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Comparative Study of Tortious Liability of State: A Global Perspective

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1. INTRODUCTION

The rapid growth of public services and functions in most countries, the large number of persons engaged in the civil service or in the military forces, and the increase in the number of risks brought about by mechanisms such as the automobile, the airplane, and other methods of transportation, mean that an ever-increasing number of persons will suffer injuries resulting from governmental acts and operations. A problem of great importance, then, is that of the responsibility of the State and its agents for such injuries. The solution of this problem involves considerations dealing with: the nature of the State; an ethical basis for the establishment of responsibility; a legal basis for the establishment of responsibility; the types of action for which the State and its agents should be responsible; the persons to whom it should be responsible; and the relationship that should exist between the State and its subdivisions and agents.[1]

The countries have not solved their problem of responsibility in the same way. This is largely due to the historical circumstances under which the systems have been developed. An attempt will be made to summarize the ways in which the responsibility of the State and its agents for tort are solved in England, United States of America, Canada, France, China, Australia etc. Responsibility will be examined in these various countries, so far as possible, as it exists in the three chief units of government (central, state or regional, and local). Some attention will then be given to the responsibility of officers.

To what extent the administration would be liable for the torts committed by its servants and employees is a complex problem especially in developing countries with ever-widening State activities. The liability of the State and the Government in tort is governed by the principles of public law mainly inherited from British Common Law. The whole idea of vicarious liability of the State for the torts committed by its servants is based on three principles:

i) *Respondeat Superior* (Let the principal be liable),
ii) *Qui Facit per AliumFacit per se* (He who acts through another does it himself), and
iii) Socialization of Compensation.[2]

2. HISTORICAL BACKDROP

[1] *Available at*: http://www.scholarship.law.duke.edu (last visited on May 25, 2020).
[2] Harshdeep Singh, "Liability of the Administration – Concept and Explanation", *available at*: http://www.legalbites.in (last visited on June 15, 2020).

ISSN: 0975-3583, 0976-2833 VOL12, ISSUE 01, 2021

Historically, States have enjoyed almost unlimited immunity against the legal claims for redressal in torts by individuals. Both in the common law and the civil law traditions, the starting point has been that of sovereign immunity. Maxims such as 'The King can do no wrong' or *Le Roi ne peut mal faire* reflect the State's unwillingness to redress the grievance of the persons who have suffered from the actions of State.

The doctrine of 'vicarious liability', generally termed 'liability for the acts of others' by civil lawyers, has long been regarded as controversial in the common law world. The term, claimed to be invented by the English jurist Frederick Pollock in the 1880s,[3] is itself ambiguous and fails to distinguish clearly between agency liability, and secondary liability for the original tortfeasor. A brief glance at any common law textbook will indicate ongoing debates and, in particular, a troublesome decisions of cases (*Lister v.Hesley Hall Ltd,*[4] *Bazley v. Curry*),[5] in which the senior courts of England and Wales and Canada respectively considered both the scope and underlying rationale of this doctrine. In the context of these cases – whether the governmental department should be held vicariously liable for sexual abuse by adults entrusted to care for vulnerable children – perhaps indicates both their contentious nature, notably in terms of loss distribution and tort law policy, but also the fact that current social policy leads us to challenge traditional legal definitions of the limits of such liability. Lord Justice Longmore in a recent English Court of Appeal decision expressed much of the frustration of the common law courts: 'Is it that the law should impose liability on someone who can pay rather than someone who cannot? Or is it to encourage employers to be even more vigilant than they would be pursuant to a duty of care? Or is it just a weapon of distributive justice. Academic writers disagree and the House of Lords in Lister did not give any definitive guidance to lower courts.'[6]

In Europe, the English regime did not follow the major European trend of generously favouring State liability, at least in theory.[7] Moreover, the English legal regime is the only one where the question of public immunity in general can be posed as a relevant legal problem. English courts repeatedly applied striking out procedures, refusing even to admit that public authorities were subject to a duty of care mainly based on policy concerns.[8]

[3] Paula Giliker, "Vicarious Liability or Liability for the acts of others in Tort: A Comparative Perspective" 2 *JETL* 31 (2011).
[4](2002) 1 *AC* 215.
[5](1999) 174 *DLR* (4th) 45.
[6]*Maga v. Birmingham Roman Catholic Archdiocese Trustees*, (2010) 1 *WLR* 1441.
[7]Ralph Andreas Surma, "A Comparative Study of the English and German Judicial Approach to the Liability of Public Bodies in Negligence" in Duncan Faircrieve, MadsAndenas, *et.al.*(ed.), *Tort Liability of Public Authorities in Comparative Perspective* 521 (British Institute of International and Comparative Law, London, 2002).
[8] Raymond Young, *English, French and German Comparative Law* (Routledge, London, 2nd edn., 2007).

ISSN: 0975-3583, 0976-2833 VOL12, ISSUE 01, 2021

Legal systems in continental Europe were very much influenced by the French experience.[9] The French Law of 1790 stated clearly that judges cannot and shall not interfere with the administration. Such rule in practice created an effective immunity from judicial review for administrative acts that was not necessarily intended by the 1790 legislators. Historically, it is not clear why that was so.

From the nineteenth century onwards, and especially in the twentieth century, the rule of absolute immunity has undergone significant erosion. For example, Federal Tort Claims Act, 1946 in United States of America and Crown Proceedings Act, 1947 in England haveconsidered the tortious liability of State.

3. GLOBAL APPROACH TOWARDS THE TORTIOUS LIABILITY OF STATE

In comparing common and civil law approaches to vicarious liability of State, the broader perspective is gained – access to resources beyond the legal systems, new sources of scholarship and doctrine – but most importantly internal preconceptions about the operation of rules which underlie any individual legal system are subject to challenge.[10] In the words of Curran, 'comparative legal analysis introduces legal concepts, styles, organisations and categorisations previously unknown, opening unsuspected possibilities in the very notion of law. The differences discovered in foreign legal cultures should propel law students and scholars to greater acuity in distinguishing the actual from the inevitable; and historically contingent happenstances from causally connected phenomena.'[11]

Comparative analysis is capable, however, of identifying alternative approaches in this context. When one examines the response of the civil and common law courts to the changing nature of employment relationships, two approaches stand out: firstly, adopting a more flexible interpretation of the control test, or secondly, favouring a multi-faceted test which examines the whole context of the working relationship. To compare the situation regarding tortious liability of State worldwide, the legal developments of various countries relating to tortious liability of State are to be studied, which is discussed below.

3.1 Position in United Kingdom

Rule of law has since long been the cardinal principle and one of the merits of the British legal system. Dicey argued that it allowed actions to be brought in the ordinary courts against the officer responsible in the same manner as against other subjects. He said: "... here every man, whatever be his rank or condition, is subject to

[9] Basil Markesini, "Unity of Division: The Search for Similarities in Contemporary European Law" in Duncan Faircrieve, MadsAndenas, *et.al.*(ed.), *Tort Liability of Public Authorities in Comparative Perspective* 451 (British Institute of International and Comparative Law, London, 2003).
[10] G Frankenberg, "Critical Comparisons: Rethinking Comparative Law" 26 *HILJ* 411 (1985).
[11] V.G. Curran, "Dealing in Difference: Comparative Law's Potential for Broadening Legal Perspective" 46 *AJCL* 657 (1998).

ISSN: 0975-3583, 0976-2833 VOL12, ISSUE 01, 2021

the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals. In England the idea of legal equality, or of the universal subjection of all classes to one law administered by the ordinary courts, has been pushed to its utmost limit. With us every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen". [12] What he did not stress, however, were the immunities from suit enjoyed by the crown. [13]The 'Garland of Royal Prerogatives' immunised the King from tortious liability. [14] The principle which is traceable back to Bracton, that 'the King can do no wrong' accounts for this exception. [15] There is no more famous statement of this ideal than Bracton's, made 700 years ago: "*rex non debetesse sub hominesed sub deo et sub lege, qualexfacitregem*."[16] It meant originally that the "King was not privileged to commit illegal acts."[17] The theory broke down because there was no human agency to enforce the law against the King. The courts were King's courts, and like other feudal lords the king could not be sued in his own court. [18]

In England, the law on this subject has greatly been changed by the Crown Proceedings Act, 1947. Before 1947, if a government servant committed a tort, it was not possible to bring as action against the Crown. But the action always could be brought against the actual wrongdoer. It is not very clear on what grounds the exemption of the Crown was based. Many hold that the true basis of the doctrine is the constitutional maxim "the King can do no wrong". But as Holdsworth suggests, the rule that no action lies against the Crown is procedural rather than substantive. On principle, there could be no justification for exempting the government from the liability for torts of its servants. However, the Crown Proceedings Act, 1947 determines that the Crown is equated with a private person of full age and capacity in respect of liability for tort, although some exceptions in favour of the police and certain statutory corporations were kept.Now the Crown or the departments can be sued for the torts committed by the government employees and servants during the course of their employment. [19]

3.2 Position in United States of America

[12] A.V. Dicey, *Introduction to the Study of the Law of the Constitution* 193 (Macmillan & Co. Ltd., London, 10th edn., 1961).
[13] J.A.G. Griffith & H. Street, *Principles of Administrative Law* 251 (Sir Issac Pitman & Sons Ltd., London, 4th edn., 1967).
[14] Pollock & Maitland, *The History of English Law Vol.1* 517 (Cambridge University Press, Cambridge, 2nd edn., 1968).
[15] H. Street, *Governmental Liability: A Comparative Study* 2 (Cambridge University Press, Cambridge, 1st edn., 1953).
[16] "The king must not be under man but under God and under the law because it is the law that makes the King", quoted in H.W.R. Wade, *Administrative Law* 664 (Clarendon Press, Oxford, 4th edn., 1977).
[17] P. IshwaraBhat, *Administrative Liability of the Government and Public Servant* 19 (Deep and Deep Publication, New Delhi, 1983).
[18] *Supra* note 16.
[19] U.N. Shukla, *Constitution of India* 903 (Eastern Book Company, Lucknow, 12th edn., 2012).

ISSN: 0975-3583, 0976-2833 VOL12, ISSUE 01, 2021

The American history of State liability in tort, somewhat surprisingly, reflects the evolution from the unqualified and almost unquestioned reception of a common law doctrine of sovereign immunity, containing a strong flavour of the feudal privilege of the Lord over his vassals, to an apparent statutory basis for immunity,[20] although with some important waivers, such as the Federal Tort Claims Act, 1946 and other State statutes along similar lines.'[21]

The primary function of the Government is the protection of the persons and their property. The political theory underlying the American Constitutional law has been regarded as a bulwark of protection to the individual in his relations with the Government. Yet, until the passing of the Federal Tort Claims Act, 1946, the individual citizen was left to bear almost all the risks of a defective, negligent, perverse or erroneous administration of the State's functions.

In the US, the common-law rule prevailed, though now the law has greatly been changed. But there is no source to know the origin of sovereign immunity in United States of America. The reasonable understanding is "that the English doctrine should have been introduced in to the United States", however;the makers of the Constitution did not adopt the principle of sovereign immunity. In *Cohens v. Virginia*,[22] it was held that no suit can be commenced or prosecuted against the United States; that the Judiciary Act, 1789 does not authorize such suits. The Supreme Court in *Gibbons v. United States*[23] holds that "No State has even held itself liable to individuals for the misfeasance, latches, unauthorized exercise of power, by its officers or agents.

The Congress enacted various private laws and the petitions for relief. But this system did not work outsatisfactorily. Most of the claims were left out unsettled. In 1798 the Eleventh Constitutional Amendment, was passed to restrain State immunity. In most of the States, judiciary played a vital role in abolishing the doctrine of sovereign immunity. Justice Holmes in 1907 said that the sovereign is exempted from all suits because there can be no legal right against the authority that makes the law on which rights depend and also the sovereign cannot exist in the absence of the State and this would be assumed only if some immunity is granted to it. No one was satisfied with the system of immunity. As a result of it, the Congress enacted Court of Claims Act, 1855. The Act enabled the State to establish a tribunal consisting of three members. The tribunal acted as a fact finding organ, investigated and reported to the Congress in matters arising out of contracts and not torts. However, people felt some relief due to the implementation of this Act.

[20] Lawrence Rosenthal, "A Theory of Government Damages Liability: Torts, Constitutional Torts, and Takings" 9 *UPJCL* 797 (2007).
[21] Helene Goldberg, "Tort Liability for Federal Government Actions in the United States: An Overview" in Duncan Faircrieve, MadsAndenas, *et.al.*(ed.), *Tort Liability of Public Authorities in Comparative Perspective* 521 (British Institute of International and Comparative Law, London, 2003).
[22](1821)19 U.S. (6 wheat) 264.
[23](1868) 75 U.S. (8 wall) 269.

ISSN: 0975-3583, 0976-2833 VOL12, ISSUE 01, 2021

During 20th century, certain claims regarding marine and admiralty torts, war damages, federal employer'scompensation, postal claims and claims against Federal Bureau of investigations were settled. Thus compensation was awarded, for the claims on infringement of rights were recognized in United States of America. This laid the foundation for the enactment of Federal Tort Claims Act, 1946. The application of sovereign immunity doctrine to the United States is "one of themysteries of legal education."[24]

3.3 Position in France

In France, the ideas of French Revolution led to the conviction that sovereign responsibility should replace the outmoded concept of sovereign infallibility. There, the administrative courts have jurisdiction to annul illegal administrative acts or award damages against the administration when a citizen is injured by an administrative act. This is done on the basis of two principles which the *Conseil d' Etat* evolved – '*legalite'* and '*responsibilite'*. According to the former the administration must act in accordance with the law. As per the latter the administration will be responsible to indemnify the citizens whose rights are infringed through any unlawful act on its part.[25]

Regarding administrative torts the *Conseil d' Etat* evolved two principles - *Faute de Service* and *FautePersonnelle*. If the agent of the administration was at fault in carrying out administrative responsibilities then a person injured in consequence could sue the State in the *Conseil d' Etat* for *Faute de Service*. If the tortious act was done due to the personal fault of the individual officer then the liability could be imposed on him personally in the civil courts for *FautePersonelle*. A combination of service fault and personal fault is recognised as what is called *Cumul*. In such cases the victim can sue the official both in civil courts and in administrative courts. This does not mean that the victim can obtain damages twice. Instead the damages are contributed by the joint tortfeasors. The judgment debtor who pays damages has the right of action against the other for contribution. In France the administration can be made liable even if there is no fault on its part. This liability without fault is based on the risk theory.[26] According to this theory the administration has a duty to compensate anyone injured as a result of the carrying out of public works involving risk. Thus France has the most advanced system of case law on governmental liability.

3.4 Position in Canada

The consolidation of the State liability in Canada has added another milestone in this topic. Initially the Crown enjoyed immunity from tortious liability. But a suit could be brought as in England so in Canada through the petition of Right which was

[24]Bornard Schwartz and H.W.R. Wade, *Administrative Law in Britain and the United States* 193 (Oxford University Press, Oxford, 1972).
[25] A. Prasanna, "Tortious Liability of Government" 9 *CULR* 415 (1985).
[26]L. Nevil Brown and J. F. Garner, *French Administrative Law* 100 (Butterworths, London, 1973).

ISSN: 0975-3583, 0976-2833 VOL12, ISSUE 01, 2021

accorded a statutory base in all the Canadian provinces and also at the Federal level. The English Crown Proceedings Act, 1947 served a model for the enactment of such legislation in the provisions of Canada. The rule that the Crown was not liable in tort still applied in the provinces of British Columbia, New FoundLand and Prince Edward Island.

According to Canadian Petition of Right Act, 1927, the Crown could be sued in a separate Court, the Court of Exchequer, on Petition of Right but so far as liability in tort was concerned that was confined to negligence.[27]The Crown Liability Act, 1953 was passed by the Dominion legislature under which the Crown in right of Canada is made liable for damages in tort as much the same lines as those of Crown Proceedings Acts in England and New Zealand. The British Columbia enacted the Crown Proceedings Act,1979.In Canada also the Crown was put in most respects in the same position as an ordinary person. The Crown Liability Act, 1953 does not prevent the issue of aninjunction against the Crown. For the purpose of litigation, the Crown is to be treated par with ordinary subject. [28] In *Windsor Motor v. District of Powell River*[29]the plaintiff company was given a license by a License Inspector to set up a used car business which was later found to be invalid because it contravened a zoning by-law. The company was awarded damages for the financial loss it suffered under the Hedley Byrne Principle. The Crown is also not subjected to the prerogative writs. Regarding the production of documents in evidence, the objection can be taken on the ground of doctrine of Crown or executive privilege.[30]

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

3.5 Position in China

State'stortious liability in Chinese law is complex.Under the 1982 Constitution, State liability was revived and the present rules and regulations concerning State liability are embodied in the State Compensation Law enacted in 1994. Largely speaking, in China, State liability is dominated by government and with court intervention which is only marginal. According to Chinese law, the State body under

[27]*Palmer v.The King*, (1952) 1 *DLR* 259.
[28]British Columbia (Canada), Code of Civil Procedure, 1968, art.14.
[29](1969) 4 *DLR*(3d) 155.
[30]S.S. Srivastava, *Rule of Law and Vicarious Liability of State* 27 (Eastern Law House, Kolkata, 1995).

ISSN: 0975-3583, 0976-2833 VOL12, ISSUE 01, 2021

compensatory obligation shall instruct its personnel or the entrusted organization or person who has committed intentional or grave mistake to bear part or all the expenses for damage. Besides, the individual public employee could also undertake administrative or criminal liability (under Article 24 of the State Compensation Law). The statistics show that there is a significant number of cases concerning State liability in China, in particular the wrongdoings by public prosecutors, confirming the general impression that Chinese authorities use the State Compensation Law to monitor public employees and to make sure they act in a lawful way.[31]

3.6 Position in some other countries

In Australia, its Constitution does not create rights in tort nor does it expressly authorise any conduct that would otherwise constitute a tort.The principle of legality provides some protection from Statutes that authorise what would otherwise be a tort.Courts are reluctant to hold that a statute authorises the commission of what would otherwise be a tort, unless the statute does so clearly and unambiguously.For example,in *Coco v. The Queen*,[32]the HighCourt considered whether section 43(2)(c) of the Invasion of Privacy Act, 1971, which conferred authority on a judge to authorize the installation and maintenance of a listening device, extended to authorising entry onto private premises to install the device. They held it did not authorise what would be otherwise be a trespass onto the accused's land to install the device.The Judiciary Act, 1963 lays down the law relating to government liability. In the case of *Sargood Bros. v. Commonwealth*,[33] it was held that an action lies against the Commonwealth in tort, in the ordinary manner, by a subject or a State. Similarly, in the case of *Commonwealth v. New South Wales*,[34] it was held that a State may be sued in tort without its consent. Thus the maxim, the King can do no wrong, has not been applied in Australia.

In Germany, the law would probably lie somewhat in between the English and the Latin systems of State liability, where the civil code contemplates official liability (Article 839 BiurgerlichenGesetzbuches (BGB) but the Constitution effectively transfers the liability of the official to the public authority (Article 34 the German Constitution (GG)).[35]Still, German State liability has also advanced by means of case laws by restricting the application of legal statutes limiting public liability. This positive trend is seen by German legal doctrine as still insufficient and roots itself in the need to protect the individual from 'public powers'. [36]The basic principles of responsibility in Germany are established by constitutional and statutory law, rather than judicial decisions. An important feature of the German system is the fact that

[31] Keith Hand, "Watching the Watchdog: China's State Compensation Law as a Remedy for Prosecutorial Misconduct" 9 *PRLPJ* 95 (2000).
[32](1994) 179 *CLR* 427.
[33](1910) 18 *CLR* 258.
[34](1923) 32 *CLR* 200.
[35] Michael Nierhaus, "Administrative Law" in J. Zekoll& M. Remann (ed.), *Introduction to German Law* 83 (Kluwer, The Hague, 2nd edn., 2005).
[36]*Supra* note 7.

ISSN: 0975-3583, 0976-2833 VOL12, ISSUE 01, 2021

basically there is the same system of responsibility for all divisions of government and all public bodies and corporations. The public bodies are responsible directly for injuries caused by the wrongful administration of public and sovereign functions. The individual deeming himself injured does not sue the officer, but sues the public body. The latter, however, retains the constitutional right to sue the officer if it is compelled to make compensation to the injured person. No distinction is made, as regards responsibility, between governmental units which are sovereign or quasi-sovereign and those which are merely administrative agencies. No responsibility exists, however, in respect to legislative acts. Finally, suits in respect to torts are brought in the regular civil courts according to the rules of civil procedure.[37]

In Italy, State liability has faced important developments in recent years also due to a major court decision of the Court of Cassation.[38]A second substantial step towards a more generous State liability was made with a new law,concerning a reform of administrative law and procedure.

It is Spain that favours the most State liability, having chosen a broad, no-fault State liability regime. Fault is formally only important at most to determine the amount of damages. The situation in Spain has reached such a point that some legal commentators speak now of 'overcompensation' or a practical 'social insurance' system established under the veil of State liability.

In Argentina and in Chile, case law has developed State liability (including liability imposed on the legislative and judicial branches of government) but the application remains a practical issue.State liability is also explicitly mentioned in the Colombian 1991 Constitution (Article 90) as well as by the 2008 Constitution of Ecuador (Article 11) and by the 1967 Constitution of Uruguay (Article 24). In the case of Mexico, State liability is enshrined by the Constitution (Article 113) that was amended in 2000 to restrict immunity and has been developed by the new Law of Federal Liability of Public Servants enacted in 2002, as part of a reform for transparency and reduction of corruption.[39]

3.7 Position in India

As far as India is concerned, the traditions of the past have made its legal system what it is and still influencing it. India has a known history over 5000 years and there were the Hindu and the Muslim periods before the British period and each of those periods have distinctively contributed in formulation of law. However, the Indian legal system is greatly influenced by the British law. The organised and well established legal machinery was firstly set up in British India. It was only the duly

[37] Frederick F. Blachly and Miriam E. Oatman, "Approaches to Governmental Liability in Tort: A Comparative Survey" 9:2 *LCP* 204 (1942).
[38] Thomas Glyn Watkin, *The Italian Legal Tradition* 179 (Dartmouth Publishing Company, Sudbury, 1997).
[39] Stephen Zamora, *Mexican Law* 318 (Oxford University Press, Oxford, 2007).

ISSN: 0975-3583, 0976-2833 VOL12, ISSUE 01, 2021

constituted courts which gave the judgments according to the complex situations of various parts of India which helped a lot in the development of law and stability in India.

However, when the question of the liability of State in torts arose, the British Indian Courts went into a very complex situation. They presented the principle of 'sovereign and non-sovereign functions' and decided the State's tortious liability on magnitude of this difference, though the legal maxim 'King can do no wrong' did not find place in India. The Government was held not liable when any tort is committed by its employees or servants during the course of employment while doing the sovereign functions.

India is a fast developing country with vast State functions. Nearly sixty five years after independence, its legal system, is yet to find an adequate answer to the liability by the State actions. Not merely has any legislative solution been attempted to solve the problem of compensation for injuries caused to Indian citizens out of the routine activities of State agencies, but also the State has usually put forth the defense of sovereign immunity whenever compensation claim have been pressed.[40] This violates the directive principles and the preamble of the Constitution of India. The true implication of Article 300 of the Constitution is to denote suability of the Union and the States and not their respective liabilities. Disinclined to follow the corpus of past cases, tests and distinction, judges have repeatedly urged for legislation in *State of Rajasthan v. Vidyawati*[41] and *Kasturilal case*[42]. For better administration of State tortious liability law, the old dichotomy distinction between 'sovereign and non-sovereign functions' should be done away with and giving way to legislation.

What is striking in this situation is that the State should be contesting such matters as far as the Supreme Court of India and that the courts, while giving relief, should still be nominally adhering to, rather than expressly repudiating, the 1861 test distinguishing between sovereign and non-sovereign functions, so un-contemporaneous today. The very first report of the Indian Law Commission in 1956 urged legislative abolition of this distinction and courts have repeatedly endorsed this recommendation. A Bill introduced in 1965 lapsed in 1967 as it never gone through the parliamentary bridges; since then Parliament has not found this item to be one deserving high priority on the legislative agenda. It is much to be hoped that the Supreme Court of India without waiting for any legislative action, bids farewell to this colonial doctrine, making it difficult for citizens of India to claim compensation for injuries they suffer as a result of the growing volume of State activity in all domains of Indian life.

[40]A.G. Noorani (ed.), *Public Law in India* 212 (Vikas Publishing House, New Delhi, 1982).
[41]*AIR* 1962 SC 933.
[42]*AIR* 1965 SC 1039.

ISSN: 0975-3583, 0976-2833 VOL12, ISSUE 01, 2021

In *ChallaRamkonda Reddy v. State of A.P.*,[43] the court held that there is no sovereign immunity in the case of deprivation of Article 21 of the Constitution of India to negligence caused by public servants. The rule of sovereign function is not applicable where the matter is in respect of fundamental right to life guaranteed by Constitution of India.

In the *Chairman, Railway Road v. Chandrima Das*,[44] the Supreme Court held that the functions of State are not limited to administration of justice and defence, but they extend to social, economical, educational, commercial, political etc. These functions are not covered under the heading of sovereign powers.

In *GovindKaur v. State of Rajasthan*,[45] a 4 years old child died by drowning in the pond constructed by Municipality in a small village. There was no wall around the pond. The child played near it not knowing that there is a pond. The High Court of Rajasthan held that State is liable for the act because it was the duty of Municipality to protect the area near the pond.

4. CONCLUSION

After the comparative study of various Nations regarding the tortious liability of State, it can be easily concluded that in most of the countries there is no proper and suitable law with regard to the remedies which a person could avail against the State if any tort has been committed by the servant, employee or official of the Government. The States having such laws are full of drawbacks and are not impartial. The historical study also shows that the every State has always remained enjoying the sovereign immunity whenever the question of liability of the State in torts has ever been arisen. The rule that 'King can do no wrong' has prevailed in England since time immemorial. Italy is still witnessing the constant changes in law in this regard. The remedies for a common man are very weak against tortfeasor State in Germany. China has a very complex law regarding liability of the Government. Moreover, nothing written is there in Australia regarding the rights and liabilities and the conduct of public authority which could amount to tort.

It was only in 20th century when the seriousness of this point was first ever realised in England. Due to voices raised since long, gradually, the Crown Proceedings Act, 1947 was enactedin which the government was placed as regards the right to sue and to be sued in the same position as a private individual. The people also got some relief against the tortious act of State after the passing of Federal Tort Claims Act, 1946 in United States of America. Canada also comprehended the seriousness of this matter and enacted the Petition of Right to be filed by its people against the Government. In Germany, public body can be sued but not a public officer. However, the Spain and Franceare the countries which have the most advanced system

[43] *AIR* 1989 AP 235.
[44] *AIR* 2000 SC 465.
[45] *AIR* 2009 Raj. 61.

ISSN: 0975-3583, 0976-2833 VOL12, ISSUE 01, 2021

of redressing the grievances of individuals against governmental liability. To talk about India, even after 70 years of independence, there are no specific statutory provisions to describe or define the tortious acts of State and the liability arisen therefrom. However, the Judiciary has played a significant role in diminishing the sovereign immunity of Indian Government.