REPARATION OF THE WRONG: PROBLEMS AND PERSPECTIVES

[An Evaluation on the Compensation for the Breach of Fundamental Rights]

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Introduction:

The term 'reparation' denotes payments of money, restitutions of property, liberation of persons or other act by a person or State legally responsible for injury to another in order to repair that injury. The object of reparation is compensation of the victim and not punishment of the guilt. It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.[1] Restitution is the normal form of reparation. It is only when restitution is not possible, the aggrieved party is indemnified through damages or compensation.

Reparation is sometimes used in International law interchangeably with indemnity. Indemnity, however, has a narrower connotation in that, it refers only to monetary payments. Since World War I, the term 'reparation' has been used with reference to war claims in preference to the term 'war indemnity' reflecting the efforts of victorious belligerents to rest their demands on legal grounds. Among primitive people the victor in a war often paid reparation to the vanquished[2] on the theory that, the latter, having suffered the humiliation of defeat, should be compensated to assuage his wounded feelings, mitigate his desire for revenge, and thus restore conditions of peace. The situation after World War II resembled that common among primitive societies. The victor contributed heavily to building up the vanquished, though perhaps more from political expediency than concern for human welfare and general peace.[3]

Damages or compensation are to be measured by pecuniary standards.[4] Grotious has pointed out that money is the common measure of valuable things.[5] Compensation implies a complete restitution of the *status quo ante*.[6] The

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1 See Oppenheim, *International law, vol. I (English Ed.) at 353; Chorzow Factory(Indemnity) case,(1928) P.C. I. J.* series A, No. 17, p.29

2 For details see Phillipson, Coleman, *Termination of War and Treaties of Peace* (London 1916)

3 see Moulton, Harold G, and Pasualsky, Leo, *War Debts and World Prosperity (New York, 1932)*

4 see Arbitral Award in the *Lusitania case (1923), 7 RIAA 32 at 34*

5 V.M.Shukla, *Legal Remedies at 67 (1991)*

6 see *The Encyclopedia Americana*,Int. Ed. Vol.23, 384-6 (1974); see also *Norwegian Ship owner's Claim (1992), RIAA, 309 at 338.*

problems connected with reparations concern (1) the justification of such demands; (2) the measurement of reparations in accordance with the justifications; (3) the problems of collection; (4) distribution of available reparations among allies and individuals and (5) the problem of the economic effects of reparation payments etc. Theoretically speaking the consequences of the wrongful act of a State may be end less but there must be an end to its liability. State responsibilities during the wars have been generally accepted in Art. 3 of Hague Convention, 1907.

The wrongs or injuries giving rise to State responsibility may be of original and vicarious. It arises for international delinquency[7]; for injuries to aliens; for acts of private individuals; for acts of mob-violence[8]; in respect of injuries suffered by persons serving the U.N.[9]; for acts of insurgents; for contracts with foreigners; for acts of government organs[10]; for breach of treaty or contractual obligations[11]; in respect of expropriation of foreign property[12]; liability for acts of multi-national corporations[13]; and State responsibility for environmental pollution etc.[14] States have a right under international law to protect the life, liberty, property and honour of their nationals living abroad[15]. Similarly a State has a duty under its Constitution to protect its citizen's life, liberty and property at the domestic level. How far a State is liable for the torts committed by it or by its servants against citizens? Is the State vicariously liable for the torts committed by it, that has resulted in violation of fundamental rights of the citizens? Does the century old feudal doctrine "king can do no wrong" apply to this situation? In other words, how far the doctrine of 'Sovereign Immunity' is applicable here? Are the courts empowered to award compensation to the victim without recourse to 'vicarious liability'? Can the State proceed against the errant official subsequently? In the research paper all these issues raised above are addressed and solutions/suggestions are mooted at the end. The study is confined to the Indian context though the author traces the historical origin of State tortious liability in other Common law and Continental countries.

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7 Ian Brownlie, *Principles of Public International Law, second Ed. At 442 (1973)*

8 Charles, G.Fenwick, *International Law at 338 (Third Indian Reprint, 1971)*

9 Reparation for injuries suffered in the service of the U. N., *ICJ Rep at 174 (1949)*

10 W. Friedmann, *Law in Changing Society at 337 (1970)*

11 see *I' am Alone, PCIJ (1928) Series, A No. 17 (I) W.C.R. 646; Anglo Indian oil company case , ICJ Rep (1952) at 93.*

12 *General Assembly Resolution, 626(vii) of 21*st *Dec. 1952.*

13 See *Union carbide Corporation* v. *Union of India,* AIR, 1990 SC 1480;.*M.C.Mehta* v. *Union of India,* AIR1987, SC1086

14 see R.P.Anand *"Development and Environment: the case of Developing Country"*, IJIL Vol. 20 at 1 (1980) ; C.G.Weeramantry, "The Right to Development", *IJIL* vol. 25.

15 J.G.Starke, *Introduction to International Law*, at 234 (1994)

State Tortious Liability – Historical Retrospect:

In Roman thought, the Emperor was above the law. The whole power of the State was concentrated in one single individual namely, the ruler whose will is law. Gradually the king himself became the State[16]. Political theoreticians from ancient times through middle ages and modern times, have provided divergent and sometimes diametrically opposite ideas about the nature, functions and relationship with the individuals of the State. While Aristotle[17] had given justification for the origin of the State with an ethical purpose of preservation of life Hegel propounded the theory that the State is an end itself. Hegel's philosophy leads to the view that the State is immune, unaccountable and has no duty or liability to its citizens[18]. On the other hand, Locke[19] propounds that the State has got a duty towards the citizens if not liability. Adam Smith recognizes to a limited extent the liability of the State. It is Laski who clearly postulates duties and liabilities of the State and provides a firm basis for government liability.

The position in England:

According to Bodin, sovereignty was supreme power over citizens and subjects, un restrained by the laws. The sovereignty was absolute and bound by the law of God and of nature. He was not responsible for tortious acts of its agents in his own courts unless he consented for that[20]. The reason is based on the common law doctrine that "The king can do no wrong". Just as in feudal system no lord could be sued in the court, the king at the apex of the feudal pyramid was not sueable. Thus, the impact of feudalism is distinctly visible on the doctrine of sovereign immunity[21]. The social conditions of England were responsible for the non-accountability of the king. There the feudal lords were supreme. The theory that "the king can do no wrong" found expression in the *Blackstoneon Commentaries* as well[22]. The prerogative of the crown extends not to do any injury. It is created for the benefit of the people and therefore cannot be exerted to their prejudice[23].

Maitland, on the other hand, explained the maxim thus "English law does not provide any means whereby the king can be punished or compelled to make redress.[24] However, Ludwick Ehrlich pleads that the maxim has been

16 see Kelson, *Absolutism and Relativism in what is Justice*, at 201
17 Aristotle, *Politics*
18 Hegel, *The Philosophy of Law* (1821)
19 Locke, *The Treatises of Civil Government.*
20 Holdsworth, *History of English Law*, vol.4 at 192.
21 Pollack and Maitland, *History of English Law*, 2nd Ed. At518.
22 Blackstone: *Commentaries,* 10th Ed. (1887)
23 Blackstone, Sir William, *Commentaries on the laws of England,* vol.I, 245 (1844)
24 Maitland, F.W. *The Constitutional History of England,* 482 (1st Ed., 1955 Reprint)

misunderstood by Blackstone.[25] The maxim merely meant that the king was not privileged to do wrong. If his acts were against the law, they were wrongs. Professor H.W.R. Wade says that the true meaning of the maxim "the king can do no wrong" is that the king has no legal power to do wrong[26]. The king was subject to law because according to Bracton it is the law that makes the king. The courts mere the kings courts and he like other feudal lords could not be sued in his own courts. He could be a plaintiff but could not be made a defendant.

With the increase in the functions of the State, the crown in England became one of the largest employers of labour. Under these circumstances, the rule of immunity of the crown became highly incompatible with the demands of justice. It was in the thirteenth century only when a new development in the field of liability occurred. The Petition of 1258 demanded that the royal courts be endowed with new and anti-feudal powers[27]. Thus, this may be taken as an attempt for seeking remedy against the feudal lords in the kings courts. Indirectly it was also an effort to make feudal lord who had hither to been absolved of liability by virtue of his status, liable in law.

The monarchial superiority introduced by Norman kings favoured the king and exempted from liability. The king, however, allowed suits at pleasure. Lord Somervell traces the origin of king's legal liability in tort in *Mary de Shepey's* case of 1322[28]. However, the king could waive his privilege of non-suability[29]. The early remedy in tort cases against the king was not through a writ, but through a petition. It was only in 1843 when it was decided that a petition of right did not lie for tort[30]. The king gradually lost his power after the revolution of 1688. The circumstances compelled the Crown to accede to the genuine claims in tort cases and the practice of nominated defendant emerged which was justified by the Privy Council[31]. However, House of Lords[32] and the Court of Appeal[33] strongly denounced the practice and stimulated the Parliament to abolish the general immunity in tort. Position had changed entirely after passing of the Crown Proceedings Act, 1947. Now the Crown is vicariously liable to pay compensation for a tort committed by its servants just like a private individual[34].

25 Ludwick Ehrlich, "Proceedings against the Crown", 42-49 (1921) Monograph extracted from 34 *Yale law Rev.* 2

26 Wade, H.W.R. *Administrative Law,*664 (Fourth Ed., 1997)

27 Clause 29, petition of 1258 quoted in Pollock and Maitland.

28 Lord Somervell, *"The State as Defendant"*, 33 *ALJ*, 148-49 (1959)

29 First Statute of Westminister, 1275.

30 *Viscount of Counterbury* v. *Attorney-General* (1843) I Phill, 306; see *Tosin* v. *the queen* (1864)16 C.B.N.S, 34

31 *Thomas Eales Rogers* v. *Rajendra Dutt,* 8 MIA, 103 (1860)

32 *Adams* v. *Naylor* (1946) 2 All.E.R. 241

33 *Royster* v. *Cavey* (1946) 2 All.E.R. 642

34 see Chapman, *Statutes on the Law of Torts,* 385 (1962)

The American Position:

The doctrine of foreign sovereign immunity is a part of customary international law, according to which no independent foreign sovereign can be sued in domestic courts without his consent[35]. In the latter part of nineteenth century, the personified concept of sovereign immunity metamorphosed into "State immunity" with the emergence of republican form of governments in Europe and United States of America[36]. However, the law of sovereign immunity has been undergoing far reaching changes since last few decades in the State practice of many States including America. Despite the absence of historical or philosophical justification, the doctrine of sovereign immunity made an inroad in American law perhaps because of necessity, expediency and syllogistic reasoning. In order to save the U.S. from bankruptcy as it owed huge debts contracted in the prosecution of the war, the U.S. Supreme Courts' decisions[37] favoured the doctrine of State immunity on the basis of dichotomy of functions namely 'governmental' and 'proprietary'. Under the Federal Tort Claims Act, 1946, now the U.S. is liable for the torts committed by its servants though the State is escaped from liability of tort arising out his discretionary function[38].

Tort Liability in France:

In France, liability of the State in its beginning, dates back to the Declaration of the Rights of Man in 1789. Before that time, France denied any responsibility of the State under the theory of the absolute monarchy. A combination of the Roman idea of 'Imperium' and feudal lordship for which the lawyers of the king like Bodin worked out the theoretical foundations, was attached to the position of the king and prevented suits in tort against him or the State which he represented. The famous and prevailing doctrine of that time was *leroine faire mal* which corresponds to the English principle "The king can do no wrong". Since the creation of the Civil Code by Napolean, sec. 1384 establishes the liability of the State[39]. *The Counseil d' Etat* as early as 1855, began to claim exclusive jurisdiction over this area as against Civil Courts.[40] *Tribunal des conflicts* ultimately decided that administrative courts

35 see P.M. North (ed.) *Cheshiers Private International Law* 98-9 (9th ed. 1974); H.Lauterpacht, "The problems of Jurisdictional Immunities of Foreign States", British Year Book of International Law, vol. 28, p. 220-72 (1951); see also *Schooner Exchange* v. *M.C.Faddon, (1812) 7 Canch 116;* Parliament Belge, (1880) 5 P. D. 197; *Ex Parte Republic of Peru,* (1943) 318 U.S. 578.

36 S.Sucharit Kul, *State Immunities and trading Activities in International Law,*1-3(1959); N.Ch.Dunbar, *"Controversial Aspects of Sovereign Immunity in the case of some States", Recucil Des Cenrs* 203 (1971)

37 See *Cohens* v. *Virginia,* 19 U.S. 264(1821); *Gibbons* v. U.S., 75 U.S. 269 (1868); *Kawnankoo* v. *Polyback,* 205 U.S. 347

38 see, "The Discretionary Function Exception of the Federal Tort Claims Act, (1953), 66, *Harv.L, Rev.* 488 (1953); *Dalehite* v. *U.S.,* 346, U.S. 15 (1953)

39 see Street, *"Governmental Liability: A Comparative Study,* 22-23 (1953)

40 see *Rothschild case,* Counseil d' Etat, 1885, Rec 707

should have jurisdiction over State liability and not the civil courts[41].

While in the beginning the French courts adopted the notion of 'fault' as the basis for public tort liability, its character was fundamentally changed with the gradual introduction of 'service-connected' faults and 'personal faults'. It is only in the case of service connected fault, the State is liable.[42] It is submitted that the State liability rests on the idea that the 'State is an honest man' and does not evade responsibility for damage done by wrongful acts by raising the shields of immunity. The State represents the community and the government means a group of individuals who, are at the helm of affairs.[43] The ever increasing functions of the State are discharged by the Government with the help of a large number of employees. Service in the Government does not make men free from their human fallibility. Excluding the State from legal responsibility is fraught with danger which may ultimately threaten liberty[44]. Infact, the problem of the State liability for tortuous actions, as Friedman points out, has long ceased to be a major juristic problem in Continental Jurisdictions.[45]

Tortious Liability of the State in India:

In ancient period, the law was supreme and the king was not only responsible for his own deeds, but he had to be accountable for any transgression perpetrated by any other man within his administration. He could be chided by an ordinary citizen if he ignored his liability. Thus, there was no legal immunity for the king. The common law rule of immunity had no place in the Indian kinship[46]. According to Manu, the king must restore the stolen property when recovered and must compensate when not recovered[47]. Like wise, the prince and the servants of the king were all liable in law for the wrongs done to their subjects[48]. In the Muslim period, the officers of the State were accountable for the wrongs committed during the course of their employment. A police officer was personally liable to pay compensation for the wrongful arrest of a citizen[49]. After the commencement of the Constitution Art.300 defines the extent of Government liability for the torts committed by its employees.

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41 see, *Blanco* decision, T.C. 8th Feb. 1873, Rec,Ist sup 61

42 *Pelletier case,* Sirey 1905, 3, 113 cited by street; see also*Tomasco Creco* case; *Auxerre* case, Dall.per 1906, 3, 81; *Anquet* case Dall.per.1913, 3, 26 cited by street.

43 F.Ridley and J.Blonder, *Public Administration in France*, 148 (1964)

44 see Herold J.Laski, *A Grammar of Politics,* 394 –95 (1960 Reprint)

45 W.Friedman, *Law in a Changing Society,* 300 (Abridged First Indian Reprint. 1970)

46 Radhabinodpal, *The History of Hindu Law,* 180 (Tagore Law Lectures, 1930) 1958

47 Sarkar U.C., *Epochs in Hindu Legal History* , 99 (1958); *Arthasastra,* Ch. XVI; see also Max Muller, *The Sacred Books of the East,* vol. XXV, Ch. VIII at 260 (1886)

48 Nariman F.S., "Government Liability in Civil Law" , *Law and Commonwealth,* 361, (First ed. 1971)

49 Ahmad M.D., *The Administration of Justice in Medieval India*, 24(1941); see also *Haji Zahid and Pirji* v. *State; Sher Muhammed* v. *State,* where decrees were passed against the State.

Emerging Compensatory Trend: Death Blow to Sovereign Immunity:

The question of State liability for wrongful acts of its employees has assumed considerable significance in the latter half of the twentieth century, particularly in the context of the State donning innumerable functions for promoting welfare of its citizens. Misuse or abuse of power by these employees of their negligence may cause injury to person or property of the citizen and involve even an assault on his fundamental rights. Such a situation calls for an adequate mechanism for determining liability of the State and compensating the victim. It is unfortunate that, the State which has extended its tentacles practically into all spheres of activities has not thought it fit to enact a statute for determining the citizen's claims against the all powerful State. Indeed, the absence of such a mechanism has put an onerous task on the judges who have evolved in their own way some principles and forged new tools for meeting the aforesaid situation.

The Government of India was made liable for the acts of its servants in *P&O. Steam Navigation*[50] where Peacock C.J., seemed to hold that Government immunity had no place in Indian tort litigation. It is in this case that the distinction between sovereign and non- sovereign functions of the East India Company appears to have been first made after the Government of India Act, 1858. Infact, the general liability of the Company for suit either in England or in India was never in doubt[51]. Peacock C.J., who delivered the judgment held that for the negligence of its servants in doing acts not referable to sovereign powers of the East India Company would have been liable and so the Secretary of State for India was equally liable. This observation later on created confusion as to classification of Governmental functions into 'sovereign' and 'non-sovereign' categories.

It may be pointed out here that most of the sovereign functions enumerated in the above case were referable to the 'act of state'. However, the Madras[52] and Bombay High Courts[53] expressed the view that the Government would also be liable for torts committed in the exercise of sovereign functions. It is submitted that the view expressed by these High Courts at a time when imperialism reigned supreme is more in consonance with the modern ideal of protecting the individual against the caprice of the State than some of the decisions of the recent times, thus, highlighting the fallacy of the classification of 'sovereign' and 'non-sovereign' functions.

50 *P&O Steam Navigation Co.* v. *Secretary of State for India,* (1868-1869) 5 B.Com H.C.R. App.1, p.1

51 The only statute which did provide for the immunity of the East India Company and its officers was the Act of settlement of 1781 which provided immunity only for "acts done in connection with the collection of revenue".

52 *Secretary of State for India* v. *Hari Bhanji,* I.L.R. (1882) 5 Mad. 272

53 *Rao* v. *Advani,* AIR, 1949 Bom. 277. The Supreme Court approved this view in *Province of Bombay* v. *Khushal Das,* AIR, 1950 S.C. 222

In *Rajasthan* v. *Vidyawati*[54], the Supreme Court observed that there was no justification in principle or on the ground of public interest for not holding State liable vicariously for tortiuous acts of its servants. However, in *Kasturilal* case,[55] the State was absolved from liability for torts committed by police officers in the exercise of delegated sovereign powers. The 'sovereign' and 'non-sovereign' dichotomy was again openly supported by the Court. This is no longer tenable in the present day changed social context. The very concept of sovereignty has been changed and the people therefore, are the real sovereigns[56]. As a result of the decision in *Kasturilal* the hapless victims are at the mercy of uncertain judicial law-making. The defence of sovereign immunity and water tight compartmentalization of the functions of the State as sovereign and non-sovereign is highly reminiscent of *laissej-faire era.* It is out of time with modern jurisprudential thinking and unworkable in practice.

The defence of sovereign immunity was not taken up by the State when reparation claims were founded upon violation of the fundamental right to life and personal liability under Art. 21 of the Indian Constitution. The question was considered by the court, for the first time, involving an inhuman act by the police[57]. The Court conceded the State liability but did not pronounce on the issue of compensation. The Supreme Court has evolved the remedy of compensation to the victims for the first time in *Rudal Shah*[58] case where the petitioner was illegally incarcerated. *Rudal Shah* is a landmark in Indian human rights jurisprudence where the Supreme Court articulated compensatory jurisprudence for infraction of Art.21 of the Constitution[59]. The Court made it clear that the State must repair the damage done by its officers to the petitioner's rights. The expansive interpretation of Art.21 has imposed a positive duty upon the State for protection of people's liberties. This duty of the State to protect the individual's property was considered by the Court in *R.Gandhi* v. *Union of India*[60]. The compensation was claimed for destruction of property of the victims due to arson and looting. The High Court upheld the compensation claims for rehabilitation of the affected persons fallowing *Pavement Dwellers*[61] case, where the Court observed that the deprivation of the right to property would amount to deprivation of right to life under Art.21 of the Indian Constitution. Because, no person can live without the means of livelihood to the point of abrogation.

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54 AIR 1962 S.C. 933

55 *Kasturilal Raliaram Jain* v. *State of U.P.,* AIR, 1965 S.C. 1039.

56 *Union of India* v. *Harbans Singh,* AIR, 1959 Punj. 39; *Baxi Amrit Singh* v. *Union of India,* 1973, 175 PLRI

57 *Khatri* v. *State of Bihar,* AIR, 1981 S.C. 928; 1068.

58 *Rudal Shah* v. *State of Bihar,* AIR, 1983 S.C. 1086; see also *Sebastian M.Hongray* v. *Union of India,* AIR, 1984 S.C. 571; *Bhimsingh* v. *State of J & K* , AIR, 1986 S.C. 494

59 Art.21 of the Indian Constitution deals with a persons right to life and personal liberty.

60 AIR, 1989 Mad. 205.

61 *Olga Tellis* v. *Bombay Muncipal Corporation* , AIR, 1986 S.C. 180

It is submitted that wherever there is a question of violation of fundamental right particularly right to life, the role of the courts hitherto was no more than the protector and custodian of the indefeasible rights of the citizens. Now-a-days, the courts are empowered to proceed further and give compensatory relief under the public law jurisprudence within the constitutional scheme for the wrong done due to the breach of public duty by the State in not preserving the life or liberty of the citizen. Award of compensation for the breach of Art.21 of the Constitution is therefore, not only to civilize public power but also to assure the citizens that they live under a legal system wherein their rights and interests are protected and preserved. Further, the courts have the obligation to satisfy the social obligations of the citizens. Since the courts and the law are for the people they are expected to respond to their aspirations[62].

Public law proceedings serve a different purpose than the private law proceedings. The primary source of the public law proceedings stems from the prerogative writs and the order of monetary relief is therefore to be read into the powers of the Supreme Court under Art. 32 and of the High Courts under Art. 226 of the Indian Constitution. Hence, the grant of compensation for the violation of Art.21 is an exercise of the courts under the public law. It is for penalising the wrong doer and fixing the liability for the public wrong on the State which failed in the discharge of its public duty to protect fundamental human rights of the citizens. Though there is no express constitutional provision for the grant of compensation when right to life is violated, the Supreme Court has judicially evolved the constitutional remedy by way of compulsion of judicial conscience. This is the only effective remedy to apply as balm to the wounds and give much solace to the family members of the aggrieved or victims. It is the only practical mode of enforcement of the fundamental rights with a view to preserve and protect the rule of law[63].

Basically the idea was that a person should be held responsible for his own fault. This was also asserted by Plato[64] in his laws that a person should be made liable for his own sins. However, in England, after the Norman conquest, it was firmly established that the master would be liable for his servants or slaves torts only when there is an express command of the mater to the servants wrong. In the seventeenth century this limited form of liability was found inadequate due to rise in commercial transactions. Consequently, a new development took place when sir John Holt in the case of *Tuberville* v. *Stamp*[65]

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62 *D.K.Basu* v. *State of West Bengal,* AIR, 1997 S.C. 610 at 625

63 see *Nilabati Behera* v. *State of Orissa,* AIR, 1993 SC 1960; see also *N. Nagendra Rao & Co.* v. *A.P.,* AIR, 1994 SC 2663.

64 Plato, *Republic.*

65 (1967) I Ld. Raym. 267

held that "master would be liable for his servants tort if he had given his implied command". This 'implied command' can only be inferred from the general scope of the servants employment. Accordingly, a master would be liable for his servants' tort if he had committed it during the course of employment. Justice Holt was therefore, the founder of the modern law of vicarious liability.

Vicarious liability is based on the maxim 'Respondent Superior' which means superior is responsible or let the principal be liable. It also derives its validity from the maxim *Qui Facit per Alium Facit per se,* which means he who does an act through another is deemed in law to do it himself[66]. Further, if a person commits a tort while acting on behalf of another but without his authority and that other subsequently ratifies that act, he thereby becomes responsible for it. Such an act becomes the act of the principal in the same way as if it were done with previous authority[67].

Now, the State is the biggest employer of servants who are discharging multifarious functions touching various fields. In view of transformation of police State into welfare State, the Government will necessarily have to interfere in varied activities through its servants. In doing so, the servants commit torts while acting on behalf of the State. However, the court in *Saheli*[68] came to the rescue of the State by showing a way to recover compensation so paid from the recalcitrant officials without recourse to 'vicarious liability' and rejected the defence of sovereign immunity laid down in *Kasturilal.* It is submitted that the State after paying the amount of compensation is entitled to be indemnified by the wrongdoer. Otherwise, the State exchequer would dry out of funds on the ground of vicarious liability for 'no fault' of the State. On the other hand, the new trend would fix up responsibility also on the part of the employee and prevent him from abdication of duties.

The whole question of sovereign immunity was again examined by the Supreme Court in *Common Cause, a Registered Society* v. *Union of India* [69] where the doctrine was rejected. The State liability rule as laid down in *P&O Steam Navigation* case is outmoded as the people are real sovereigns in a democracy. The increased activities of the State have made a deep impact on all facets of citizen's life and therefore, the liability of the State must be made co-extensive with the modern concept of a welfare State. The Apex Court rightly observed that in this process of judicial activism, *Kasturilal* has paled into insignificance and is now no longer of binding value.

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66 see *Baxi A. Singh* v. *The Union of India,* PLRI (1973) 75

67 Every ratification of an act relates back and there upon becomes equivalent to a previous request. For details see *Wilson* v. *Tumman,* (1845) 6 M&G 236.

68 *Saheli, A Women's Resources Centre* v. *Commissioner of Police, Delhi,* AIR, 1990 SC 513

69 AIR 1999 SC 2979.

D.K.Basu v. *West Bengal*[70] is an important case in which the Supreme Court considered a public interest litigation for dealing with the complaints of custodial violence and deaths in police lock ups. Monetary compensation is based upon the principle of strict liability and the State is not allowed to avail the defence of sovereign immunity. The relief is in addition to the traditional remedies without prejudice to civil suits. The forum awarding compensation may take into consideration the economic conditions and other humanitarian grounds of the victim. Recently, the court awarded compensation to the parents of the deceased who died in the judicial custody in *Ajab Singh* v. *State of U.P.*[71] Likewise the Supreme Court allowed compensation claim to the members of the family of deceased in 'fake encounter' in *People's Union for Civil Liberties* v. *Union of India*[72]. In *Forum* v. *Union of India*[73] the court awarded compensation to the rape victim. The court went to the extent of directing the State to pay compensation to a patient for its failure in providing emergency medical assistance and for non-availability of bed in a State run hospital[74].

In *M.C.Mehta* v. *Union of India*[75] (Olium Gas leak case), the Supreme Court held that the scope of Art.32 is wide enough to include the power to grant compensation for violation of fundamental rights. The power of the court under Art.32 is not merely preventive but also remedial in nature, i.e., power to grant compensation. However, compensation only in 'appropriate cases' and not in every case. The 'appropriate cases' are those cases where the infringement of fundamental right is 'gross and patent' that is incontrovertible and *ex facie* glaring and either such infringement should be on a large scale affecting the fundamental rights of a large number of persons or it should appear unjust, harsh and oppressive on account of their poverty or disability or socially or economically disadvantaged position to require the person affected by such infringement to initiate and pursue action in civil courts.

The court in *Nilabati*[76] made it very clear that the doctrine of sovereign immunity has no application to the constitutional system and is no defence to the constitutional remedy under Arts. 32 and 226 of the Constitution. The court, further, fixed strict liability as the basis in Public law for the award of relief when right to life is violated. Following *Nilabati Behra*, the court held that the provisions of Art. 9 (5) of International Covenant on Civil and Political Rights, 1966 are enforceable which say that any one who has been victim of

70 AIR 1997 SC 610.
71 AIR 2000 SC 3421.
72 AIR 1997 SC 1203.
73 (1995) 1 SCC 14; see also *Bodisathwa Gautam* v. *Subrachakraborthy,* (1996) 1 SCC 490.
74 See *Paschim Banga Khet Majdoor Samithi* v. *State of West Bengal,* (1996) 4 SCC 37; see also *Paramannada Katare* v. *Union of India,* AIR 1989 SC 2039.
75 AIR 1997 SC 3021.
76 See *supra* note 63.

unlawful arrest or detention shall have an enforceable right to compensation for enforcing fundamental rights. It is surprising to note that the Supreme Court has read the international treaty provisions into the constitutional field. It is to be noted the courts of Ireland[77] and the Privy Council[78] while interpreting the Constitution of Trinidad and Tobago and the court of Appeal in New Zealand in *Baigent* case[79] were influenced by these judicial trends. They echoed the same sentiment when faced with similar situations. The rule of strict liability was formulated by the House of Lords in *Rylands* v. *Fletcher*[80] thereby recognizing 'no fault' liability. The Supreme Court in *Olieum Gas Leak* case expressly stated that such liability will not be subject to exceptions as have been recognized in *Rylands* v. *Fletcher.*

Similarly liability is to be fixed on Union Carbide Corporation – a multinational corporation registered in U.S.A. for violation of right to life in Bhopal due to leakage of MIC gas[81]. In 1991, as a legislative sequel to the ruling of the Supreme Court in the *Olium Gas Leak* case and the *Bhopal* litigation, the Indian Parliament passed the Public Liability Insurance Act, 1991(PLIA) that purported to provide immediate relief to the victims of industrial accidents and incidents occurring as a result of handling of hazardous substances. The Act makes it mandatory for every owner to take out insurance policies before handling any hazardous substances for coverage against any liability that may arise on account of accident or incident involving these substances[82]. In effect, the Act is also an answer to reflections of the Supreme Court in *Charan Lal Sahu's* case[83] where a call had been made to enact such a legislation. In 1995, National Environmental Tribunal Act was passed providing strict liability for compensation arising out of damage to the environment caused due to accident. The Act imposes liability on the basis of non-fault. This clearly shows how the courts in India have been concerned with corrective justice and to that end formulating an overall social policy. Change in the law and indeed in the legal ethic has therefore been achieved through the legal institutions.

Conclusion:

In Indian democracy, there is no ruling class and ruled. The State represents the community, and the injury gets distributed amongst all members of the community in case of injury to a private individual due to wrongful act

77 *Byrne* v. *Ireland,* (1972) 113 IR 241 at 264.

78 *Maharaj* v. *A.G. of Trinidad and Tobago* (No.2) 1978, 2 ALL. ER 670.

79 *Simpson* v. *A.G.* 1994 NZIR 667.

80 1868 L.R. 3 H.L. 330

81 *Union Carbide* v. *Union of India,* Bhopal Gas case is still pending in the American Courts though compensation was paid through judicial settlement of the Supreme Court , 1996 (2) *Scale* 410.

82 For literature on the PLIA see generally S.N.Singh, *Public Liability Insurance Act,* (1991).

83 *Charan Lal Sahu* v. *Union of India,* 1 SCC 613

of the State. Therefore, the State should compensate the injured person for any type of governmental action. This is the ideal which has inspired the common law and continental jurisprudence. The judicial trends in India in the matter of awarding compensation for violation of fundamental rights is a wholesome development in the field of State tortuous liability. One can witness shift of the State immunity doctrine into the doctrine of strict liability by judicial polemics. The absence of legislation in this field has left the question to the judicial adjudication. Hence, it is suggested that a parliamentary legislation is the only a way out in remedying the situation.