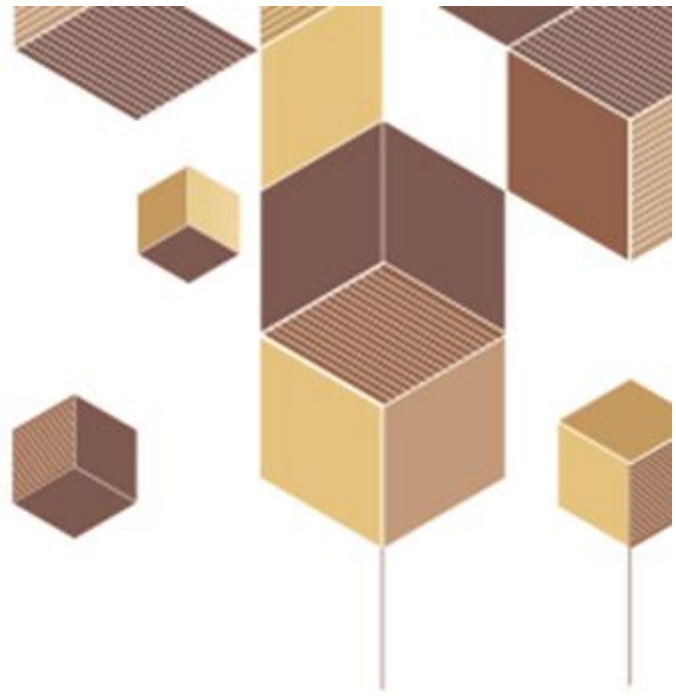




Vidhi

Centre For Legal Policy

BETTER LAWS. BETTER GOVERNANCE



VICARIOUS LIABILITY OF THE STATE IN TORT IN INDIA

A CASE FOR REFORM

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1. INTRODUCTORY NOTE

The concept of the State has undergone a vast transformation from a form of political organisation to that of an entity that closely interacts with its citizens in a number of areas. The functions of the State are no longer limited to maintenance of law and order, administration of justice and defence of the country, but also extend to commercial and economic activities, provision of various public services etc. In its interactions with citizens, the State can affect the lives of people, sometimes causing harm to their lives and property through the wrongdoing of its servants. Some incidents that occurred in the past year can be used to illustrate this point. In November 2014, a state-run mass sterilisation camp in Chattisgarh resulted in the deaths of about 14 women. In June 2014, the alleged negligence of the officials of the Larji Hydroelectric project in Himachal Pradesh in releasing the water stored in its reservoir into the Beas river without any warning caused the death of 24 students. In another incident, due to the alleged negligence of the officials of a state-owned gas transmission and marketing company, a fire broke out at its gas pipeline in Andhra Pradesh that claimed 22 lives. Accidents caused due to unmanned railway crossings, open bore wells etc. may also be attributable to negligence of State actors to a certain extent. While it can be argued that negligent actions of the victims (or even third-party interventions) may have contributed to such accidents, these incidents do raise questions about the culpability of State actors.

It is only fair, in a society based on the principles of equality and justice, that the state be held responsible for the damage caused to citizens due to the wrongdoings of its employees or agents in the carrying out of its services and operations. Often, the remedy for such wrongs can be found through the imposition of civil liability in tort law, which would recompense the citizen for the intrusion into his/ her private rights. Such a remedy would fit very well with the ideas of corrective justice, in that it requires the state whose activities have interfered with the rights of a citizen to set it right, and distributive justice, in that the state bears the risk of harming the individual through its activities, even though it may not be at fault.¹

The significance of such remedy in vindicating the private rights of individuals as against the state being clear, the principles fixing liability on the state in tort must be precise and easily identifiable. However, the law on state liability in tort in India does not meet these criteria, and consequently fails to provide adequate guidance to the citizen and in some cases, results in injustice to citizen by leaving him/her without redress. The current legal position in India has its foundation in a provision which was formulated during the years of colonial rule and has since become of doubtful relevance. Further, judicial decisions interpreting the provision have created confusion because of the conflicting stances taken therein. In spite of a Law Commission Report making a case for reform very soon after the Constitution came into effect, the Parliament has not enacted a law on this subject yet. In this note, we review the present position on state liability in tort and support the case for legislative reform of this area.

In Section 2 of the note, we consider the current legal position in India and discuss the unsatisfactory nature of the law. In section 3, we consider international practices from the United Kingdom, the United States and France which can be of help in evolving suitable principles that can be incorporated into legislation on governmental liability in tort. Such an exercise is helpful since these countries

¹ See *Clerk and Lindell on Torts* (Michael Jones & Anthony Dugdale eds, 20th edn., 2010) Ch. 1 paras 1-14, 1-15.

were early movers in enacting legislation on state liability in tort, taking into account the increased role of the state in public life. In section 4, we take a brief look at the attempts at law reform that have taken place in India. Drawing on the experiences of these countries, and the earlier attempts at reform, in section 5, we underscore the need for legislation in this area and make recommendations on the content of such legislation. It ought to be noted that the purpose of this note is not to spell out the specific reforms that are necessary for a robust state liability regime in India. On the contrary, it is intended to provide a conceptual understanding of the key issues that must be considered before embarking on such a project and why such a project is necessary. In this sense, it is intended to serve as an initiator for a more detailed study delving into details of specific proposals for law reform. It may also be noted that the scope of this note is restricted to vicarious liability of the state for tortious acts of public servants and it does not delve in detail into state liability for acts that infringe constitutional/ fundamental rights of individuals.

2. LEGAL POSITION IN INDIA

2.1. Constitutional law

The legal regime governing state liability for tortious acts of its employees is based on A.300 of the Constitution of India. A. 300(1) allows for actions to be brought by and against the Government of India or the Government of a State in the name of the Union of India or the State respectively.² This provision expressly permits the imposition of civil liability on the Government of India and the Government of every state. Additionally, A. 300(1) delineates the scope of such liability by imposing liability on the Government of India and the Government of every state to the same extent as the liability of the Dominion of India and the corresponding provinces or the corresponding Indian states. A. 300(1) also makes the scope of liability thus defined subject to any legislation made by the Parliament of India or the legislature of any state.

The result of this constitutional position is that the scope of liability of the Government of India and the Government of every state is defined by reference to the scope of liability of the Dominion of India and the corresponding Indian princely states or provinces respectively, as it stood prior to the enactment of the Constitution. Therefore, in order to determine the scope of such liability, reference must be made to the Government of India Act, 1935 to assess the scope of liability of the Dominion of India and the corresponding provinces. S 176(1) of the Government of India Act, 1935, which is the relevant provision, ultimately refers to S 65 of the Government of India Act, 1858.³ S 65 of the Government of India Act, 1858, while dealing with the scope of liability of the Secretary of State for India, merely stipulates that the scope of liability of the Secretary of State for India would be the same as that of the East India Company.⁴

² A.300(1) says: “The Government of India may sue or be sued by the name of the Union of India and the Government of a State may sue or be sued by the name of the State and may, subject to any provisions which may be made by Act of Parliament or of the Legislature of such State enacted by virtue of powers conferred by this Constitution, sue to be used in relation to their respective affairs in the like cases as the Dominion of India and the corresponding Provinces or the corresponding Indian States might have sued or been sued if this Constitution had not been enacted.”

³ S 176(1), Government of India Act, 1935 refers to the legal position contained in s 32, Government of India Act, 1935 thus: 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.”

S 32, Government of India Act, 1915 refers to the position contained in s 65, Government of India, 1858.

⁴ S 65, Government of India Act 1858: “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.”

Ultimately, as the above provisions do not provide any substantive guidance as to the scope of liability, reference must be made to certain relevant judgments, which have specifically considered the scope of state liability in relation to the tortious acts of public servants.

(A) Pre-Constitution Judgments

The first key judgment, which considered state liability for tortious acts of public servants, was *P & O Steam Navigation Co. v Secretary of State*.⁵ This case involved a claim for damages for injury caused to the appellant's horse due to the negligence of workers in a government dockyard. The issue was whether the Secretary of State would be liable for the negligence of the workers. Peacock C.J. held that the Secretary of State would be liable for negligence. Peacock C.J. reasoned that state liability for tortious acts of public servants would arise in those cases where the tortious act would have made an ordinary employer liable. Peacock C.J. recognised a crucial distinction between sovereign and non-sovereign functions - thus, if a tort was committed by a public servant in the exercise of sovereign functions, no state liability would arise. This distinction was made on the basis that the East India Company⁶ could be held liable for torts committed by its employees during the course of its commercial and trading activities and not for the acts it performed as a delegate of the Crown.

This distinction between sovereign and non-sovereign functions was followed in *Nobin Chunder Dey v Secretary of State*.⁷ In this case, a claim for damages was brought in connection with the issuance of a government licence. The claim was ultimately rejected by the court as it related to the exercise of a sovereign function.

Subsequently, this distinction was relied on to repel state liability for tortious acts of public servants where injury was caused in connection with the maintenance of military roads,⁸ wrongful conviction,⁹ wrongful confinement,¹⁰ maintenance of public hospitals,¹¹ etc.

In contrast to the above trend, a few High Courts¹² adopted a much narrower view of the ambit of sovereign functions. The most significant example of this trend is the decision in *Secretary of State v Hari Bhanji*.¹³ In this case, Turner C.J. rejected the plain distinction between sovereign and non-

⁵ 5 Bom HCR App. 1.

⁶ The Secretary of State's liability was coterminous with the liability of the East India Company under s 65, Government of India Act, 1858.

⁷ (1876) ILR 1 Cal. 12.

⁸ *Secretary of State v Cockraft*, AIR 1915 Mad 993.

⁹ *Mata v Secretary of State*, AIR 1931 Oudh 29.

¹⁰ *Gurucharan v State of Madras*, AIR 1942 Mad 539.

¹¹ *Etti C v Secretary of State*, AIR 1939 Mad 663.

¹² *Ross v Secretary of State*, AIR 1915 Mad 434; *Kishanchand v Secretary of State*, (1881) ILR 2 All 829; *State of Bombay v Khushaldas Advani*, AIR 1950 SC 222.

¹³ (1882) ILR 5 Mad. 273.

sovereign functions, and held that immunity from liability for tortious acts of public servants would only be available in respect of acts done in the exercise of sovereign power and without the sanction of a statute ('acts of State').¹⁴ For acts done pursuant to a statute, or in exercise of powers conferred on a public servant by a statute, no immunity would be available, even though such acts might be done in exercise of sovereign powers.¹⁵

(B) Post-Constitution Judgments

The decision of the Supreme Court in *State of Rajasthan v Vidhyawati*¹⁶ was one of the earliest decisions on the issue of state liability for the tortious acts of public servants after the Constitution came into force. In this case, a government servant negligently drove a government vehicle and injured a pedestrian, who later succumbed to his injuries. The Supreme Court followed the decision of Peacock C.J. in *P & O Steam Navigation Co.* to hold that the Government of Rajasthan would be liable for the tortious acts of its servants like any other private employer. The Supreme Court also observed that "*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.*"

The decision in *Vidhyawati*, while adopting the decision in *P & O Steam Navigation Co.*, did not engage in any attempt to define sovereign functions or to apply a definition of sovereign functions to the facts at hand.

The decision in *Vidhyawati* was analysed by the Supreme Court in a subsequent decision in *Kasturilal Ralia Ram Jain v State of Uttar Pradesh*.¹⁷ In this case, a quantity of gold seized from the plaintiff by the police and kept in police custody was misappropriated by a police constable. The plaintiff raised a claim against the Government of Uttar Pradesh and argued that the loss was caused due to the negligence of police officers. The Supreme Court rejected the claim raised by the plaintiff and affirmed a more expansive view of sovereign immunity.

The Supreme Court did not follow the decision in *Vidhyawati* as it distinguished this decision on the basis of the facts involved. It noted that the tortious act in *Vidhyawati* (driving a government vehicle from the workshop to the Collector's residence) could not be considered as an exercise of sovereign functions, unlike the tortious act in *Kasturilal* (seizure of property by police).¹⁸ Therefore, the decision in *Vidhyawati* necessarily had to be different from the decision in *Kasturilal*. It also noted

¹⁴ The Court understands 'acts of State' as "Acts done by the Government in the exercise of the sovereign powers of making peace and war and of concluding treaties, obviously do not fall within the province of Municipal law..." (para 16).

¹⁵ This decision seems to be one of the earliest indications of the distinction between executive acts and acts done under a statute, a distinction which seemed to have been glossed over in the later judgment in *Kasturilal Ralia Ram Jain v State of Uttar Pradesh*, AIR 1965 SC 1039.

¹⁶ AIR 1962 SC 933.

¹⁷ AIR 1965 SC 1039.

¹⁸ The Supreme Court specifically held that the state was not vicariously liable as - (a) the power to arrest and search a person and seize his property were statutory powers conferred on the police officers; and (b) such powers could be characterised as sovereign powers (para 31).

that the decision in *Vidhyawati* ought to have been premised on this specific aspect, even though this did not happen in fact.

Ultimately, the Supreme Court held that state liability for tortious acts of public servants would not arise if the tortious act in question was committed by the public servant while employed “*in discharge of statutory functions which are referable to, and ultimately based on, the delegation of the sovereign powers of the State.*”¹⁹ This broad formulation of the definition of sovereign functions resulted in a substantial expansion in the scope of sovereign immunity.

The decision of the Supreme Court in *Kasturilal* has been a subject of much academic scrutiny. Seervai, doubting the validity of the decision, notes that the Court failed in its duty to recognise the fundamental distinction between an act of the State, which can be afforded protection under sovereign immunity and a wrongful act of a public servant purportedly done under the authority of a municipal statute. The reasoning of the Court erodes this distinction and enlarges the scope of sovereign immunity beyond reasonable limits.²⁰ It is pertinent to note that the Supreme Court itself, in its decision in *Kasturilal*, recognised the possibility that this legal position in relation to state liability for tortious acts of public servants might give rise to unjust situations where a citizen might suffer serious loss and not possess any legal remedy against the state.²¹ However, in the opinion of the Supreme Court, the means of resolution of this problem was through suitable legislative intervention and not judicial interpretation.²²

Subsequently, the definition of sovereign functions enunciated in *Kasturilal* was applied in a number of circumstances by reference to whether the act in question could be pursued by private individuals or not. If the act in question could be pursued by private individuals, then such act would not be a sovereign function and state liability would arise.

In *Shyam Sunder v State of Rajasthan*,²³ the Government of Rajasthan was held vicariously liable for the death of a person sent on famine relief work. It was held that famine relief work could not be considered as a sovereign function as it could be carried out by private individuals also.

Similarly, in *Chairman, Railway Board v Chandrima Das*,²⁴ the establishment of guest houses at railway stations was not considered as a sovereign function.

However, notwithstanding such extensive judicial guidance, distinguishing between sovereign and non-sovereign functions has remained rather difficult. In fact, a cursory look at two decisions from the High Courts on analogous facts illustrates this difficulty. In one decision,²⁵ it was held that an

¹⁹ *Kasturilal*, n 17, para 23.

²⁰ See H.M. Seervai, *Constitutional Law of India* (Vol 2, 4th edn., 2013) pg. 2132.

²¹ *Kasturilal*, n 17, para 32.

²² *Ibid.*

²³ AIR 1974 SC 890.

²⁴ AIR 2000 SC 988. It must be noted that this case was brought under A. 226, Constitution of India.

²⁵ *Thangarajan v Union of India*, AIR 1975 Mad 32.

army driver carrying carbon dioxide to a naval ship was performing a sovereign function. In the other decision,²⁶ it was held that sovereign immunity would not be available in case of a tortious act committed while carrying arms from a railway station to a military camp by truck.

The difficulties faced in distinguishing sovereign and non-sovereign functions have been further compounded by a number of decisions that have attempted to bypass the distinction altogether. These decisions have sought to impose liability for tortious acts of public servants on the basis of other justifications.

In *State of Bombay (Now Gujarat) v Memon Mahomed Haji Hasam*,²⁷ certain vehicles and goods seized by customs authorities were disposed of owing to the negligence of the police. The Supreme Court, after comparing the position of the Government of Gujarat to that of a bailee, held that the Government of Gujarat was liable for tortious acts of public servants such as the police. It further held that the decisions in *Vidhyawati* and *Kasturilal* were not relevant to the issue of state liability in such circumstances.

Similarly, in *Basava Dyamogouda Patil v State of Mysore*,²⁸ on facts largely similar to the facts in *Kasturilal*, the State of Mysore was held liable for property which was lost while in the custody of the police.

(C) Constitutional Remedies

Even as uncertainty prevailed in relation to the test for state liability for tortious acts of public servants, there was a crucial development in the field of constitutional law that bore special relevance to this issue. This development was the recognition of state liability for tortious acts of public servants through the instrument of fundamental rights. The Supreme Court, in certain landmark decisions,²⁹ recognised state liability for acts of public servants that infringed fundamental rights, including tortious acts of public servants. The appropriate remedy in such circumstances was to file a petition under A.32 or A.226 of the Constitution.

In *Nilabati Behera (Smt.) v State of Orissa*,³⁰ the Supreme Court imposed liability on the State of Orissa and awarded damages pursuant to a petition for relief against the infringement of fundamental rights. The Supreme Court observed that such a remedy was a remedy available in public law,³¹ based on strict liability for contravention of fundamental rights to which the principle of sovereign immunity

²⁶ *Usha Aggarwal v Union of India*, AIR 1982 P & H 279.

²⁷ AIR 1967 SC 1885.

²⁸ AIR 1977 SC 1749.

²⁹ *Rudul Shah v State of Bihar*, (1983) 4 SCC 141; *State of Andhra Pradesh v Challa Ramkrishna Reddy*, (2000) 5 SCC 712; *D K Basu v State of West Bengal*, (1997) 1 SCC 416.

³⁰ (1993) 2 SCC 373.

³¹ This decision was recently followed in *Sanjay Gupta v State of Uttar Pradesh* where Supreme Court ordered the state to pay interim compensation to the victims or their legal representatives for a fire that occurred at a brand show area. It was held that the state was prima facie liable to pay compensation as its servants gave the organisers of the show permission to hold the exhibition without ensuring that proper fire safety arrangements had been made.

does not apply, even though it may be available as a defence in private law in an action based on tort.

(D) [Recent Judgments](#)

In light of the above development in constitutional jurisprudence, subsequent judgments sought to revisit the issue of state liability for tortious acts of public servants.

In *N. Nagendra Rao & Co. v State of Andhra Pradesh*,³² the Supreme Court considered whether the State of Andhra Pradesh could be held liable for the loss caused to the appellant due to the negligence of its officers in returning goods seized from him under the Essential Commodities Act 1955. The Supreme Court held that the State was vicariously liable for the negligence of its officers in complying with the provisions of the statute. However, in addition to this specific finding, the Supreme Court expressed a decidedly unfavourable view of the doctrine of sovereign immunity and remarked that "*the doctrine of sovereign immunity has no relevance in the present day context when the concept of sovereignty itself has undergone drastic change.*" The Supreme Court also noted that the distinction between sovereign and non-sovereign functions was not a meaningful distinction and that the doctrine of sovereign immunity appeared to exist merely for reasons of practicality.

Notwithstanding this clearly adverse stance, the Supreme Court in *Nagendra Rao* did not reject the doctrine of sovereign immunity - most likely because it could not have overruled or disregarded the decision of a larger bench in *Kasturilal*. The Supreme Court merely restricted the application of the doctrine of sovereign immunity to those cases in which the act in question related to a "*function for which it [the state] cannot be sued in court of law.*"³³ These functions included - "*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.*"³⁴

The decision in *Nagendra Rao* was followed in *Common Cause, A Registered Society v. Union of India*.³⁵ In this case, the Government of India was held liable for loss in connection with the allotment of a petrol outlet as such function could not be considered a sovereign function.

Last year, in *Vadodara Municipal Corporation v Purshottam V Murjani*³⁶, the Supreme Court considered whether the municipal corporation which was responsible for the management of the Sursagar lake, was liable to pay compensation under the Consumer Protection Act, 1986 for the death of 22 persons who drowned in the lake during a boat ride due to negligence in plying the boat. The Corporation had outsourced the activity of plying boats for joyrides to an agent. While holding the municipal corporation vicariously liable, the Court did not rely upon *Kasturilal* or *Nagendra Rao* at all and held that the municipal corporation was not only discharging its statutory duty but was also acting as a service provider through its agent. The Court did not consider the distinction between sovereign and non-sovereign functions of the state in reaching its conclusion.

³² AIR 1994 SC 2663.

³³ *Ibid*, para 25.

³⁴ *Ibid*, para 24.

³⁵ AIR 1999 SC 2979.

³⁶ 2014 (10) SCALE 382.

Further, the Court reiterated that not only do Constitutional Courts have to uphold claims arising out of loss of life or liberty on account of violation of statutory duties of public bodies, in private law actions, just and fair claims against public authorities have to be upheld and compensation awarded in tort.³⁷

Ultimately, it appears that while there is broad consensus that the distinction between sovereign and non-sovereign functions is obsolete, the judiciary has not moved away from this distinction or indeed, from the doctrine of sovereign immunity. In fact, to mitigate unjust outcomes, the Supreme Court has been constantly struggling to limit the scope of the doctrine of sovereign immunity as attempted in the decision in *Nagendra Rao* and subsequent decisions.³⁸

2.2. Private action under statutes

A number of statutes impose liability to pay compensation for the tortious acts of persons which cause death or injury to the person or property of others. Such actions in private law are permitted by the Fatal Accidents Act 1855 (“FAA”), Motor Vehicles Act 1988 (“MVA”), Consumer Protection Act 1986 etc. An examination of the cases brought under these statutes shows that general principles of tort law are relevant in identifying the liability of the defendant in tort.³⁹

The state, like any other private person, can be sued under these statutes. Thus, vicarious liability of the state can arise under these statutes for tortious acts or omissions of its employees in the course of their employment.⁴⁰ However, the contours of vicarious liability of the state under these statutes are determined in accordance with A. 300 and the case law thereon. Thus, cases under these statutes have relied on the distinction between sovereign and non-sovereign functions of the state to determine whether the state was vicariously liable in tort.

The reliance on the distinction between sovereign and non-sovereign functions is despite the fact that none of these statutes negate or limit the vicarious liability of the state if the tort was committed in the execution of a sovereign function. The Supreme Court in *Pushpa Thakur v Union of India*⁴¹ was required to consider the question of whether sovereign immunity was available as a defence to claims against the state under the MVA. However, the Supreme Court left the position ambiguous - while

³⁷ *Ibid*, para 19.

³⁸ *Ibid*; *State of Maharashtra v Kanchanmala Vijaysing Shirke*, AIR 1995 SC 2499; *Achutrao Haribhau Khodwa v State of Maharashtra*, AIR 1996 SC 2377.

³⁹ See *Municipal Corporation of Delhi v Subhagwanti*, AIR 1966 SC 1750; *Achutrao Haribhau Khodwa v State of Maharashtra*, AIR 1996 SC 2377; *Vadodara Municipal Corporation v. Purshottam V. Murjani* 2014 (10) SCALE 382. In *Subhagwanti*, an action under s 1 of the FAA, the Court looked at general principles of negligence law to determine whether the MCD was liable for the death caused due to its “wrongful act, neglect or default” in maintaining a clock tower which collapsed.

⁴⁰ See *State of Maharashtra v Kanchanmala Vijaysing Shirke*, AIR 1995 SC 2499. Here, a claim brought under s 92A of the MVA for compensation for death caused due to the negligence of the driver of a State government vehicle, the State government was held vicariously liable as the negligence of the driver was in the course of their employment.

⁴¹ AIR 1986 SC 1199.

the plea of sovereign immunity of the state was not allowed on the specific facts and circumstances of the case, the Court did not expressly rule out the applicability of sovereign immunity to claims arising against the state under the MVA. Subsequently, the Allahabad High Court in *Union of India v Ashok Kumar*,⁴² while considering the liability of the state to pay compensation for deaths caused due to negligent driving of its employees, noted the absence of a provision in the MVA negating the liability of state for acts of its servants done in the exercise of sovereign powers.⁴³ However, ultimately the decision of the Court was based on the finding that transportation of ration for armed forces in that case was not a sovereign function.

Cases under other statutes have also considered the distinction between sovereign and non-sovereign functions to determine state liability for the acts or omissions of its employees. This is illustrated in *Shyam Sunder v State of Rajasthan*,⁴⁴ where in a claim against the State under the FAA, the court considered the question of whether famine relief work, in connection with which the employee was acting, was a sovereign function of the state as to render it immune from vicarious liability. Similarly, in a medical negligence case under the Consumer Protection Act 1986, the state was held vicariously liable to pay compensation on the ground that maintaining and running a hospital was not a sovereign function.⁴⁵ Thus, even when relief is sought under these statutes, it seems clear that the individual seeking relief would be left without any remedy against the state where the negligent act or omission of its servant is identified as being done in the performance of a sovereign function.

⁴² 2011 ACJ 2708.

⁴³ “Moreover, the Legislature in enacting Motor Vehicles Act, 1988 has not taken this aspect that act done in exercise of sovereign function would not fall within the purview of provisions of this Act.” (para 35, *Ibid*).

⁴⁴ AIR 1974 SC 890.

⁴⁵ *Achutrao Haribhau Khodwa v State of Maharashtra*, AIR 1996 SC 2377. This decision has been followed in *State of Haryana v Smt. Santra*, AIR 2000 SC 1888, to hold the state vicariously liable for the negligence of the doctors in a government hospital in performing a sterilisation operation.

3. INTERNATIONAL PRACTICES

An examination of international practice across jurisdictions shows the emergence of a liberal view of state liability over time. This is especially true of jurisdictions in continental Europe whose constitutional provisions incorporate the principle of state liability. Such provisions have been reinforced by case law developments which have broadened the scope of state liability in tort.⁴⁶ Jurisdictions such as France, Italy and Spain have evolved principles which take a very expansive view of state liability.⁴⁷ On the other hand, the prominent common law jurisdictions- the United Kingdom and the United States have been slow movers in comparison, when it came to the imposition of state liability in tort.

In this section, we look at the evolution of the law on state liability for tortious acts in three jurisdictions (the United Kingdom, the United States and France) and assess some of the key provisions of the legislation in those jurisdictions.⁴⁸ The jurisdictions discussed initially provided for blanket immunity to the sovereign from litigation. However, they have gradually moved away from this approach, tackling this issue differently from the approach taken in India.

3.1. Law on state liability in tort in the United Kingdom

(A) Background

The sovereign in the United Kingdom enjoyed immunity from liability for tortious acts for a very long time. However, even then, limited relief was provided to the individual as a matter of grace- the Crown would meet the liability of the officer or servant who committed the tort. This slowly developed into a practice whereby the government and the claimant would identify a nominal defendant who would stand in place of the government.⁴⁹ The policy behind this involved: a) the recognition of certain rights of the individual as against the state, and not just against fellow citizens; b) increased interactions with the citizens due to increased activities of the Crown.⁵⁰ However, this practice was not very satisfactory as the servants could not always be held liable, especially in cases where they owed duties only to the Crown and not the public.⁵¹

⁴⁶ Giuseppe Dari-Mattiacci, Nuno Garoupa & Fernando Gomez-Pomar, 'State Liability', *Amsterdam Center for Law & Economics Working Paper No. 2010-01* (2010) <<http://ssrn.com/abstract=1590874>>.

⁴⁷ Ibid.

⁴⁸ Annexure A briefly discusses the continental approaches in relation to sovereign immunity and state liability in tort.

⁴⁹ Janet McLean, *Searching for the State in British Legal Thought* (2012) 227.

⁵⁰ Ibid, 227.

⁵¹ Ibid, 227.

The immediate impetus for law reform in the UK was given by two cases- *Adams v Naylor*⁵² and *Royster v Cavey*.⁵³ These cases highlighted the problems associated with the practice of holding the Crown liable through a fictitious defendant who would be substituted for the Crown in the actual proceedings. In light of this, Crown Proceedings Act 1947 (“CPA”) was enacted which overhauled the legal regime completely.

(B) Liability under the CPA

The most significant change brought about by the CPA was to impose a general liability in tort on the Crown for the acts of its employees and agents (S 2(1)(a)). Thus, the Crown’s liability was made analogous to that of a private employer under common law⁵⁴- the Crown would be liable for all acts or omissions of its employees or agents during the course of his employment.

Further, s 2(1)(b) and (c) impose liability on the Crown for breaches of duties owed to the employees or agents by virtue of the employment relationship and for breaches of common law duties attaching to the ownership, occupation, possession or control of property respectively.

Ss 2(2) and 2(3) lay down the liability of the Crown for breach of statutory duties. S 2(2) excludes liability of the Crown for public duties and governmental functions by limiting its liability for breach of statutory duty to cases where the statutory duty is binding on persons other than the Crown and its officers. Further, s 2(3) specifies that the Crown shall be liable for torts committed by officers of Crown in the exercise of or purported exercise of functions imposed by common law or statute as if those functions were conferred or imposed by the lawful instructions of the Crown.

The scope of the Crown’s vicarious liability under all these provisions also extends to independent contractors as well,⁵⁵ such liability being akin to that incurred by a private person in respect of the acts or omissions of the independent contractor.⁵⁶

The vicarious liability of the Crown under these provisions can be restricted through limitation of liability or immunity clauses contained in statute which limit or negate the liability of government departments or officers of the Crown.⁵⁷ Further, the Crown’s vicarious liability is restricted to that for torts committed by officers directly or indirectly appointed by the Crown. This is a big drawback as it results in the exclusion of a number of officials such as the police who are appointed by the local authorities.⁵⁸

⁵² [1946] AC 543.

⁵³ [1947] KB 204.

⁵⁴ S 2 (1), CPA 1947. Please also note that proceedings against the Crown under s 2(1)(a), CPA cannot be brought in the absence of any cause of action against the servant, agent or his estate (Proviso to s 2(1), CPA).

⁵⁵ S 2 read with s 38(2), CPA. The definition of the term ‘agent’ in s 2 is given in s 38(2): “...“Agent,” when used in relation to the Crown, includes an independent contractor employed by the Crown...”

⁵⁶ S 40(2)(d), CPA.

⁵⁷ S 2(4), CPA.

⁵⁸ Clerk and Lindsell, n 1, Chapter 5, para 5-06.

The nature of relief that can be granted against the Crown is akin to that which can be given in proceedings between subjects. However, the Court cannot grant an injunction or make an order for specific performance, an order for recovery of the land or delivery of the property against the Crown.⁵⁹ Further, the Court cannot grant an injunction or make an order for specific performance against an officer of the Crown if the effect of such an order is give a relief against the Crown that could not have been obtained otherwise.⁶⁰

(C) Exceptions from liability

Instead of making a distinction between sovereign and non-sovereign functions, as done in India, the CPA lays down specific exceptions to the vicarious liability of the Crown in tort. Such a system avoids the pitfalls of either a narrow or a broad classification of sovereign functions.

The most notable exception to the position of vicarious liability of the Crown under the CPA is that the immunity of the Crown for a tort committed in its private capacity is retained.⁶¹ Other key exceptions are as below:

a) Judicial acts- S 2(5) grants immunity to the Crown for acts or omissions of persons in the exercise or purported exercise of responsibilities of a judicial nature or responsibilities in relation to the execution of judicial process. Thus, liability of the Crown is excluded for quasi-judicial acts as well as administrative errors in the exercise of judicial functions.⁶²

b) Armed forces- S 10 pertains to an exception for tortious acts or omissions by members of the Armed Forces which result in the death or injury of another member of the Forces who was either on duty or if not, was on service property. Such an exception is available so long as the Secretary of State certifies that the death or injury could be attributable to service. Further, there is immunity for injury or death suffered by members of the armed forces where such death or injury is caused due to the condition of the service property. This section was repealed by the Crown Proceedings (Armed Forces) Act 1987 prospectively; however, the Secretary of State has limited power to apply the immunity under s 10 for the “purpose of any warlike operations in any part of the world outside the United Kingdom.”⁶³ Even if such immunity does not apply, it has been held that there exists no common law duty of care owed by a soldier towards his fellow soldier in battle conditions; neither is there any obligation on the Crown to provide a safe system of work in such a situation.⁶⁴

c) Exercise of prerogative or statutory powers- S 11 provides an exception from liability for the Crown for torts committed by its servants in the exercise of prerogative or statutory powers conferred on

⁵⁹ S 21, CPA.

⁶⁰ Ibid.

⁶¹ S 40(1), CPA.

⁶² Clerk and Lindsell, n 1, Chapter 5, para 5-14.

⁶³ S 2, Crown Proceedings (Armed Forces) Act, 1987.

⁶⁴ *Mulcahy v Ministry of Defence*, [1996] QB 732.

the Crown, especially those powers exercised for the defence of the realm and training of the armed forces.

d) Acts of State- it is an accepted rule that Crown servants enjoy immunity from personal liability in case of acts of State.⁶⁵ This immunity is preserved for the Crown as well. Thus, acts done in pursuance of executive policy in the course of relations with another state or its subjects are protected from being challenged.⁶⁶

Thus, it is seen that the fundamental nature of the legal regime in the UK is one that holds the state liable for torts of its servants like any private employer. However, the exceptions strike a fair balance in protecting the Crown from hindrance in executive policy-making, exercise of judicial functions etc.

(D) Liability of public authorities under Human Rights Act 1998

The enactment of the Human Rights Act 1998 (“HRA”) is a development in public law which can be seen as roughly analogous to the development of constitutional remedies for compensation in India. The HRA provides for damages to be awarded for breaches of human rights by public authorities.⁶⁷ The remedy of compensation for loss caused is a discretionary one- it is to be awarded when it is necessary to provide “just satisfaction” to the victim. The HRA route can provide an alternative where tort law does not always provide a remedy. This is so, especially in the case of omissions by public servants where tort law does not often provide a remedy- tort law usually provides protection for negative rights whereas human rights approach can be used to protect positive rights which may be affected due to omissions by public servants.⁶⁸ The HRA approach might also work better in those cases where there has been an incursion into rights which an individual has against the state and which rely upon the special responsibility of the state vis-à-vis the citizen.⁶⁹ Thus, the HRA, to a great extent, supplements the regime of governmental liability under private law.

3.2. Law in the United States

(A) Background

The common law rule of state immunity held sway in the United States even though historical reasons did not justify the presence of such a rule in the US where there has never been a monarch. This

⁶⁵ Clerk and Lindsell, n 1, Chapter 5, para 5-16.

⁶⁶ Collier, ‘Act of State as a Defence against a British Subject’ (1968) *C.L.J.* 102. in Clerk and Lindsell, n 1, Chapter 5, para 5-17.

⁶⁷ S 6, Human Rights Act 1998. Please note that the Parliament is expressly excluded from the purview of ‘public authority’ (S 6(3), HRA).

⁶⁸ François du Bois, ‘Human Rights and the Tort Liability of Public Authorities’, 127 *Law Quarterly Review* (2011) 589, 593.

⁶⁹ *Ibid*, 594.

position was fortified by the Eleventh Amendment⁷⁰ and subsequent judicial decisions.⁷¹ Reasons that have been advanced for the same include that of immunity from suits being a privilege of sovereignty, grounds of necessity and consistency with the supremacy of executive power.⁷²

While this situation was changed through legislative action in 1887,⁷³ tort claims were excluded. Relief in case of torts committed by public officials could only be obtained through the private bill procedure. In practice, this procedure proved to be cumbersome, often unjust, took up a lot of Congressional time and led to political favouritism.⁷⁴ Thus, dissatisfaction with the private bill procedure led to the enactment of the Federal Tort Claims Act (FTCA) in 1946.

(B) [Liability under FTCA](#)

The FTCA, s 1346(b) authorizes actions in tort to be brought against the US by victims of tortious acts committed by government employees and federal agencies while acting within the scope of office or employment subject to certain exceptions.⁷⁵ The vicarious liability of the United States for the torts of its employees is analogous to the liability of private employers for the torts of their employees “under like circumstances”.⁷⁶ This had raised the question of whether the FTCA impliedly permitted distinguishing between governmental and non-governmental functions, giving the state immunity for torts committed while discharging governmental functions. However, the decision in *Indian Towing Co v United States of America*⁷⁷ clarified that the phrase in s 2674 was not to be construed as giving immunity to the government for torts committed while carrying out an activity or enterprise not carried on by private individuals. Thus, there is no distinction between sovereign and non- sovereign functions as in India.

Unlike the CPA, the FTCA does not provide for liability of the state for torts of independent contractors. However, through case law, it has been recognised that ‘derivative sovereign immunity’ may be available to government contractors and agents acting on behalf of the government if their

⁷⁰ The Eleventh Amendment was passed to nullify the effect of the decision in *Chisholm v Georgia*, (1793) 2 Dall. 419 which challenged the rule of state immunity.

⁷¹ *Cohens v Virginia*, 6 Wheat. (19 U.S.) 264 (1821), *Kawananakoa v Polyblank*, 205 U. S. 349 (1907); *Cunningham v Macon and Brunswick R. R.*, 109 U. S. 446 (1883).

⁷² Harry Street, ‘Tort Liability of the State: The Federal Tort Claims Act and the Crown Proceedings Act’ 47(3) *Michigan Law Review* (1949) 341, 343.

⁷³ An alternate remedy for the citizen was found through private legislation procedure which subsequently led to the setting up of a Court of Claims in 1855. After the enactment of the Tucker Act 1887, this Court of Claims had jurisdiction to try suits against the United States.

⁷⁴ Street, n 68, 346.

⁷⁵ 28 U.S.C. § 1346(b). According to the provision, United States is liable for, “for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.”

⁷⁶ 28 U.S.C. § 2674.

⁷⁷ (1955) 350 US 61.

acts are so closely connected with the work and policy of the government that they can be considered as government agents.⁷⁸ Such immunity is available only when the federal government enjoys immunity from liability under any of the exceptions to the FTCA.

The FTCA may also cover liability for the acts of employees of government corporations if the corporation acts as an agency or instrumentality of the US.⁷⁹ Further, the presence of an administrative settlement procedure for tort claims is another unique feature as compared to the CPA.⁸⁰

(C) Exceptions to liability

The FTCA is more restrictive of state liability in tort than the CPA. The key exceptions are:

a) Intentional torts- Unlike the position in the UK, the vicarious liability of the state under the FTCA is restricted to claims for injury or loss of property, or personal injury and death. It excludes vicarious liability of the state for claims arising out of intentional torts such as assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights etc.⁸¹ There seems to be no coherent rationale for the exclusion of such torts from the purview of the FTCA.⁸²

b) Limited exception for torts committed in the exercise of statutory powers- In respect of statutory duties, the liability of the state for the acts or omissions of the employee is excluded as long as “due care” was exercised in the execution of the statute.⁸³ Such an exception is necessary as imposing liability on the state for activities normally authorized by the statute would unduly restrict the carrying out of statutory duties. The scope of this exception depends on the construction that would be placed on what acts can be considered as related to the execution of the statute. Committee hearings and reports on the draft Bill have suggested that a narrow construction is to be adopted.⁸⁴

c) Discretionary function exception- The state is also immune from liability for claims “based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion

⁷⁸ *Yearsley v W.A. Ross Construction Co.*, 309 U.S. 18 (1940); *Boyle v United Techs. Corp.*, 487 U.S. 500 (1988), *Butters v Vance International Inc.*, 225 F.3d 462(4th Cir. 2000).

⁷⁹ Street, n 68, 350.

⁸⁰ The administrative settlement procedure is contained in s 2672 and s 2677. It permits the head of a federal agency to “consider, ascertain, adjust, determine, compromise, and settle any claim for money damages” not exceeding USD 25000. Any claim in excess of USD 25000 requires the prior approval of the Attorney General.

⁸¹ 28 U.S.C. § 2680(h). It must, however, be noted that the exception does not prevent the government from being held liable for a suit based on negligence that led to the intentional tort. *Sheridan v United States*, 487 U.S. 392.

⁸² Street, n 68, 355.

⁸³ 28 U.S.C. § 2680(a).

⁸⁴ ‘The Federal Tort Claims Act’, 56(3) *Yale Law Journal* (1947) 534, 543.

involved be abused.”⁸⁵ This exception is designed to prevent claims from hindering governmental policymaking in the economic, social and political spheres. The scope of this exception was explained in *Dalehite v United States*⁸⁶ as covering executive decision-making in designing programs and activities as well as the determinations necessary for such decisions.⁸⁷ In order to be covered within the discretionary function exception, the conduct of the employee must follow the specific directions contained in statute, regulation or policy of the government.⁸⁸ It must require “judgment or choice”⁸⁹ and such judgment or choice must be “susceptible to policy analysis.”⁹⁰ The scope of the exception is rather broad as it covers even operational decisions made at the lower level.⁹¹ The problem with such a broad exception is that it can capture a wide variety of actions- by covering even instances of negligent conduct or wilful malice, it leaves the affected individual without any effective remedy. In *Dalehite* itself, the discretionary function exception protected the government from vicarious liability for the negligence of its employees in the planning and execution of shipment of unstable fertilizer which caused the deaths of over 560 persons and wiped out an entire dock.⁹²

d) Armed forces- an exception is provided for torts committed by armed forces in their combatant activities during the time of war. ⁹³ The *Feres* doctrine⁹⁴ also provides immunity to the state from compensation claims for injuries caused to members of the armed forces where such injuries are caused due to or are sustained the course of the activity incident to service.

Other exceptions include immunity from liability from claims for tortious acts or omissions of the postal department,⁹⁵ claims arising in respect of the assessment or collection of any tax or customs duty including those regarding detention of any property by tax, customs or law enforcement officers,

⁸⁵ 28 U.S.C. § 2680(a).

⁸⁶ 346 U.S. 15 (1953).

⁸⁷ The discretion protected by the exception:

“...is the discretion of the executive or administrator to act according to one’s judgment of the best course...includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations.” (Ibid).

⁸⁸ *Berkovitz v United States*, 486 U.S. 531(1988).

⁸⁹ Ibid.

⁹⁰ *United States v Gaubert*, 499 U.S. 315, 325 (1991).

⁹¹ Ibid.

⁹² See Jackson J.’s dissent in *Dalehite* that the government officials could have reasonably foreseen that the shipment of unstable fertiliser created a huge risk to the public.

⁹³ 28 U.S.C. § 2680(j).

⁹⁴ *Feres v United States*, 340 U.S. 135 (1950).

⁹⁵ 28 U.S.C. § 2680(b).

⁹⁶ claims for damages caused by the imposition or establishment of a quarantine;⁹⁷ claim for damages resulting from the fiscal operations of the Treasury or by the regulation of the monetary system;⁹⁸ claims arising in a foreign country⁹⁹ etc.

Thus, it is seen that the FTCA, although it follows the same approach as taken in the UK towards state liability in tort, i.e., legislative intervention, has restricted the liability considerably.

(D) Liability under state laws

While the FTCA has, for most part, done away with sovereign immunity of the federal government, sovereign immunity continues to play a huge role in the case of states which constitute the Union. Such immunity of the states has been preserved through the rulings in two landmark cases- *Seminole Tribe of Florida v Florida*¹⁰⁰ and *Alden v Maine*¹⁰¹ that have interpreted the US Constitution as incorporating the principle of state sovereign immunity which is applicable both in federal and state courts. These cases held that the Eleventh Amendment was to be construed widely to accord sovereign immunity to the states that make up the Union. While the Congress can abrogate the operation of such state sovereign immunity by virtue of the Fourteenth Amendment in certain circumstances, by finding a constitutional basis for state sovereign immunity, these cases have limited the power of the Congress.

Most state laws seek to preserve the immunity of the state in tort through provisions which prohibit actions in tort being brought without governmental consent or which negate the liability of the state under various circumstances.¹⁰² Certain other statutes make the government liable only in particular

⁹⁶ 28 U.S.C. § 2680(c). Note that the following is not covered under this exception: “any claim based on injury or loss of goods, merchandise, or other property, while in the possession of any officer of customs or excise or any other law enforcement officer, if—

(1) the property was seized for the purpose of forfeiture under any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense; (2) the interest of the claimant was not forfeited; (3) the interest of the claimant was not remitted or mitigated (if the property was subject to forfeiture); and (4) the claimant was not convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law.”

⁹⁷ 28 U.S.C. § 2680(f).

⁹⁸ 28 U.S.C. § 2680(i).

⁹⁹ 28 U.S.C. § 2680(k).

¹⁰⁰ 517 U.S. 44 (1996).

¹⁰¹ 527 U.S. 706 (1999).

¹⁰² See Lawrence Rosenthal, ‘A Theory of Governmental Damages Liability: Torts, Constitutional Torts and Takings,’ 9 *University of Pennsylvania Journal of Constitutional Law* (2006-7) 797; Robert Leflar & Benjamin Kantrowitz, ‘Tort Liability of the States’, 29 *New York University Law Review* (1954) 1363. Exceptions include California (distinction between proprietary and governmental functions is retained), Connecticut (legislative waiver of sovereign immunity in tort in several areas), Michigan and New York.

cases. In addition, most state laws also contain limitation of liability clauses which restrict the quantum of damages that can be recovered from the government or public employee.¹⁰³

There also exist state laws which prohibit actions being brought against public employees for tortious acts or omissions while acting in the course of their employment.¹⁰⁴ Public employees are often given protection from liability through provisions which require indemnification or payment of judgment debts by employers for torts committed by employees in the course of their employment, except in cases of serious individual misconduct.¹⁰⁵

Thus, the US position, while it has waived sovereign immunity of the federal government for certain categories of torts under the FTCA is far from satisfactory insofar as liability of state governments in tort is concerned.

(E) [Constitutional torts: Bivens actions](#)

The rule in the United States is that immunity of the federal government is preserved against actions for damages arising out of constitutional torts committed by its employees. This is unlike the position in India where a constitutional remedy is provided under A.32 and A.226 of the Constitution. However, since the landmark ruling in *Bivens v Six Unknown Named Agents*,¹⁰⁶ a remedy in damages can be given against federal officials when there is a violation of the plaintiff's constitutional rights. Such a remedy for monetary damages is available when there is no adequate alternative remedy. The scope of such actions is circumscribed by the requirement of an actual or compensable loss under common law. Further, the official also enjoys qualified immunity from liability which is available as long as his actions do not violate clearly laid down constitutional rights or statutory rights which would have been known to a reasonable person.

The states also enjoy immunity from constitutional torts by virtue of the Eleventh Amendment, although the application of such immunity can be curtailed by the Congress under its powers to enforce the Fourteenth Amendment.¹⁰⁷ It must be noted that such immunity under the Eleventh Amendment does not protect state officials, who can be held personally liable for constitutional torts.¹⁰⁸

(F) [S 1983 Actions](#)

S 1983, USC provides for the liability of local governments and state and local government officials for deprivation of an individual's constitutional rights or statutory rights under federal law. However, the scope of such actions against municipalities is greatly restricted- municipalities can be held liable

¹⁰³ Rosenthal, *ibid*.

¹⁰⁴ *Ibid*, 804-812.

¹⁰⁵ *Ibid*, 812.

¹⁰⁶ 403 U.S. 388 (1971).

¹⁰⁷ Rosenthal, n 98, 816, 817.

¹⁰⁸ *Ibid*, 817.

only when injury is caused due to the execution of government's policy or custom.¹⁰⁹ S 1983 has not proven to be very effective- municipalities are often immune due to the 'policy or custom' requirement.¹¹⁰ The availability of the qualified immunity defence to officials in most cases ensures that actions against local or state officials are also often fruitless.¹¹¹

3.3. Law in France

(A) Background

The French law on state liability in tort has gradually evolved from limited immunity for the sovereign to that of absolute liability of the state. Immunity of the state was provided for by two provisions in the Constitution of the Year VIII: a) denial of jurisdiction to courts to try cases relating to acts of the administration; b) requirement of governmental consent for suing government agents, barring Ministers, for acts done in the discharge of their official duties.¹¹² The state was liable, according to the provisions of the Civil Code, only in case of torts committed due to the fault or negligence of its servants. Further, a distinction was made between sovereign acts of the state, for which it could not be held liable in tort and non-sovereign functions. The cumulative effect of these provisions was to act as a deterrent to litigation against the state.¹¹³

Following protests, this system of 'administrative guarantee'¹¹⁴ was done away with by decree in 1870. Thus, suits could now be brought against the state for acts of its employees or agents in administrative courts.

(B) Liability under administrative law

The development of French law on state liability in tort has been through case law. The *Blanco* case¹¹⁵ did away with the determination of state responsibility according to principles contained in the Civil Code- the Civil Code had fixed responsibility on the state only in case of fault or neglect and determined such responsibility according to the rules governing principal-agent or master-servant relationships.¹¹⁶ State liability in tort depended on a distinction between personal faults (*faute*

¹⁰⁹ *Monell v Department of Social Services*, 436 U.S. 658 (1978).

¹¹⁰ See 'Government Tort Liability', 111(7) *Harvard Law Review* (1998) 2009, 2013.

¹¹¹ *Ibid.*

¹¹² Harry Street, *Governmental Liability: A Comparative Study*, Issue 4 (1953) 57.

¹¹³ *Ibid.*

¹¹⁴ Frederick F. Blachly & Miriam E. Oatman, 'Approaches to Governmental Liability in Tort: A Comparative Survey' 9(2) *Law and Contemporary Problems* (1942) 182, 206.

¹¹⁵ Rec. Cons. d'Et 1873, Supp. 1, 61 as cited in Blachly & Oatman, *ibid.*

¹¹⁶ Blachly & Oatman, n 110, 206.

personnelle) carrying only personal liability of the officer, and service- related faults (*faute de service*), for which the remedy lay against the state *alone* in the administrative courts.¹¹⁷

It is of specific interest in the Indian situation that a distinction between acts of public power (*actes d'autorite*) and acts of management (*actes de gestion*) or business acts was also made to restrict the liability of the state- the state was not liable for the former category of acts.¹¹⁸ However, unlike in India where such a distinction continues to be made, in France it was slowly rendered redundant: state responsibility was established, through judicial decisions, for almost all administrative acts without considering whether the act involved the exercise of a sovereign or non-sovereign function.¹¹⁹ The state was held liable for the tortious acts of its officers irrespective of whether they were engaged in law enforcement, military activities, tax collection activities or in activities of a business nature.¹²⁰

From 1919 onwards, the regime of state liability changed to one based on risk. Thus, the present position is that a state, its departments, communes and public establishments can be held liable for the risk involved in its operations, even in the absence of fault on the part of the body.¹²¹ The affected individual need only show that injury was caused due to the functioning of the body.¹²² Thus, French law now takes a very liberal stance towards the issue of governmental liability in tort.

¹¹⁷ *Pelletier*, Rec. Cons. d'Et 1873, Supp. 1, 118. Generally, a *faute de service* is a fault resulting from the failure or mistake in physical or mechanical activities undertaken by the government employee and is intricately connected with the service itself. However, personal liability of the officer alone arises where the act exceeded his jurisdiction, where it was a purely personal act to be separated from the official act, where the act constitutes a crime etc. The officer is also liable personally when he acts with wilful malice or gross negligence or outside the scope of his official duties (Blachly & Oatman, n 110, 209-10).

¹¹⁸ Blachly & Oatman, n 110, 208.

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.*

¹²¹ *Ibid.*, 209.

¹²² *Ibid.*, 209.

4. ATTEMPTS AT LAW REFORM IN INDIA

The project of reform of the law relating to vicarious liability of the state in tort was taken up as early as 1956. However, after an aborted attempt at reform through legislation, this project has languished. This section tracks these attempts and the key reforms advocated therein.

4.1. First Report of the Law Commission of India (1956)

The Law Commission of India (“LCI”) in its First Report acknowledged the uncertainty that existed with regard to liability of the state for tortious acts of its servants. The decision of the Madras High Court in *Hari Bhanji* was approved by the Commission as laying down the correct position on the extent of state liability. Acknowledging the increased participation of the State in commercial activities and its public welfare initiatives, the Commission recommended that the extent of liability of the State should be the same as that of a private employer, subject to certain limitations. The proposals of the LCI are taken up in the next section.

Following the recommendations of the LCI, a draft Bill was introduced in the Lok Sabha in 1967, but this was aborted with the dissolution of the Lok Sabha in 1971.

4.2. Consultation Paper, National Commission to Review the Working of the Constitution (2001)

The National Commission to Review the Working of the Constitution (“NCRWC”) came out with a Consultation Paper (the “NCRWC Paper”) in 2001 which surveyed the decisions from the pre-Constitution era and judicial developments post-1950. The Paper noted that the present position was highly unsatisfactory for several reasons- a) it was unjust that a state, a political organisation set up for the citizens, absolve itself of any liability for harm caused to the citizens through its wrongful acts; b) A. 300, on the basis of which vicarious liability is currently fixed on the state, adopted the position laid down in old colonial law and therefore, should not form the basis for subsequent legal developments; c) given the changing boundaries of states, it is difficult to determine the “corresponding Province” or “corresponding Indian state” as provided for in A.300; d) the post-Constitution decisions on the extent of state liability in tort have adopted conflicting stances in applying the distinction between sovereign and non-sovereign functions.

The Paper echoed the general principles on the extent of state liability proposed in the Law Commission’s Report with a few modifications to the exceptions to such liability proposed therein.¹²³ These modifications are discussed in the subsequent section.

There have been no further developments in this area with the result that the position on vicarious liability of the state continues to be based on the provisions of the Government of India Act, 1858 as adopted by A.300.

¹²³ For the NCRWC’s views on the proposals given in the LCI Report, see pp. 688-692, NCRWC Paper.

5. RECOMMENDATIONS

From a normative standpoint, corrective justice demands that the state compensate individuals who have been harmed by the activities of its servants. This is also in line with principles of distributive justice which seeks to justly distribute the burden of losses including risks. Vicarious liability of the state as an employer can be justified on the basis that the state which exercises a degree of control over and stands to gain profits from the activities of its employees/agents must also bear the risk that their conduct may harm others.¹²⁴ This proposition holds even more force in the modern context, where the activities of the state have expanded to include trade, industry, provision of services, etc.

In the modern context, the degree and manner of interaction between the state and its citizens have increased the risk of harm to citizens through the wrongful acts or omissions of public servants. Consequently, there is no logical justification why the state should be treated differently from any private employer for the purposes of liability for tortious acts of its servants. However, this position did not find favour for a long time in many jurisdictions due to the special status of the state as the sovereign.

5.1. Summary of Position in Other Jurisdictions

The jurisdictions discussed in the previous section initially accorded blanket immunity to the sovereign against litigation in tort. Concessions were made as a matter of grace only: in the UK, the practice was of the Crown meeting the personal liability of the tortfeasor, while the US had a private bill procedure for obtaining relief in case of tortious acts of public officials. In France, the concession was given in the form of governmental consent to bring an action against the state for the tortious acts of its employees, in the administrative courts. However, this requirement, in practice, rendered the remedy ineffective as such consent was seldom given.

However, in each of these jurisdictions, the need to restrict sovereign immunity and to prevent injustice through the acts of public servants was ultimately recognised. Eventually, through suitable legislative intervention,¹²⁵ these jurisdictions restricted sovereign immunity and permitted the imposition of state liability for tortious acts of public servants. The scope of sovereign immunity still extended to certain spheres such as acts of state, defence of the realm, executive policy-making etc that ensured reasonable freedom to the state to perform its functions.

5.2. Summary of Position in India

In India, the immunity enjoyed by the erstwhile East India Company in relation to the acts done by it as the delegate of the Crown in India mutated into a similar sovereign immunity for the Government of India in relation to its sovereign functions. The crux of this legal regime, plainly enough, was the distinction between sovereign and non-sovereign functions - i.e. the 'sovereign powers' test.

¹²⁴ See *Clerk and Lindsell on Torts* (Michael Jones & Anthony Dugdale eds, 20th edn., 2010) Ch. 1 paras 1-14, 1-15.

¹²⁵ In the case of France, such legislative intervention was backed by judicial decisions.

(A) Rationale for the 'sovereign powers' test

While the 'sovereign powers' test came about on account of historical reasons, it still finds some justification in the present context on account of practical benefits. The 'sovereign powers' test, it may be argued, serves as a flexible tool to protect the state from unfair litigation that would otherwise interfere with the performance its functions. This approach ensures that the state can pursue its myriad functions with a relative degree of security.

(B) Problems with the 'sovereign powers' test

The flexibility of the 'sovereign powers' test is both a benefit and a serious disadvantage. While such flexibility ensures that the courts are able to intervene in suitable cases to protect the state from unfair litigation, it also creates a lot of uncertainty about the scope of state liability for tortious acts of public servants. This uncertainty is problematic in itself, but additionally, it manifests itself in the form of unjust decisions that effectively deprive citizens of compensation for harm suffered at the hands of public servants. The decision in *Kasturilal* is one such unjust decision. This uncertainty also results in the wastage of judicial energy in trying to prescribe a meaningful distinction between sovereign and non-sovereign functions and to apply or modify such distinction to ensure fair outcomes. In fact, it would perhaps be too modest to state that distinguishing between sovereign and non-sovereign functions has proved to be a difficult task for the courts in India. Consequently, the enactment of suitable legislation to define state liability for tortious acts of public servants appears to be the best solution for the resolution of this issue.

5.3. Passage of legislation on vicarious liability of the state in tort

The Supreme Court has often reiterated the need for a comprehensive legislation addressing tortious liability of the state and its instrumentalities.¹²⁶ The proposal to enact legislation on state liability for tortious acts of public servants has also been mooted by the LCI and the NCRWC. The NCRWC has provided its suggestions in the form of comments on the proposals mooted by the LCI. Consequently, this section draws on recommendations of the LCI and NCRWC and international practices discussed in section 3 to specify key principles that should be reflected in legislation.

(A) Liability of the state

The main proposal of the LCI was that the extent of the vicarious liability of the state should be akin to that of a private employer, subject to certain exceptions. Consequently, any defences available to a private employer must also be available to the state. We would support this recommendation for reasons for fairness and consistency.

a) Liability of the state in general

- The state should be liable for torts committed by its employees and agents while acting within the scope of their employment. We would like to specify that there should be no exception from liability of the state for intentional torts committed by its employees or agents as long as they are acting within the scope of employment. There is no rational basis

¹²⁶ See *Vadodara Municipal Corporation v Purshottam V Murjani* 2014 (10) SCALE 382; *Kasturilal Ralia Ram Jain v State of Uttar Pradesh* AIR 1965 SC 1039.

to distinguish between the commission of an intentional tort and an unintentional tort by a public servant.

- The state should be liable for the acts of independent contractors only in those limited circumstances that a private employer can be held liable under common law- such circumstances include non-delegable duties placed on the employer by virtue of common law or statute, ratification of the independent contractor's tort by the employer etc.¹²⁷ This is significant as the state now provides a wide range of public services and operations such as building of highways, dams etc through delegation to independent contractors. Where the employment of such independent contractors results in a breach of duty owed by the state itself, the state should be held vicariously liable in tort.
- The state should be liable for those breaches of duties which are owed to employees/agents as an employer.
- The state should be held liable for breaches of duties under general law attached to the ownership, occupation, possession or control of immoveable property.

b) Liability of the state for breach of statutory duties

- Generally, the position in law is that a master is not responsible for acts of its servants done in discharge of a statutory duty. The rationale for the same is that when a person is acting in discharge of statutory duties, his actions are not subject to the control of the employer. This position should be followed in the case where the state is the employer. However, the state should be liable in certain cases for the actions of its servant. In this regard, we support the proposals made in the LCI report below.
- The state should be liable for the breach of statutory duty imposed on the state or its employees which causes damage to the claimant, subject to the provisions of such statute pertaining to liability for such breach.
- The state should be liable for the acts or omissions of its employees in discharge of statutory duties if they act negligently or maliciously. In this regard, it is not sufficient that the act be done in good faith. This principle should be followed even in cases where discretion is conferred on the state or employee in the performance of the statutory function. Protective clauses in statutes giving immunity to the state for acts of its servants done in good faith should be appropriately restricted. We would like to point out that this would serve to avoid situations like *Kasturilal* where although the seizure of property was in exercise of statutory power, due to the negligence of the employee of the state, property was stolen.

(B) Exceptions to state liability

This note had considered exceptions to state liability in tort provided for legislations in the UK and the US. The US takes a very restrictive approach to state liability in tort, very significantly taking

¹²⁷ Clerk and Lindsell, n 1, Chapter 6.

even intentional torts and discretionary functions out of the purview of state liability. The UK approach provides better guidance in this regard. The LCI had also recommended a comprehensive list of exceptions to state liability in tort, considering the positions in these two jurisdictions.

This note shall consider some of the key exceptions to state liability that ought to be incorporated into legislation, drawing from the proposals of the LCI and the suggestions of the NCRWC. It is not the purpose of the note to lay down exhaustively all exceptions to state liability.

- Acts of state- an exception should be provided for executive acts performed by the state in the course of its relations with another state or its subjects as recommended by the LCI.
- Acts done by armed forces- as the LCI recommended, such an exception should cover claims relating to combatant acts done by armed forces in times of war. Further, there should be an exception for liability of the state for acts or omissions of one member of the armed forces which cause death or injury to another member of the force while on duty. Such immunity is necessary as it might not be practicable to impose a duty of care on the soldier or on the state in conditions of war. There should also be an exception for acts done by the Union in exercise of their powers relating to the defence of the country and training of armed forces as provided for in s 11 of the CPA and the LCI proposals.
- Judicial acts- s 3 of the Judges (Protection) Act, 1985 (“JPA”) offers judges protection from civil and criminal liability in relation to acts or things done or words spoken in the performance of or purported discharge of his official or judicial duty or function. Such protection extends to quasi-judicial authorities who are empowered by law to give a binding judgment by virtue of s 2 of the JPA. In such cases, an exception from tort liability is warranted.
- Acts relating to political functions of the state- The LCI recommends immunity from state liability for acts done in relation to political functions of the state such as a) foreign affairs; b) diplomatic, consular and trade representation; c) United Nations Organisation; d) participation in international conferences, associations and other bodies and the decisions taken there; e) negotiation, entry into and implementation of treaties, agreements and conventions with other countries; f) war and peace; g) foreign jurisdiction; h) acts done by the President or Governor in relation to their constitutional powers to summon, prorogue or dissolve the Legislature or in exercise of power to issue proclamations under the Constitution; i) acts or omissions done during a Proclamation of Emergency resulting from a threat to national security. Such immunity is necessary to enable the legislature and the executive to carry out their functions and engage in policy-making effectively without any hindrance. However, this should be subject to state liability for acts done in breach of statutory duties in these areas.
- Discretionary functions or duties of government agencies or employees- a limited exception for discretionary functions, as provided for under US law is justified in order to prevent interference into policy decisions and judgments taken by government agencies and employees. This enables them to make policy decisions on various governmental activities and operations without fear of litigation for the decisions taken by them as most decisions taken by the government affect citizens in some way or the other. However, this exception

must be restricted to prevent the state escaping liability for damage caused due to the exercise of such discretion by its servants in a malicious or negligent manner.

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- Acts of employees of corporations owned or controlled by the state - while the state carries out a number of activities and public services through government corporations, regard must be had to the separate legal personality of the corporation from that its shareholder. Thus, the state, like any other private entity which sets up a corporation, must not be held liable for the acts of the corporation's employees, subject to cases where the corporate veil may be pierced. In such cases, the corporation can be held liable in tort for the acts of its employees.

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Continental Approaches

The concepts of sovereign immunity and state liability in tort have evolved very distinctly in various continental jurisdictions. For example, under German tort law, codified under the German Civil Code, there is no rule of sovereign immunity. Therefore, public authorities are held responsible for harm caused by individuals acting as official representatives while exercising sovereign functions. According to s 839(1) of the *Bundesgesetzblatt* (“BGB”), if an official intentionally or negligently commits a breach of official duty which is incumbent upon him towards a third party, that third party may seek compensation from the damages from the official, provided he cannot obtain relief elsewhere, such as through social security, etc. S 839(1) of the BGB, which is private law, read in conjunction with A.34 GG of the Basic Law of Federal Republic of Germany renders the state employer liable for the tortious acts of its officials.¹²⁸ The provisions impute liability for the acts of the official to the state or the public body that employs him, in case the officer violates his official duty, which must be discerned by looking into the purpose of the duty.¹²⁹

Under Spanish law, the public administration is strictly liable for the acts and omissions of public servants. Individuals have the right to be compensated by the corresponding public administration for the damage suffered by any of their goods and rights, so long as the damage arose out of the normal or abnormal functioning of the public services.¹³⁰ The fault is ascribed on a no-fault basis and is therefore much broader than laws in other jurisdictions in the continent.¹³¹ In Italy, liability of the State in tort has seen significant developments through a decision of the Court of Cassation. In a landmark decision in *Cassazione Sezioni Unite, no 500*, the Italian courts held that civil courts may hold public authorities liable to pay damages for legal injuries caused to private parties. Subsequently however, a new legislation was enacted overruling the law laid down by *Cassazione* inasmuch as it attributed exclusive competence to determine liability and award damages to administrative courts.¹³²

Judicial decisions in the Netherlands have established a system of liability, under administrative law, for legal acts of public authorities, known as the ‘egalite principle’, which is based on the premise of equal apportionment of public burdens. This principle prescribes that public authorities exercising a public task must compensate damages which “reasonably should not be borne by the individual who suffered the damage”. Hence, the ‘egalite principle’ ensures that public authorities compensate

¹²⁸ Paul Giliker, *Vicarious Liability in Tort: A Comparative Perspective*, (2010) 52.

¹²⁹ Gerald Spindler and Oliver Riekers, *Tort Law In Germany*, (2011) 66.

¹³⁰ S.139 of the Ley 30/1992, de 26 de Noviembre, de Regimen Juridico de las Administraciones Publicas y del Procedimeinto Administrativo Comun, modified by Ley 4/1999, de 13 de Enero (Organic Law regulating Public Administration).

¹³¹ Pablo Salvador Codrech et al., *Vicarious Liability And Liability For The Actions Of Others*, <http://www.indret.com/pdf/079_en.pdf>.

¹³² Giuseppe Dari-Mattiacci, Nuno Garoupa & Fernando Gomez-Pomar, n 45.

disproportionate losses suffered by victims. Private law, in the Netherlands acts as a safety net, for it enables victims to obtain compensation if the administrative law offers no means of recourse.¹³³

¹³³ Esther Engelhard et al., *‘Égalité’ as the Foundation of Liability for Lawful Public Sector Acts*, <www.utrechtlawreview.org/index.php/ulr/article/download/284/285>.



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