THE LAW OF GOVERNMENTAL LIABILITY IN TORT WITH REFERENCE TO INDIA (1985). By K.C. Joshi. Vishal Publications, Kurukshetra. Pp. xxxii+270. Price Rs. 125.

THE AUTHOR of the book[1] under review has made a commendable endeavour to probe into the feasibility and extent of tortious liability of the Government in India for wrongs committed by its servants.

The book is divided into eight chapters dealing with the law of governmental liability for torts in England, United States and India. Chapter I contains an analysis of the principles and immunities of a sovereign in general and acquaints the readers with the general theme carried in the book.

Chapter II, divided into two parts, exhaustively deals with the law of tortious liability in England. The first part, highlights the law prior to 1947 and surveys the social and political conditions prevailing in that country leading to the passage of the Crown Proceedings Act 1947 which water downs the immunity of the Crown in tort. The second part, analyses its relevant provisions along with limitations to assess its efficacy and adequacy. Similarly chapter III summarises the law in the United States before and after the enactment of the Federal Tort Claims Act 1946. The author refers to judicial opinions in the right perspective. Severity of the exceptions provided in the USA Act has been compared with that of the British Act bringing out the restrictiveness and harshness of the former. The observation is rightly made that it is "most deceptive"[2] and "does not abolish the sovereign immunity but only fetters it."[3]

Chapter IV gives a comprehensive view of the law of tortious liability of the state in ancient India. The first part seeks to show that the British feudal maxim 'King can do no wrong' was unknown to the ancient Indian polity and legal system. A number of instances during the Hindu and Muslim periods[4] have been quoted revealing the roles and responsibilities of Kings and disapproval of the doctrine of sovereign immunity.

In referring to the governmental liability during the era of the East India Company, a mention is made of all the relevant Charters and Acts leading to the statutory recognition in the 1858 Act of the tortious liability of the Secretary of State for India to that of the East India Company, which was subsequently carried out by the Government of India Acts of 1915

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1. K.C. Joshi, *The Law of Governmental Liability in Tort with Reference to India* (1985).

2. *Id.* at 67.

3. *Id.* at 68.

4. The author points out that in the Muslim polity Monarch and subjects were equal before Islamic Law. See *id.* at 74.

and 1935. All these changes have been analysed in parts II and III of the chapter.

The provision of the 1858 Act for the first time came up before the Calcutta Supreme Court for judicial interpretation in the *P and O* case.[5] Chief Justice Peacock determined the vicarious liability of the East India Company by classifying its functions into "sovereign"[6] and "non-sovereign". This classification laid down the foundation of the law of governmental liability in tort in India since 1861. The author convincingly expresses his reservations as to generality of the case and analyses two important but unnoticed cases in which the doctrine of sovereign immunity was not applied in India.[7]

Chapter V is devoted to the tortious liability of the state under the Constitution. The Constituent Assembly, surprisingly, did not make any sincere attempt to discontinue the feudal and vague governmental liability in tort carried over successively by constitutional enactments beginning from the Government of India Act 1858. It accordingly incorporated article 300 determining the extent of the liability of the government for torts. After the commencement of the Constitution the question was re-examined by the Supreme Court in *State of Rajasthan* v. *Vidyawati*.[8] The court, recognising the changed context and role of a welfare state, gave a restrictive significance to the concept of "sovereign" functions in determining government's liability. While doing so Chief Justice Sinha observed :

> Now that we have, by our Constitution, established a Republican form of Government, and one of the objective is to establish a Socialistic State...there is no justification, in principle, or in public interest, that the State should not be held liable vicariously for the tortious acts of its servants.[9]

The progressive view[10] taken in *Vidyawati* received a setback in *Kasturilal* v. *State of Uttar Pradesh*.[11] In this case Chief Justice Gajendragadkar, who with admitted reluctance and under legal compulsion,[12] applied

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5. *Peninsular and Oriental Steam Navigation Company* v. *Secretary of State*, (1961) 5 Bom. H.C.R. App. I, 1.

6. *Narayan Krishna Laud* v. *Gerard Norman, Collector of Bombay*, 5 Bom. H.C.R. O.C.J. 1 (1868) and *Secretary of State for India* v. *Bombay Landing and Shipping Co.*, 5 Bom H.C..R. O.C.J. 23 (1968).

7. *Supra* note 1 at 90-92.

8. A.I.R. 1962 S C. 933.

9. *Id.* at 940.

10. See, Alice Jacob, "Vicarious Liability of Government in Tort", 7 *J.I.L.I.* 247 (1965); A.R. Blackshield, "Tortious Liability of Government: A Jurisprudential Case," 8 *J.I.L.I.* 643 (1966); H.M. Seervai, *Constitutional Law of India*, vol. 2, p. 1795 (3rd ed.).

11. A.I.R. 1965 S.C. 1039.

12. *Supra* note 10 at 651. Also see *Secretary of India* v. *Hari Bhanji*, (1882) I.L.R. 5 Mad. 273 (The Law Commission of India in its First Report has recommended the adoption of the *Hari Bhanji* rule) *P.R. Rao.* v. *Khushaldas*, A.I.R. 1950 S.C. 222 (Mukherjee J. approved the view of Chagla C.J. and Tendulkar J.) ; *India* v. *Murlidhar*, A.I.R. 1952 S C 141; *India* v. *Ram Kamal*, A.I R. 1953 Ass. 116. *P and O* has been treated as *obiter*.

the *P and O* case by maintaining that the distinction between 'sovereign' and 'non-sovereign' had been uniformly followed in India,[13] perpetuated the fuedalistic distinction between such functions for determining governmental liability for tort, though he had referred to the changed socio-politico-legal situations at home and abroad. The author not only surveys the judicial opinions pertaining to the pre- and post-Constitution periods but also offers a precise and convincing analysis and valuble comments thereon. He also touches upon the defences available to the state.

"Legislative inaction to bring the law up to date" coupled with the "lack of judicial activism" in the field of governmental liability[14] led to the case by case approach to give content to the doctrine of sovereign immunity *vis-a-vis* governmental liablity. Unfortunately the process has created conflicting, unpredictable and unjust results.[15] However, the Indian judiciary has tried to mitigate the harshness and unjustness of the doctrine by restricting its scope.[16]

The Law Commission of India[17] and the Supreme Court[18] have made a strong plea for the enactment of a legislation[19] to regulate and control the

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13. Seervai remarks that the observation in *Kasturilal* that the distinction made in *P and O* is uniformly followed by judicial decisions in India is wrong and is made *per incuriam* (*supra* note 10).

14. See, P.K. Tripathi, "Rule of Law, Democracy and the Frontier of Judicial Activism", 17 *J.I.L.I.* 17 (1975).

15. See, for case law, M.P. Jain and S.N. Jain, *Principles of Administrative Law* 762 (4th ed. 1986).

16. In *Thangarajan* v. *Union of India*, A.I.R. 1975 Mad. 32, the court recommended an *ex gratia* payment of Rs. 10,000 to the injured boy. Recently the Supreme Court has awarded damages/compensation is some cases of gross violation of individual rights by the administration. See, *Rudal Sah* v. *State of Bihar*, A.I.R. 1984 S.C. 1023; *Oren* v. *State of Bihar* (unreported, see *Hindustan Times* (13 August 1983); *Devaki Nandan Prasad* v. *State of Bihar*, A.I.R. 1983 S.C. 1134; *Bhim Singh* v. *State of Jammu & Kashmir*, A.I.R. 1986 S.C. 494, *Khatri* v. *State of Bihar*, A.I.R. 1981 S.C. 928. For comments see, S.N. Jain, "Money Compensation for Administrative Wrongs through Article 32", 25 *J.I.L.I.* 118 (1985); K.I. Vibhute, "Compensatory Jurisdiction of the Supreme Court", *C.U.L.R.* 83 (1986); P.K. Tripathi, "Article 32 and the Compensation Conundrum", 2 *S.C.C.* (*Jour.*) 52 (1984); N.R. Madhava Menon, "SC's break through judgement", *Hindustan Times* (11 Nov. 1983, Delhi). Surprisingly, the author of the book under review has not dealt with these cases.

17. *First Report* (*Liability of the State in Tort*) (1956).

18. *Kasturilal* v. *State of Uttar Pradesh*, *supra* note 11. Kailasam and Maharajan JJ. have reassured the need of such legislation and reminded the plea made in *Kasturilal* (*Thangarajan*, *supra* note 16).

19. However, Alice Jacob takes the view that the cure lies in the hands of the judiciary and not the legislature (*supra* note 10 at 251). Similarly Seervai feels that such 'strong plea' for legislation is inappropriate to remove the cruelty and injustice resulting from ill-founded and borrowed distinction between sovereign and non-sovereign. It can be cured by the Supreme Court, not by the legislature, by restating that the maxim of English law that "the King can do no wrong" had no application to the East India Company and therefore can have no application to the Union of India or to the states (see *supra* note 10 at 1796). Blackshield also argues that the whole distinction between 'sovereign' and 'non-sovereign' activities did not apply to the East India Company (see *supra* note 10 at 656).

claims of sovereign immunity. The author, on humanitarian grounds, social justice, equality and changed conception of a state and its role, urges Parliament to enact a comprehensive law to regulate tortious liability of the state as it has gone beyond the judicial reform.[20]

The Government (Liability in Tort) Bill, drafted on the lines recommended by the Law Commission was first introduced in Parliament in 1965. The Bill lapsed and was reintroduced in 1967 and certain modifications were suggested in 1969 by the Joint Select Committee of Parliament. However it again lapsed, owing to dissolution of the House of the People in 1970. Its various provisions, as reported by the joint committee, are examined by the author in chapter VI. He has rightly evaluated them in the light of, and in comparison to the UK and USA Acts to have a comprehensive view of the Indian Bill. Highlighting the exceptions in the Indian Bill the author rightly apprehends that the exceptions negate most of the principles of governmental liability in tort.

Chapter VII highlights a few genuine procedural difficulties in tort litigations with the help of a sample survey conducted in accident compensation claims made against the Haryana Government Roadways from 1966 to 1972. On the basis of the survey a plea is made for establishment of special tort claims tribunal in the field of governmental liability in tort to ameliorate the basic problems of cost and delay.

The author aptly argues that it is high time to do away with the unjust feudalistic, authoritarian and irrational doctrine of governmental immunity in torts and to adopt a functional test to determine the liability. The present day outdated and antiquated law is not only unsuitable to the contemporary welfare state but leads to logical fallacy and practical absurdity. It is hardly necessary to suggest that the liability of the state should be made co-extensive with its modern role and not confined to the *laissez-faire* era and bygone feudalism.[21]

The book not only traces genesis of such irrational governmental immunity in torts in its various perspectives but also provides valuable insights in this vital aspect of public law and offers valuable suggestions. The information and analysis contained in the study is useful for understanding the nature of governmental liability in torts in its historical, legal and social perspectives.

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20. *Supra* note 1 at 173.
21. *Id.* at 242-44.

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