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LIABILITIES OF STATES AND REMEDIES AGAINST IT: A COMPARATIVE STUDY BETWEEN INDIA, UNITED KINGDOM, USA AND FRANCE

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INTRODUCTION

The concept of Constitutionalremedy usually comes from the DOCTRINE OF VICARIOUS LIABILITY but unlike the concept of common tort here the liability falls on the state for the wrong doings of its officials. The legal maxim '*respondat superior'* is usually used by the courts in deciding such cases where in the states are held liable. This is made in use so that the state can held liable for the action of its officials and in order to check the state from abusing its power.[1]

We cannot say that state is not a constitutional entity, by constitutional entity it means that the state which is a creation of the constitution can be held liable under certain circumstances; so as to say that states are under the purview of constitution and cannot work ultra vires or are totally immune in the court of law. In olden days state took the liberty of being free or safe from being held liable for maximum actions of its officials. When a servant commit's a tort in the course of his employment, the master is very often guilty of what German lawyers call "Culpa in eligendo" or "Culpa in inspiciendo" in order that the doctrine of vicarious liability may apply, the conditions that need to be fulfilled are that firstly, the relationship of master and servant must exist between the defendant and the person committing the wrong complained of. Secondly, the servant must in committing the wrong have been acting in the course of his employment.[2]

[1].Kashyap C Subash, An introduction to India's constitution ,3rd edition, 2002
[2]Prarthana, Vicarious Liability of State in Sovereign Functions, http://www.legalservicesindia.com/article/580/Vicarious-Liability-of-State-in-Sovereign-Functions.html

INDIAN SCENARIO:

Under the Constitution of India two Articles viz Article 294 and Article 300 contain explicit and implicit provisions regarding tortious liability of State and suit against it. Both the Articles come under Chapter III of "Part XII of the Constitution of India which is headedas Property Contracts. Rights, Liabilities, Obligations and Suits". Article 294 (b) of the Constitution of India provides that the liability of Union Government or State Government may arise out of any contract or otherwise. The word "otherwise" would include various liabilities including tortious liability also. This Article thus constitutes and transfers the liabilities of Government of India and Government of each governing province in the Union of India and corresponding States. Article 300 of the Constitution of India provides that State can sue or be sued as juristic personality. It reads as under:

"The Government of India may sue or be sued by the name of the Union of India andthe Government of a State may sue or be sued by the name of the State and may, subject toany provisions which may be made by Act of Parliament or of the Legislature of such Stateenacted by virtue of powers conferred by this Constitution, sue or be sued in relation to theirrespective affairs in the like case asthe Dominion of India and the corresponding Provincesor the corresponding Indian States might have sued or been sued if this Constitution had notbeen enacted.

In **P&O Steam Navigation Co. v. Secretary of State.**[3]The principle of this case holds that if any act was done in the exercise of sovereign functions, the East India Company or the State would not be liable. It drew quite a clear distinction between the sovereign and non-sovereign functions of the state.As the facts of the case go, a servant of the plaintiff-company was proceeding on a highway in Calcutta, driving a carriage which was drawn by a pair of horses belonging to the plaintiff. He met with an accident, caused by negligence of the servants of the Government. For the loss caused by the accident, the plaintiff claimed damages against the Secretary of State for India.The Supreme Court observed that the doctrine that the 'King can done wrong', was applicable to the East India Company. The company would have been liable in such cases and the Secretary of State was thereafter also liable. This arose out of the section 65, Government of India Act, 1858, which equated the liability of the Secretary of State for India with that of the East India Company. Distinguishing between sovereign and non-

[3](1861) 5 Bom. H.C.R. App. I.

sovereign functions it was held that if a tort were committed by a public servant in the discharge of sovereign functions, no action would lie against the Government – e.g. if the tort was committed while carrying on hostilities or seizing enemy property as prize.**A**fter 1970 a series of good judgements were made on the cases related to state liability. In case of any medical negligence, if the doctor acting in the course of employment of the Government Hospital, the Government is liable for the negligent act as it come under the preview of State Liability.[4]

Again in **State of Rajasthan v. Vidyawati**[5] the respondents filed a suit for the damages made by an employee of a State and the case questioned whether the State was liable for the tortious act of its servant – The Court held that the liability of the State in respect of the tortious act by its servant within the scope of his employment and functioning as such was similar to that of any other employer.

The facts of the case are as follows : the defendant was an employee of state government who on while driving the car back along a public road, in the evening of February 11, 1952, knocked down one Jagdishlal, who was walking on the footpath by the said of the public road in Udaipur city, causing him multiple injuries, including fractures of the skull and backbone, resulting in his death three days later, in the hospital where he had been removed for treatment. The plaintiffs who are Jagdishlal's widow, Vidyawati and a minor daughter, aged three years, through her mother as next friend sued the said Lokumal and the State of Rajasthan for damages for the tort aforesaid. They claimed the compensation of Rs. 25,000/- from both the defendants. The state was as much as liable as its employee when it comes to negligence in the course of employment[6].

Then came the famous case of KasturiLal v State of Uttar Pradesh[7], in this case, the plaintiff had been arrested by the police officers on a suspicion of possessing stolen property. Upon investigation, a large quantity of gold was found and was seized under the provisions of the Code of Criminal Procedure. Ultimately, he was released, but the gold was not returned, as the Head Constable in charge of the maalkhana, where the said gold had been stored, had absconded with the gold. The plaintiff thereupon brought a suit against the State of UP for the

[4] Kumar, rakesh, Doctrine of Constitutional Torts: Evolution and Evaluation, 2009, p.3
[5]AIR 1962 SC 933.
[6]Rao.Subhkanya, Vicarious Liability of State, https://www.lawctopus.com/academike/vicarious-liability-state/
[7]AIR 1995 SC 1039.

return of the gold or alternatively, for damages for the loss caused to him. It was found by the courts below, that the concerned police officers had failed to take the requisite care of the gold seized from the plaintiff, as provided by the UP Police Regulations.

The trial court decreed the suit, but the decree was reversed on appeal by the High Court. When the matter was taken to the Supreme Court, the court found, on an appreciation of the relevant evidence, that the police officers were negligent in dealing with the plaintiff's property and also, that they had not complied with the provisions of the UP Police Regulations. However, the Supreme Court rejected the plaintiff's claim, on the ground that "the act of negligence was committed by the police officers while dealing with the property of Ralia Ram, which they had seized in exercise of their statutory powers. The power to arrest a person, to search him and to seize property found with him, are powers conferred on the specified officers by statute and they are powers which can be properly categorized as sovereign powers. Hence the basis of the judgment in KasturiLal was two-fold - The act was done in the purported exercise of a statutory power. Secondly, the act was done in the exercise of a sovereign function.

Another landmark judgement was NilabatiBehra V. State of Orissa[8], in awarding compensation to the petitioner for the death of her son in police custody. The court held that a claim in public law for compensation for violation of human rights and fundamental freedoms, the protection remedy for enforcement and protection of such right, is distinct from and in addition to the remedy in private law damages for tort. The court expressly held that principle of sovereign immunity does not apply to the public law remedies under Article 32 and Article 226 for the enforcement of fundamental rights. The KasturiLal case ratio is confined to private law remedies only.

Thus in India, the state liability solely depends on the scope of sovereign and Non –Sovereign functions of the state. But there is no clear distinction mentioned between the two and Supreme Court has tried to bring maximum of Governmental action under the purview of Non-sovereign function so that the state doesn't go out its jurisdiction. The doctrine of sovereign immunity has no relevance in the present-day context when the concept of sovereignty itself has undergone drastic change.

[8]1993 SCR (2) 581

POSITION IN UNITED KINGDOM:-

There were two ancient but fundamental rules prior to the Crown Proceedings Act,1947 governing the law relating to the liability of the Crown and its servants: (i)The rule of substantive law that the King can do no wrong, and (ii) the rule ofprocedural law that the King could not be sued in his own Courts. The survival ofthese rules into the twentieth century meant that till 1st January, 1948 the Crowncould be sued neither in respect of wrongs that had been expressly authorised norin respect of wrongs committed by Crown's servants in the course of theiremployment.[9]

(i)The King can do no wrong:-The maxim that the "King can do no wrong" is an ancient and cardinal principle, but it does not mean that the King is above the law and that everything he does is necessarily just and lawful. It has two meanings according to the great commentator Blackstone. Firstly, that whatever is exceptionable in the conduct of public affairs is not imputed to the King, nor is he answerable for it personally to his people for this doctrine would totally destroy that Constitutional independence of the Crown, which is necessary for the balance of Power in free and active and therefore compounded Constitution: and secondly, it means that the prerogative Of the Crown extends not to do any injury; it is created for the benefit of the people and therefore cannot be extended to their prejudice. LudwickEhrlich, however, opines that the maxim has been misunderstood even by Blackstone. The maxim merely meant that the King was not privileged to do wrong. If his acts were against the law, they were injuria.

(ii) King could not be sued in his own Courts:-The rule that the King could not be sued in his own Courts was based on the feudal vestige that a feudal Lord could not be held liable in his own Court. The social conditions of England were responsible for the non-accountability of the Crown. The feudal lords were Supreme. The law was of a highly archaic type. The Lords exercised their powers and even protected their men who had committed the offences. According to Street, "Just as no Lord could be sued in the Court whichhe held to try the cases of his tenants, so the King, at the apex of the feudal pyramid and subject to the jurisdiction of no other Court, was not suable". A judgement of the King's Court in 1234 proclaimed "our Lord the King cannot be summoned or receive a command from anyone ". Thus, under

[9]TORTIOUS LIABILITY IN ENGLAND, USA AND FRANCE,https://shodhganga.inflibnet.ac.in/bitstream/10603/126943/11/11_chapter%203.pdf, p 1 & 2

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Common Law no human agency could enforce the law against the King. He could be a plaintiff but he could not be made a defendant.

Though the King was at the fountain of the justice system in olden days but he could not refuse to redress wrong when petitioned by his subjects. The early remedy for tort against the king was not through writ, but through a petition. In essence the 'Petition of right' was a document in which the suppliant sets out his right and its infringement and prays the King to do him right and Justice. The Crown's consent was signified by endorsing the petition 'Let Right bedone', so that after obtaining this fiat the Plaintiff could obtain the judgement of one of the regular Court.

This was in Banker's case[10] , in which various bankers attempted to sue the Crown for payments due on loans to Charles II on which that King had defaulted. The case turned on question whether the petition of right was the proper procedure. The Court of exchequer chamber answered in the positive. No further case of importance arose until 1874, when an inventor of a new kind of heavy artillery sued for a reward promised to him by the War office in the Thomas v. The Queenwhich finally settled the point that judgement could be given against the Crown on a petition of right for breach of contract made by the Crown's agent.

Liability under the Crown Proceedings Act, 1947:-

With the advancement of civilisation, the position of the crown also changed. A large number of accidents involving State transportation during the Second World War, and the fear of nationalisation of many industries by the Government so as to lead an increase in the Governmental immunities together with the outcome of Adams and Royster cases, led to the introduction in the House of Lords at Government sponsored Crown proceedings Bill mostly based on 1927 Draft Bill. It became a law on 31st July, 1947 and came into operation on 1st January, 1948.

Section 1 of the Act provides where any person has a claim against the Crown after the commencement of this Act,and,subject to the grant of his majesty's Fiat, by petition of right , or might have been enforced by a proceeding provided by any statutory provisions repealed by this Act, then, subject to the provisions of this Act, the claim may be enforced as of right, and

[10](1690-1700), 14 S.T.I. cited by Holdsworth W.S P.282

without the fiat of His Majesty, by proceedings taken against the crown for the purpose in accordance with the provision of the act. Since this section does not create a new cause of action, and therefore, the limitations on the scope of the former petition of right continue to apply to this right of action.

Section 2 deals with liability of the Crown in Tort. Section 2(1) provides that subject to the provision of the Act, crown shall be subject to all liabilities in tort which, if it were a private person of full age and capacity, it would be subject to:-

a) in respect of torts committed by its servants or agents;
b) in respect of any breach of those duties which a person owes to his servants or agents at common law by reason of being their employer; and
c) in respect of any breach the duties attaching at common law to the ownership, occupation, possession or control of property:

Provided that no proceedings shall lie against the Crown by virtue of paragraph(a) of this subsection in respect of any act or omission would apart from the provisions of this Act have given rise to a cause of action in Tort against the servant or agent or his estate.

Other than section 2, other relevant sections in relation to liability of Crown in tort are Sections 3,4,5,6,7,10,11,38,39, and 40.[11] Thus the Crown now has been equated with, for the purpose of litigation as nearly as possible, a private person with a few and limited escape clauses.

POSITION IN FRANCE:-

Today the French 'droit administrat if presents itself to the. world as a fully developed system of administrative liability. As schwartzputs it: "Not only the French system has been able to free itself from all traces of the doctrine of sovereign immunity but it has gone much further than to make the state liable for its torts on the same basis as individual citizens. The private citizen in France is still liable primarily for the damages caused by his faults. The State in France on the other hand, is no longer liable only, or even primarily, on the basis of fault. The rule now generally applied by the Conseild 'Etat is that of absolute liability. The French State is responsible in practically every case where damage has been caused by its acts".

Conseild'Etat: Under the principle of separation of powers, France set up the Conseil d' Etat

[11]SINGH R.K, Liability of the States for Torts Committed by its Servants: Public law and Private Law Perspective, GNLU Journal of Law, Development and Politics, vol.6, Issue 1, April 2016 page no. 26

(Council of State). It is the highest Court in France for issues and cases involving public administration. It is the Court in which French citizens may bring Claims against the administration, though since 1953 such claims originate in the regional administrative tribunals of first instance and appeals are taken to the Conseild'Etat. Until the nineteenth century France denied any State liability in common with the rest of European Counties. Its citizens, however, are allowed to sue officials with the consent of the Head of Administration by statutes of 1789 and 1790. In order to end too much interference of the judiciary, the Constitution of the year VIII denied the judiciary the right to exercise jurisdiction over the acts of administration, which later became the Keystone of the State liability in tort, in France.

The Conseild'Etat which was free to frame its own principles of State responsibility first worked out the distinction between service fault and personal fault. The State was liable in case of 'service fault' and the official can be sued in case of 'personal fault'. Despite the excellent distinction between service and personal faults, the citizens were deprived of compensation in many deserving cases. The administrative Courts might hold that there is no service-fault and the Civil Courts may find no personal fault, in a particular case. This led to formulation of the theory of combination of fault which was explained in Anquet[12], In this case a visitor to a post office was assaulted and had his leg broken by two members of the post office staff, because he left by the staff entrance, the entrance for the public have been prematurely closed. The Court found two distinct faults namely (i) there was a service-fault in the premature closing, and (ii) there was personal-fault in the unwarranted violence of the postal staff. The Conseild'Etat found that-it was this 'cumul' of faults which occasioned the complainant's injury and held the State liable not for personal fault but for service-fault in closing the exit before the official time.

Liability without Fault: - (Theory of risk): The Conseild 'Etat has built in recent years a general principle of liability without fault, based upon the theory of risk. The rationale behind such liability according to Duguit was that... "the activity of the State is carried on in the interest of the entire community; the burden that it entails should not weight heavily on some than on others. If then State action results in individual damage to particular citizens, the State should make redress, whether or not there be a fault committed by the public officers concerned. The State is in some ways, an insurer of what is often called social risk". State responsibility on the ground of risk has been identified in various spheres of State activities. Some of the typical categories are: (i) Risk arising from dangerous operations or risk in the neighbourhood; (ii)

12. C.E. 3 February, 1911

Risk of employment; (iii) Risk factor, judicial acts and its execution; (iv) Risk factor and legislative acts; and (v) Risk factor in cases of statutory liability.

Thus, In the French legal system the doctrine of sovereign immunity or State irresponsibility has been replaced by a broad principle of State's liability in all cases, where a citizen has been inflicted with injury by administrative action. The maxim that the 'King can do no wrong' has been superseded by the maxim that the 'State can do wrong' and as a honest person, it will seek to repair damages, caused by its wrongful acts and it will hot try to shirk its liability by taking refuge behind any dogma of sovereign immunity. Based upon the twin principles of fault and risk, the tortious liability of the State has been given a more coherent shape than its counterpart in the common law countries. The French administrative Courts with Conseild'Etat at their head had been successful in subjecting the administration to the Rule of Law.

POSITION IN UNITED STATES:-

The Doctrine of sovereign immunity also prevailed in the United States as well. It was the defence protecting the United States from suit. Under US legal system, this doctrine provided that a sovereign state could be sued only to the extent that it had consented to be sued and that such consent could be given only by legislative branch. Thus, when personal injuries were inflicted by government through the actions of its employees, the ordinary rules of compensation did not apply unless government took special action to allow itself to be held liable.[13] The remedy by way of personal liability was futile where the official doing a wrong was not financially sound enough to pay adequate compensation to the aggrieved party. The United States found a solution to these problems by enacting the Federal Tort Claims Act 1946 which set aside a major chunk of sovereign immunity. The law made the United States liable for tort claims inthe same manner and to the same extent as a private individual under like circumstances. However it provides a number of exceptions in which liability can be evaded. Most of these exceptions 'exempt specific administrative functions or agencies in addition to all claims arising in a foreign country. Moreover, it is provided that there is no liability for intentional torts. Thus jurisdiction of the courts is denied over any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit or interference with contract rights. Thus the aim of State liability which is sought to be achieved by the Act is considerably weakened by evading liability in

[13]SINGH R.K, Liability of the States for Torts Committed by its Servants: Public law and Private Law Perspective, GNLU Journal of Law, Development and Politics, vol.6, Issue 1, April 2016, page no. 32,33

deserving cases through the exemption clauses provided therein in the law. So there is no need to limit the scope of these exceptions by judicial interpretation or by amending the Act.[14]. Since its enactment The Federal Claims Act,1946 has been the legal instrument for compensating people who have suffered personal injury by the negligent act of employees of the US government. Three major exceptions, under which the United States may not be held liable, even in circumstances where a private person could be held liable under the state lae are: the feres doctrine which prohibits suits by military personnel for injuries sustained incident to service, the discretionary function exception, which immunises the united states for acts or omissions of its employees that involve policy decision; and the intentional tort exception, which precludes suits against the United States for assault and battery, among some other intentional torts, unless they are committed by federal law enforcement or investigative officers. The effect of these exceptions is retention of some space for sovereign immunity.

CONCLUSION:

The Crown Proceedings Act, 1947 is a land mark in the area of tortious liability of the Crown in England. For the first time the Act imposed upon the Crown a more or less general liability in tort and made the liability of the Crown correspond to that ofthe private individual. The Act, thus, has made a breakthrough in the Royal prerogative, upon which the Crown enjoyed immunities based on feudal background for a considerable period. However, it is too. much to hope that the Act has satisfactorily disposed of all the difficulties which had arisen in relation to theCrown as a litigant. “The Act makes the Crown liable in tort, but gives no clear answer to the question whether the Crown is bound by the statute reforming the law of torts in the absence of an express or necessarily implied provision to that effect.... The Act refers to ‘agents’, officers’ and ‘servants’ of the Crown, but the precise meaning of these terms is open to doubt”. In the French legal system the doctrine of sovereign immunity or State irresponsibility has been replaced by a broad principle of State’s liability in all cases, where a citizen has been inflicted with injury by administrative action. The French administration is affected by competing jurisdictions; the judiciary moves with persistent slowness and difficulties are faced in ensuring execution of Judgement. The Federal Tort Claims Act, 1946, is clearly a major step in the abrogation of sovereign immunity doctrine which prevailed in a country where there was no King since it ordained the republican Constitution in 1787.The Act tries to bring the law of Governmental liability in harmony with practical exigencies of modern

[14] PRASANNA, A Tortious Liability of Government, Cochin University Law Review Vol. IX, 1985 p. 413-435"

life, but it has not marched ahead of its English counterpart, the Crown Proceedings Act, 1947. The American Act is the most deceptive piece of legislation. With the three exceptions it mentions that almost immunes itself from any possible liability that may occur in normal circumstances to anyone. And in India where article 299 and 300 makes the state liable has been good thing by the framers of the Indian constitution but the main problem in India is with the no clear differentiation between sovereign and non-sovereign functions that they claim immunity upon. Every decision related to state liability in India is always upon the discretion of the court as since there is no clear differentiation between the functions the courts has to make the decision based on the pedigree of the case and decides the compensation. Even the first report by Indian Law Commission was made by on the very subject of state liability which shows the need to ascertain the liability of state so that they don't remain immune to a greater extent. Comparatively all the above countries discussed have managed to hold the state liable by making laws but in a larger sense there a loop holes and still to hold state liable is a difficult task since nothing concrete has been set up.