown proceedings Acts in England and New Zealand. The British Columbia which enacted the Crown Proceedings act in 1979. In Canada also the Crown was put in most respects in the same position as an ordinary person. The Crown liability Act[49] does not prevent the issue of an injunction against the Crown in the right of Canada. For the purpose of litigation, the Crown is to be treated par with ordinary subject[50]. In ***Windsor Motor v. District of Powell River***[51] the plaintiff company was given a license by a License Inspector to set up a used car business which was later found to be invalid because it contravened a zoning by-law. The company was awarded damages for the financial loss it suffered under the Hedley Byrne Principle. The Crown is also not subjected to the

[47] Which Replaced Legislation
[48] Palmer v. The King(1952) 1 DLR 259
[49] R.S.C. 1970, C-38
[50] Article 14 of the Code of Civil Procedure 1968
[51] (1969)4 DLR(3d)155

prerogative writs. Regarding the production of documents in evidence, the objection can be taken on the ground of doctrine of Crown or executive privilege[52].

The law regarding State liability in Canada has no clarity. Expressly and impliedly the State is given privileges in respect of suits and proceedings. Theoretically it is subjected to liability in law but practically it is immune from ordinary individual. The principles and procedures in Canada cannot compare with Indian legal system. For intentional torts the public officers continued to be personally liable[53]. However, the Federal Constitution has been used as a sword of remedies, when the constitutionally guaranteed rights have been invaded. In 1974, Congress amended the Federal Torts Claims Act, 1946, to make the State liable for the torts, of false imprisonment and false arrest if committed by an investigative or law enforcement officer.

STEPS TOWARDS LEGISLATION IN INDIA

Steps towards Legislation in India As far as India is concerned, it is a fast developing country with vast State function. Nearly sixty five years after independence, its legal system, is yet to find an adequate answer to the liability by the State actions. Not only has any legislative solution been attempted to solve the problem of compensation for injuries caused to Indian citizens out of the routine activities of State agencies, but also the State has usually put forth the defense of sovereign immunity whenever compensation claim have been pressed[54].This violates the directive principles and the preamble of the Constitution. The true implication of Article 300 of the Constitution is to denote suability of the Union and the States and not their respective liabilities. Disinclined to follow the corpus of past cases, tests and distinction[55], judges[56] have repeatedly urged for legislation. For better administration of State tortious liability law, the old dichotomy distinction should be done away with and giving way to legislation. Twice steps were taken. But they have never gone through the parliamentary bridges. One of the most important aspects of these efforts is discussed below-

The First Law Commission Report:

Among the two steps, the first step was taken by the Law Commission (First).To evade uncertainty in the law of State liability in tort, President of India made a reference to the Law Commission for its consideration and report on the liability of the State in tort. The Law commission after making exhaustive survey of case laws[57], stressed the need for legislation in this area. The Commission suggested that the old distinction between Sovereign and Non-Sovereign or State and Non-State functions should no longer exist. The Law Commission analysed the cases from Pre-Constitutional period as well as Post-Constitutional period in this

[52] S.S.Srivastava, Rule of Law and Vicarious Liability of State, 27 (Edn 1995, Eastern Law House)
[53] But this was not done in case of acts done in exercise of discretionary powers
[54] A.G.Noorani, Public Law in India, "Developments in Indian Administrative Law.
[55] Distinctions sovereign and non-sovereign functions as laid down in Peninsular case.
[56] Judges in Vidyawati case and Kasturilal case.
[57] The Commission studied through the Crown Proceedings Act .1947 and Federal Tort Claims Act, 1946

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regard. In its Report in 1956, it had recommended to do away with the dichotomy test and proposed proper, test which is based on the nature and form of the activity in question. It also recommended[58] that, legislative sanction be given to the rule laid down by Sir Charles Turner in ***Haribhanji[59] case***.

The commission laid down the following principles on which legislation should proceed:

1. *Under the general law of torts, State as an employer should be liable:*

   (a) For the torts committed by its employee in the course of their employment.

   (b) For breach of those duties which a person owes to his employees or agents.

   (c) For torts committed by an independent contractor under the following circumstances-

      (I) Where the employer assumes control as to the manner of performance of the work;

      (II) Where the wrongful act is specifically authorised or ratified by the employer;

      (III) Where the work contracted with the independent contractor is itself unlawful.

      (IV) Where the work contracted to be done, though lawful in itself, is of such a nature that it is likely, in the ordinary course of events, to cause injury to another, unless care is taken or that the law imposes upon the employer an absolute duty to ensure the safety of others in doing of the work;

      (V) Where the employer is under a legal obligation to do the work himself. (d) For torts where a corporation owned or controlled by the State.

   (e) For torts in respect of breach of duty by its employees.

   (f) For torts arising under the common law duty of ownership, occupation and possession or control of immovable property.

   (g) For injury caused by dangerous things

   (h) For the wrongful exercise of power by its employees causing damage.

2. *In its rights and duties:*

   (a) The State should be equivalent to a private employer.

   (b) The State should be entitled to identify from the errant employee.

[58] Law Commission of India (First Report) p. 32
[59] I.L.R. (1882) 5 Mad. 273.

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3. *In respect of duties of care imposed by statute:*

(a) If a statute authorizes the doing of an act which is in itself injurious, the State should not be liable.

(b) The State should be liable, without proof of negligence, for breach of statutory duty imposed on it or its employees which causes damage.

(c) The State should be liable if in the discharge of statutory duties imposed upon it or its employees, the employees not negligently or maliciously, whether or not discretion is involved in the exercise of such duty.

(d) The State should be liable if in the exercise of the powers conferred upon it or its employees the power is so exercised as to cause nuisance or trespass or the power is exercised negligently or maliciously causing damage.

Exceptions from liability as recognition of immunity of the State arising from the following acts-

(a) Act of State

(b) Judicial acts and execution of judicial process.

(c) Acts done in relation to the Defense Forces.

(d) Acts done in the exercise of political functions of the State and foreign affairs.

(e) Any claim arising out of-

(I) Defamation, malicious prosecution and malicious arrest.

(II) Operation of Quarantine Law

(III) Immunity under Indian Telegraph Act, 1885 and Indian Post Offices Act, 1898.

(IV) Foreign Torts.

To eradicate the confusion, the Commission defined the terms like “Agent”, “Employee”, “Independent Contractor” and “State”. The Commission also recommended that a provision be inserted in the General Clauses Act, as “In the absence of express words to the contrary, every statute shall be binding on the Union or the State, as the case may be”. The Parliament of India, never took any steps to mare the proposals effective. In the absence of legislation, the old method of case law continued to perpetuate the distinction between sovereign and non-sovereign functions of the State, as a basis for determining the liability of the State, for the torts committed by its servants. In spite of the Law Commission’s stress of the

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Haribhanji[60] principles, the Courts continued to find solution in Sir Barnes Peacock's dictum and the tests of dichotomy laid down in it. While ***Vidyawati case***[61] reaffirmed the ratio of Peninsular case, three years later the Supreme Court wrongly decided the law in ***Kasturi Lal case***[62] and expressed the opinion that the Law may be specifically laid down by the legislature, despite the fact that the second step was taken by the State and a Bill was introduced in Parliament.

CONCLUSION

The maxim *'King can do no wrong'* and *'King cannot be sued in his own Courts'* dominated the common law world. In English law, the justice was meted out to the victims of wrongful acts of the servants of the State in contractual matters only through the mechanism of *'fiat justitiae'*. But it depended upon the sole discretion of the sovereign to grant or refuse the *fiat*. So action against the errant official of the State could not be subjected to liability. The real actions were depended upon the responsibility accepted by the Crown itself. The system of innocent official being implicated to face the legal battle was contrary to justice. So after *Adams v. Naylor*, this practice was taken away from judicial procedure. The enactment of the Crown Proceedings Act 1947 was a landmark in English legal system. This Act, made the liability of State par with the liability of an ordinary employer for the wrongs of its servants. Since exception clause provided in this Act are very lenient, the errant officials may take undue advantages. The doctrine of sovereign immunity is deeply rooted in American legal system. Initially, the victim who was affected by the wrongful acts of servants of State could not succeed in any claim against the State. A suit against the State was permitted only when there were specific statutory provisions. Even when the claim was entertained, it was only for contractual liability and not for torts. The Congress permitted claims on torts by private legislations. This resulted with legal confusion and the victims who affected by the negligent acts of servants of the State had no remedy. This confusion was diluted by the enactment of the Federal Tort Claims Act 1946. This Act authorizes to bring any suits against United States. With exceptions, it makes the United States liable for injuries caused by the negligent or wrongful act or omission of any federal employee acting within the scope of his employment. The exception clause provided for discretionary functions of the servant of the State is one of the drawbacks for the victim to claim compensation. In Canada, the Crown was immune from liability and the suit could be filed only with the consent of the Crown. Most of the petitions were rejected since it was the dissertation of the Crown. Only after the enactment of the Crown Proceedings Act 1947, in England, all the provinces in Canada enacted the Crown proceedings statutes on the model of the United Kingdom. The statute put the State liable, for the tortious acts its servants. The liabilities and immunities are granted in accordance with the statute. State liability in Australia was also restricted to a limited extent since the State was immune from the wrongs committed by its servants. Now, by various

[60] Supra
[61] Supra
[62] Supra

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legislative efforts, the State could be made liable for the wrongful acts of its servants. The important problem is that the right to bring an action against the State may be denied for the reasons of social policy actions. In Australia, there is wide scope for judicial interpretations. The present law in India regulating State liability in tort is based on Article 300 of the Indian Constitution. Even though most of the cases were decided on the basis of the dictum given by the Supreme Court of Calcutta in ***Peninsular Case***[63]. The Supreme Court and the High Court are playing a vital role to demark the extent of liability and immunity of the State. The Indian judicial trend heading towards compensatory justice, taking recourse to Fundamental Right to Life and Personal Liability, is a good trend. First Law Commission in its report recommended for enacting legislation to deal the State liability in India. A Bill providing for such liability was introduced in the Parliament in 1965 and then in 1967, which could not be enacted as legislation. In India, we also need a legislation to bring uniform justice in the matter of State liability in tort.

[63] Supra