

## **GOVERNMENT AS LITIGANT -**

### **'Analysis of various legal systems and litigation tendencies of the government'**

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#### **ABSTRACT**

The development of the concept of 'statutory Liability' has evolved over time in various legal system and whereby still there are some privileges provided to the government and its officials which is against the spirit of democracy. There are many statutes and precedents set by the courts around the world so as to ensure that the government does not escape liability and pay for the damage caused by its functionaries.

It is true that there are immunities available and privileges with the government, some of which are essential even in a democracy but most of those were relevant only in colonial times and do not need to exist in the modern times.

The litigation tendencies of the Indian government have been heavily criticized and are very deviating from model litigation models. There has been instances of abuse of authority and failure on part of the government with the government not even complying with the section 80 of CPC and dishonoring the court orders. All of which do not show any good governance on part of the Union or the States.

## INTRODUCTION

In Democratic countries the government takes on the role of a welfare state, and questioning the government's actions and making it liable has serious consequences on the nation as whole since ultimately all the compensations being paid are from the tax collected money.

Early common law did however recognize the liability of the officers of the state as they were on equal footing with the ordinary citizens. But as the power of the government grew, a shift from 'officer liability' to 'state liability' could be observed.

The extraordinary legal remedies such as Writs, Special Leave petitions or PILs are available with the citizens of the state against any illegal acts of the administration. Although they are a great help in protecting the occurrence or recurrence of illegal activities by the administration but they are still not capable of providing complete redressal to the aggravations faced by the individuals. Because of which individuals may have to in addition to the available remedies seek justice under the ordinary law. Say for:

Example 1: a person who is being kept under illegal detention might be can be released by using the writ of *habeas corpus* however if he wants to further initiate prosecution of state employees for wrongful confinement or bring an action for the false imprisonment under torts.

Example 2: The administration has been authorized to destroy food which is unfit for humans to consume or kill domestic/cattle animals under the influence of a contagious disease; but in the process however the officer negligently kills an animal which is not suffering the disease, the private citizen affected must get damages.

Various legal systems around the world have developed in different manner- their ways to deal with the liability of the state and the litigation as a consequence of that. All common law systems go back to England so it is necessary to understand its position.

Earlier the crown in **England** was completely immune from any liability as it was believed that the 'king can do no wrong' but as the functions of the crown grew with the coming of the new era, the crown started defending the claims made against it. For the proper management of which, the crown Proceedings Act 1947 was enacted. This act gave the crown the same liability

as any private person would have. Also in UK the Human Rights Act 1998 opened new doors for taking actions against ministers of crown for violation of human rights, which has been setup under the European Union Rule and Regulations for governing its members. But yet any legal mechanism for suing the crown for breach of contract is undeveloped in UK.

**United States**, even being a republic country has provided the government with immunities similar to those in UK and only in 1946 with the creation of the Federal Tort Claims Act brought state liability in action.

As far as the position of law regarding government liability goes, in **India** all liabilities were compared to the liability which the East India Company would have, which was a very strange way to make the government liable but with time the courts have set precedence for making the government liable under the ordinary law. There also existed a dispute between the parliament and the law commission for removal of section 80 of the CPC which also must be understood. For tortious liability article 300 of the constitution applies and for dealing with contractual liabilities article 294, 298 and 299 are there.

The government has taken a habit of unnecessarily appealing cases in higher courts and there is a huge amount of wastage of public money for irrelevant and not required litigation. No out of court settlement ever happens whereby the government acting as the nurturer and protector of the people has aided the citizen aggrieved by mistakes and negligence on part of the government.

Inspiration has to be taken from other countries who are following a **model approach toward government ligation**.

Mainly **France**, which has effectively achieved a system dealing with government litigation whereby, a distinction between service liability and personal liability is clearly established and the government carries out state activities in the interest of the entire community offering redress even in case where the government's fault is not proved.

**Australia** too is a recent model litigator its government has emphasized on the need to follow model litigation on part of the government and thereby responsibly handle litigation. The Judicial Act 1963 is the paramount statute dealing with this, and hence the concept of 'king can do no wrong' is irrelevant in Australia.

On the other hand the Government liability in tort bill which was introduced in the Indian Parliament had lapsed although it was presented twice in 1965 and 1967, the government has shown lack of concern in this matter.

It is the need of the hour that the Indian system of **government litigation be revolutionized**. It is already bad enough that an individual is forced to come to the courts against the state, the worst part is the tendency of the government to automatically make appeal for the decisions adversary to it and then pursue this litigation relentlessly all the way to the highest reachable judicial system of courts.

The government of India is the **'biggest litigant'** in the country pending cases take decades to finish as the government keeps on appealing and there exists no mechanism to deal with these acts of the government the National Litigation Policy was a major step ahead in the right direction making the government more responsible and practicing fair litigation.

**POSITION OF LAW IN:**

**ENGLAND & EUROPEAN UNION**

An important new head of government liability arose when Britain acceded to the European communities in 1973 under the European communities Act 1972<sup>1</sup>. Whereby breaching of any obligation towards the community makes the government liable for paying compensation or damages under the rules of the European Court of Justice in Luxembourg. These community obligations could arise out of the EU treaty or from the Regulations, directives and decisions of the EU Council or the EU commission.

**Liabilities for various breaches:-**

**I) Liability in Tort Generally.**

Under English law it was not possible to sue the crown until 1948. As it was believed that 'the king can do no wrong', which is similar to the rule that 'no lord could be sued in the court which he held to try cases of his tenants. But with time the functions performed by the state grew in number and so did the risks and casualties involved also increased.

"With the increase in the function of the state, the immunity of the crown in tort became more and more incompatible with the notions of democracy"<sup>2</sup> So, the crown started defending the actions performed by its servants in the capacity provided by the crown. But the damages which were awarded against these officials had to be paid from the public treasury.

The crown Proceedings Act 1947 was enacted so as to abolish the immunity of the Crown in tort. This made the crown a subject to the same liability as it would have made 'if it were a private person of full age and capacity'<sup>3</sup>

As per the Act the Crown could specifically be made liable for:

1. The Torts committed by the crown's agent or servants;
2. The breach of Duties, which a person as the employer owes to the servants and the agents at the common law;

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<sup>1</sup>STAUNTON, SKIDMORE, HARRIS AND WRIGHT, STATUTORY TORTS 192 (2003).

<sup>2</sup>S P SATHE, ADMINISTRATIVE LAW 589 (7<sup>th</sup> ed. 1970)

<sup>3</sup> Section 2, Crown proceedings Act 1947.

3. The breach of duties attaching under common law to the ownership, occupation, possession or control of property.<sup>4</sup>

This act thus bestows Vicarious Liability on the crown for the acts of its servants at common law and those as appointed directly or indirectly appointed by the crown and paid out of the consolidated or specific funds of the crown.<sup>5</sup>

The courts have held in *Tamlin v Hannaford*<sup>6</sup>, that the transport commission was not an agent of the crown. Therefore it follows that none of the nationalized industries are the agents of crown, the main criteria seems to be whether the body is performing a function analogous to that performed by Crown servants and under some degree of control by a minister of crown.<sup>7</sup> The crown is, however not liable for certain torts committed by its servants such as torts committed by policemen.<sup>8</sup>

## II) Liability for breach of Human Rights.

The Human Rights Act 1998 has opened up new vistas of liability for public authorities; the very day this act came into force, as had been expected, there was a copious flow of proceedings against public authorities.<sup>9</sup> This Act has detailed provisions for remedies and that too especially against public authorities in ordinary courts and at the instance of individual claimants, for breaches of convention rights.<sup>10</sup> The citizen may now make claims against a public authority in the appropriate court or tribunal, and in any legal proceedings, provided that he satisfies the convention's requirement of himself being a 'victim' of the alleged breach.<sup>11</sup>

### Remedies Available:

As per Article 41 of the convention says that the European court 'shall if necessary, afford just satisfaction to the injured party'.<sup>12</sup>

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<sup>4</sup>H.W.R. WADE AND C.F. FORSYTH, ADMINISTRATIVE LAW 826 (7<sup>th</sup> ed. 1995)

<sup>5</sup> Section 2(6), Crown Proceedings Act 1947.

<sup>6</sup> (1950) 1 KB 181.

<sup>7</sup>S P SATHE, ADMINISTRATIVE LAW 589 (7<sup>th</sup> ed. 1970).

<sup>8</sup>H.W.R. WADE AND C.F. FORSYTH, ADMINISTRATIVE LAW 826 (7<sup>th</sup> ed. 1995).

<sup>9</sup>H.W.R. WADE & C.F. FORSYTH, ADMINISTRATIVE LAW 637 (10<sup>th</sup> ed., 1995).

<sup>10</sup> Ibid.

<sup>11</sup> BEATSON & TRIDIMAS, NEW DIRECTIONS IN EUROPEAN PUBLIC LAW 153 (2002).

<sup>12</sup> Article 41, Human Rights Act 1998.

In case of any act (or proposed act) of a public authority the court may 'grant such relief or remedy, or make such order, within its power as it considers just, and appropriate.'<sup>13</sup> The court habitually provides both damages and costs in a manner comparable with the British courts, and these awards are binding under the convention.<sup>14</sup>

Infringement of Human Rights Under the human rights Act may be regarded as a new species of tort or else an additional form of breach of statutory duty or else as *sui generis*.<sup>15</sup>

### III) Liability in Contract.

Contracts have now come to play a large part in the mechanism of public services; so persuasive is the technique of administration by contract that it has been called 'a revolution in the making' and 'the cutting edge of administrative law'.<sup>16</sup> Contract it is said, 'has replaced command and control as the paradigm of administration'.<sup>17</sup>

The English Law has no special regime dealing with contracts made by the public authorities. The central government departments usually make contracts in their own name as the agents of the crown so when the question of enforcement comes, it is the crown proceedings Act which governs the execution of these contracts.

European Union on the other hand has an established legal regime for procurement contracts, designed to ensure fair competition and non-discrimination.<sup>18</sup>

The crown is free to make contracts (though not to spend public money) without statutory authority since it enjoys the powers of a natural person<sup>19</sup>

### UNITED STATES

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<sup>13</sup> S. 8(1), Human rights Act 1998.

<sup>14</sup> Article 46, Human Rights Act 1998.

<sup>15</sup> H.W.R. WADE AND C.F. FORSYTH, ADMINISTRATIVE Law 639 (10<sup>th</sup> ed. 1995).

<sup>16</sup> HARLOW AND RAWLING, LAW AND ADMINISTRATION 207 (2<sup>nd</sup> ed. 2009)

<sup>17</sup> Ibid, page 21.

<sup>18</sup> Ibid, page 677.

<sup>19</sup> MITCHELL, THE CONTRACTS OF PUBLIC AUTHORITIES 182 (1954)

Even in a republican country like the United States, the state enjoyed immunities similar to those in monarchical England.<sup>20</sup> Until the detailed legislation got enacted in 1946, The Federal Tort Claims Act 1946 which made the state liable in respect of the tort of property, life and person.<sup>21</sup> The 'United States shall be liable in the same manner and to the same extent as a private individual under like circumstances.'<sup>22</sup> So far as statutory Duties are concerned, the United states is not liable for any torts committed in the discharge of such duties if the duties are performed with due care.<sup>23</sup>

## INDIA

The constitution of India clearly states that the executive power of the union and of every state extends to 'the carrying on of any trade or business and to the acquisition, holding and disposal of property and the making of contracts for any purpose'.<sup>24</sup> The constitution therefore provides that a government may sue or may be sued by its name.<sup>25</sup> Similar provisions exists in The Civil Code Procedure 1908 (CPC) i.e. section 79. All these provisions of law provide for the method and procedure of redressal, the extent of state liability is not covered under them.

Section 80 of the Civil Procedure Code & the 14<sup>th</sup> Law commission report:

**Section 80 of the CPC** provides that 'no suit shall be instituted against the government or against a public officer... working in his official capacity, until the expiration of two months next after notice in writing has been delivered or left'<sup>26</sup> at the office of:

- (i) The secretary of that Government in the case of a suit against the Central Government, except where it relates to a railway;

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<sup>20</sup> S P SATHE, ADMINISTRATIVE LAW 589 (7<sup>th</sup> ed. 1970).

<sup>21</sup> 28 US 2672.

<sup>22</sup> Ibid, page 2674.

<sup>23</sup> Ibid, page 2680, clause (a).

<sup>24</sup> Article 298, Constitution of India, 1950.

<sup>25</sup> Article 300, Constitution of India, 1950.

<sup>26</sup> Section 80, Civil Procedure Code, 1908.

- (ii) The general manager of the railway in the case of a suit against the central government, except where it relates to a railway;
- (iii) The chief secretary to the Jammu and Kashmir government or any other officer authorized by that government in this behalf in the case of a suit against the government of Jammu and Kashmir;
- (iv) The secretary to that government in the case of a suit against any other state government.

The objective behind these provisions is to give government an opportunity to reconsider its legal position and in furtherance make amends or settle the claims against it and if possible avoid litigation.<sup>27</sup>

**The Law commission** report suggested that the section be dropped.<sup>28</sup> They gave the reasoning as follows:

- a) In a democratic Country there should be no distinction between the citizen and the state.
- b) In many cases the government defeats just claims by adopting technical defenses.

The parliament's joint committee however did not comply with this, and gave the opinion that there exists a distinction between the citizen and the government, it also felt that if section 80 was omitted it might encourage vexatious suits against the government which would obstruct its welfare programs.<sup>29</sup>

The notice which is served must be taken seriously by the government, the Supreme Court has observed that it is mandatory for the government to negotiate with the aggrieved person regarding the extent of the claims made.<sup>30</sup>

## **D) Liability for tort**

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<sup>27</sup>Raghunath Das v. Union of India, AIR 1969 SC 674.

<sup>28</sup> Law Commission, 14<sup>th</sup> Report, page 475.

<sup>29</sup>S P SATHE, ADMINISTRATIVE LAW 579 (7<sup>th</sup> ed. 1970)

<sup>30</sup> Bihari Choudhary v. State of Bihar, (1984) 2 SCC 627.

The liability of government under tort is decided under public law's principles, derived from British common law and by the constitution. Under Article 300 of the constitution the extent of liability of the union and the states is dealt with. The provision directs back to the government of India Act 1935, section 176, which in turn traces back to the section 65 of the Act of 1858 which laid down that, on the assumption of the government of India by the Crown, the secretary of the Indian State would be liable to the very same extent as the East India Company had used to be liable.

So to check whether the government of India was liable it had to be satisfied that the East India Company could be held liable for the same, which was a very weird method. So to remove this confusion the Law Commission recommended a legislation pertaining to the subject. Whereby the government introduced two bills on "the government liability in tort" in loksabha in 1965 and 1967, none of which were enacted as a law and the bill lapsed.

The East India Company performed dual functions, commercial functions and functions involving exercise of sovereign power as the representative of the Crown. In its latter role the East India Company claimed sovereign immunity. This dual character of the East India Company has been explained in the Peninsular and Oriental Steam Navigation Company case (P & O case)<sup>31</sup> where the plaintiff had filed an action to recover from the Company compensation for damages sustained by injuries caused to a horse of the plaintiff due to the negligence of servants of the Company. Sir Barnes Peacock, holding the Company liable, said<sup>32</sup>:

*"There is great and clear distinction between acts done in the exercise of what are usually termed as sovereign powers, and acts done in the conduct of undertaking which might be carried on by private individuals without having such power delegated to them.... When an act is done or contract is entered into, in the exercise of powers usually called sovereign powers, by which we mean powers which cannot be lawfully exercised except by a sovereign, or a private individual delegated by a sovereign to exercise them, no action will lie."*

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<sup>31</sup> (1861) 5 Bombay HCR App 1.

<sup>32</sup> Ibid on pages 15-16.

At first in *State of Rajasthan v. Vidhyawati*<sup>33</sup> it was held that the state is vicariously liable for torts committed by its servants, But unfortunately the Supreme Court in *KasturiLal case*<sup>34</sup> relied on the observations of Sir Peacock and held that the English maxim 'the king can do no wrong' applies to the East India Company and thereby to the State in India, granting it immunity from an action in tort committed in the exercise of its 'sovereign power'. But through later case laws this position has been altered again.

In the *Privy Purse case*<sup>35</sup> the Court had to consider the action of the President de-recognising all the Rulers under Article 366(22) of the Constitution. It was contested by the Union of India that the action of the President was in exercise of his sovereign power. The Supreme Court rejected the contention and held that there is nothing like sovereign power under our Constitution in the matter of relationship between the executive and the citizens.<sup>36</sup> It held that the functions of the President stemmed from the Constitution and not from the British Crown. Hedge, J. observed<sup>37</sup>:

*"Our Constitution recognises only three powers viz. the legislative power, the judicial power and the executive power. It does not recognise any other power. In our country the executive cannot exercise any sovereignty over the citizens. The executive possesses no sovereignty.... There is no analogy between our President and the British Crown. The President is a creature of the Constitution. He can only act in accordance with the Constitution."*

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<sup>33</sup> AIR 1962 SC 933.

<sup>34</sup> *KasturiLal Ralia Ram v. Union of India*, AIR 1965 SC 1039.

<sup>35</sup> *Madhav Rao Scindia v. Union of India*, (1971) 1 SCC 85.

<sup>36</sup> *Ibid*, page 53.

<sup>37</sup> *Ibid*, page 169.

## II) Liability under Contract

Contracts are widely used by public authorities as instruments of both policy and of administration.<sup>38</sup> The government's contractual business is now so vast that it is easily tempted to use it for ulterior purposes<sup>39</sup>, it is a source of great power, which has been called a 'new prerogative',<sup>40</sup>

Article 294 makes provision for succession by the present government of the union and states to property, assets, rights, liabilities and obligations vested in the former government.<sup>41</sup> Further article 298 also lays down that government can enter into contracts for gulling its functions. Article 299 has the essentials which must be there in a government contract for it to be enforceable.<sup>42</sup>

Again here also for determination of the extent of government liability has taken succession from the liability of the East India Company. As East India Co. had pure commercial purposes it was no doubt that it could not be immune its acts as the crown was immune. This was also held by the Bengal Supreme Court in *Bank of Bengal v. United Co.*<sup>43</sup> It is true that the state owes responsibility and so cannot abuse its position, it must comply with all the conditions laid in art. 299(1), they are mandatory and have not been provided merely for the sake of form but to protect the government against unauthorized contracts, so that public funds may not be wasted on unauthorized contracts.<sup>44</sup> These essentials are:-

1. The Contract must be expressed to be made by the President or the governor, as the case may be.
2. The Contract must be executed on behalf of the president or the Governor, as the case may be.
3. The Contract must be executed by a person authorized by the President or the Governor, as the case may be.
4. Must be ratified by the government.

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<sup>38</sup>TURNIP, BRITISH GOVERNMENT AND THE CONSTITUTION 437 (5<sup>th</sup> ed. 2002).

<sup>39</sup>Hardy v. Motor Insures Bureau (1964) 2 QB 754.

<sup>40</sup>Sharp v. Pereira (1999) 1 WLR 195.

<sup>41</sup>Article 298, Constitution of India, 1950.

<sup>42</sup>Article 299, Constitution of India, 1950.

<sup>43</sup>(1831) I Bignall's Reports 87.

<sup>44</sup>I.P. MASSEY, ADMINISTRATIVE LAW 447 (1980).

5. If a person has done something for a government under an invalid contract, government is bound to pay compensation.
6. A contractual cannot clog the government's constitutional power of eminent domain.
7. Waiver must be properly pleaded.
8. A writ may be issued only by the High Courts for enforcement of contractual obligation.

It was held by the Hon'ble Supreme Court in the case of *K.P.Chowdhary v. State of Madhya Pradesh*<sup>45</sup> that:

*"In view of the provisions of Article 299 (1) there is no scope for any implied contract. Thus no contract can be implied under this Article. If the contract between the Government and a person is not in compliance with Article 299(1), it would be no contract at all and would not be enforceable as a contract either by the Government or by the person."*

Though there is hardly any distinction between a contract between private parties and Government contract so far as enforceability and interpretation are concerned, yet, some special privileges are accorded to the Government in the shape of special treatment under statutes of limitation.<sup>46</sup> Section 112 of the Limitation Act, 1963 contains provision for longer period of limitation of suits on or behalf of the State. The longer limitation period was based on the common law maxim *nulla tempus occurit regi* i.e. no time affects the Crown.<sup>47</sup> Some privileges are also accorded to Government in respect of its ability to impose liabilities with preliminary recourse to the courts. This probably is because of doctrines of executive necessity and public interest.<sup>48</sup>

The State cannot, therefore, act arbitrarily in entering into relationship, contractual or otherwise with a third party, but its action must conform to some standard or norm which is rational and non-discriminatory; the action of the Executive Government should be informed with reason and should be free from arbitrariness.<sup>49</sup>

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<sup>45</sup> AIR 1967 SC 203.

<sup>46</sup> Navrattanmal v. State of Rajasthan, AIR 1961 SC 1704.

<sup>47</sup> Andhra Pradesh v. Challa Ramkrishna Reddy, (2000) 5 SCC 712.

<sup>48</sup> S P SATHE, ADMINISTRATIVE LAW 382 (7th ed. 1970).

<sup>49</sup> <http://www.manupatrafast.com/articles/PopOpenArticle.aspx?ID=a4122e98-7362-4e05-87ce-bed7af3b9b2f&txtsearch=Subject:%20contract#f13>.

## LITIGATION TENDENCIES OF THE INDIAN GOVERNMENT

The litigation tendencies adopted by the government in India is horrifying, the sickening nature of government litigation has been expressed by J. Krishna Iyer in a matter, where he lambasted the state authorities:

*“Here is a case of a widow and a daughter claiming compensation for the killing of the sole breadwinner by a state transport bus; and the Haryana Government, instead of acting on social justice and generously settling the claim, fights like a cantankerous litigant even by avoiding adjudication through the device of asking for court-fee from the pathetic plaintiffs.”<sup>50</sup>*

Another instance of government’s failure to perform was brought to light by a newspaper report in a matter in the state of Andhra Pradesh where land was acquisitioned:

*“The case of Mareppa, Narsappa, Sawaranna&Ramana, four farmers belonging to Mehboobnagar district of Andhra Pradesh is typical. Their lands were acquired for the PriyadarshiniJurala project in 1988. The Special Deputy Collector for the project passed a compensation award in 1989. The farmers sought reference to a Civil Court as they were not happy with the award. The Court of the Senior Civil Judge, Gadwal, Mehboobnagar District enhanced the compensation in 2002. The state however appealed to the High Court in 2003. The appeals were dismissed by the High Court in 2005. This time, the state did not appeal again, but the Government did not pay up and the farmers were again forced to approach the court! At a hearing on 28 August 2007, the court chided the Government and ordered it to deposit the compensation amounts within seven days. Other citizens suffer a worse fate, dying before their claims are settled. Jamma and Balamma, whose lands were also acquired for the project did not manage to outlive the litigation. Their sons have continued to pursue the compensation which was awarded by the Court of the Senior Civil Judge, Gadwal, Mahbubnagar District in*

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<sup>50</sup> State of Haryana v. Darshna Devi, AIR 1979 SC 855.

1996. At a High Court appearance on 6 December 2007, the lawyer representing the state requested for more time to 'get instructions' from the Government. The Court granted more time with a threat to summon the Secretary to the Government for explanations if the matter was not settled by the next date of hearing. Thus, two decades have passed for these farmers without compensation for the lands that have been taken away from them. The dilatory tactics of the Government are visible at every step. Even after all appeals have been exhausted, Court orders to make payments are blatantly flouted by the Government.”<sup>51</sup>

Also the purpose and objective of Section 80 of the CPC was to develop a system which gave the government time to settle disputes out of court, but this rarely happens. In *Maharashtra v. NV Deshpande*,<sup>52</sup>J. PN Bhagwati advised states to not file frivolous appeals against sound judgments of the High Courts. This holds true for the state’s litigation in general.

Only in situations where settlement seems impossible, should the matters be brought to the court. In *State of Punjab v. Geeta Iron and Brass Works*,<sup>53</sup>J. Krishna Iyer said:

*“We like to emphasize that Governments must be made accountable by parliamentary Social Audit for wasteful litigation expenditure inflicted on the community by inaction.”*

Justice T S Thakur, of the Supreme Court criticized the government for being the “biggest litigant” saying that large number of cases against the government “cannot be a good sign of good governance”.<sup>54</sup>

He further continues by stating:

*“Large number of cases coming to court is a good sign in the sense that people still have faith in judiciary and its efficacy to settle the matters but large number of cases coming against the government cannot be a good sign of good governance, why should the government system not be responsive so as to prevent litigations where it can rationally*

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<sup>51</sup> <http://indiatogether.org/litigant-government>.

<sup>52</sup> AIR 1976 SC 1204.

<sup>53</sup> AIR 1977 SC 1608.

<sup>54</sup> <http://www.dnaindia.com/india/report-sc-judge-accuses-government-of-being-the-biggest-litigant-2060534>.

*and logically be prevented, Government is the biggest litigant in the country. For past several years we are grappling with the problem of extensive litigation in which the government is involved.”<sup>55</sup>*

He said that every case filed irrespective of merits is burdening the judiciary, costing the exchequer and increasing the pendency of case.

*“This is something I say is deficit in governance. Governance is not just army, police, road, building etc. but governance also is adjudicating rights of a citizen which is legitimately due to him,”<sup>56</sup>*

Millions of Indians who are forced to engage in an unequal battle with the state - the Central Government, a State Government or one of their myriad corporations - spend years, even decades seeking justice.<sup>57</sup>

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<sup>55</sup> Ibid.

<sup>56</sup> Ibid.

<sup>57</sup> <http://indiatgether.org/litigant-government>.

**MODEL LITIGATORS AROUND THE WORLD:**

**FRANCE**

Dr. I.P. Massey has commented upon the French system dealing with government liability and criticized the common law countries for not trying to achieve the same efficiency:

*“At the time when the common law jurisdictions were still lost in the darkness of the feudal principle of government immunity, a progressive idea of government liability was flourishing in France, which had recognized the principle of government liability.<sup>58</sup> It is rather unfortunate that that not only in India but in the UK and the US also, courts have not tried to develop any principle of public law relating to government liability, but are still busy in stretching the private law principles to a domain for which they were not designed.<sup>59</sup>”*

Modern French law on state liability for tortious actions is based on the distinction between *faute de service* (Service fault) and *faute personnelle* (personal fault).<sup>60</sup> Here because of the liberal construction of these terms by the courts have led to a government official being liable even for acts which the common law systems usually exonerate government officials from.

Brown & Garner have cleared the position of law in the French system in respect of government liability in the following words:

*“The activity of the state is carried on in the interest of the entire community; the burden that it entails should not weigh more 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...”<sup>61</sup>*

**AUSTRALIA**

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<sup>58</sup> I. P. MASSEY, ADMINISTRATIVE LAW 471 (1980).

<sup>59</sup> Ibid.

<sup>60</sup> BROWN & GARNER, FRENCH ADMINISTRATION 101 (1983).

<sup>61</sup> Ibid, page 105.

Australia is slowly adopting the model of litigation which is compulsory for the government to stick to and is becoming a country where government is properly and responsibly handling litigation.

Recently, the Attorney-General, the Hon. Robert McClelland stated that 'any breach of the model litigant obligation would be unacceptable as the Australian Government is committed to achieving the highest professional standards in its handling of claims and litigation'.

These remarks were welcomed by the Rule of Law Institute of Australia who stated in a media release that 'it is important that the message come from the highest levels of government that the Crown must behave as a model litigant when investigating and taking legal action against its citizens'. The Rule of Law Institute of Australia has called for the Federal Government to immediately commission an independent agency to conduct a thorough and consultative review of both the rules for behaving as a model litigant and their administration.<sup>62</sup>

The Judiciary Act, 1963 laid down the laws pertaining to government liability. In the case *Sargood Bros. v. Commonwealth*<sup>63</sup> it was held, an action lies against the Commonwealth in contract or tort, in the ordinary manner, by a subject or a state. Also, in *Commonwealth v. New South Wales*<sup>64</sup>, it was said that, a State may be sued in contract or in tort without its consent. Therefore the concept of - the King can do no wrong, is nonexistent in Australia.

### **GOVERNMENT AS A MODEL LITIGANT- IS THE NEED OF THE TIME IN INDIA:**

The American constitutional scholar Alexander has said:

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<sup>62</sup> <http://www.nortonrosefulbright.com/knowledge/publications/55750/the-model-litigant-policy-in-the-spotlight>.

<sup>63</sup> (1910) 18 CLR 258.

<sup>64</sup> (1923) 32 CLR 200.

*“Government actions and judicial decisions have two effects: an immediate, intended, practical effect and a perhaps unintended bearing on values of a more general and permanent interest. The government has argued that as a litigant it can make use of all available legal tactics - just like a private party in court. But unlike a private litigant, the government has the added burden of defending our legal system and upholding the rule of law. Arguments pursued in sensitive areas under the Basic Law will almost always have a strong bearing on the wider values”<sup>65</sup>*

It is clear that the obligations upon government agencies when handling claims and conducting litigation are higher than for ordinary citizens. There is an expectation that government agencies act fairly and properly. In addition, courts expect that government agencies will comply with court orders. This expectation arises as a result of the resources available to government such that courts expect that a government agency ought to be able to comply with court orders or urgent interlocutory applications.

Some reforms that have prevailed in India:

In Jammu and Kashmir, the former chief minister Sheikh Mohammad Abdullah had brought a nucleus system within law department which prevented cases from going to the court, Justice Thakur has wondered as *“why can’t a similar system be put in place to decide whether a case is fit to contest in the court”*.<sup>66</sup>

Central Information Commission (CIC) on 17 February 2015 ruled that the Governments, at both the Centre and State level, are expected to be a responsible litigant and not treat a citizen as opposite party or its rival. The ruling was given by the Information Commissioner Sridhar Acharyulu while hearing an appeal on disclosure of information on implementation of the National Litigation Policy 2010.<sup>67</sup>

**National Litigation Policy** was made by the ministry of law & Justice and the Government of India to reduce the litigation from the side of the government agencies, it tries to make them

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<sup>65</sup> <http://www.scmp.com/news/hong-kong/article/1177264/government-says-its-just-ordinary-litigant-think-again>

<sup>66</sup> <http://www.dnaindia.com/india/report-sc-judge-accuses-government-of-being-the-biggest-litigant-2060534>.

<sup>67</sup> <http://m.jagranjosh.com/current-affairs/government-is-expected-to-be-a-responsible-litigant-central-information-commission-1424179904-1>.

more responsible in filling cases and litigating. The policy was formulated looking into the fact that the government and its agencies are the dominant litigants in the country.

The policy Explains-

*"Efficient litigant as:*

- Focusing on the core issues involved in the litigation and addressing them squarely.
- Managing and conducting litigation in a cohesive, coordinated and time-bound manner.
- Ensuring that good cases are won and bad cases are not needlessly persevered with.
- A litigant who is represented by competent and sensitive legal persons: competent in their skills and sensitive to the facts that government is not an ordinary litigant and that a litigation does not have to be won at any cost.

*Responsible litigant as:*

- That litigation will not be resorted to for the sake of litigating.
- That false pleas and technical points will not be taken and shall be discouraged.
- Ensuring that the correct facts and all relevant documents will be placed before the court.
- That nothing will be suppressed from the court and there will be no attempt to mislead any court or Tribunal.”

The purpose underlying this policy is also to reduce Government litigation in courts so that valuable court time would be spent in resolving other pending cases so as to achieve the Goal in the National Legal Mission to reduce average pendency time from 15 years to 3 years Litigators on behalf of Government have to keep in mind the principles incorporated in the National mission for judicial reforms which includes identifying bottlenecks which the Government and its agencies may be concerned with and also removing unnecessary Government cases, Prioritization in litigation has to be achieved with particular emphasis on welfare legislation, social reform, weaker sections and senior citizens and other categories requiring assistance must be given utmost priority.<sup>68</sup>

### **CONCLUSION**

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<sup>68</sup> <http://pib.nic.in/newsite/erelease.aspx?relid=62745>.

The litigation tendencies adopted by the government in India is horrifying, the nature of government litigation has led to various occasions of failure of the government in performing its duties as a litigator. Heavy criticism has been drawn towards the government of India by the judiciary and there is clear dissatisfaction shown by the people who get themselves tangled in the web of litigation against the government.

Thus Government has consequentially become the biggest litigator in India and bears heavy cost for the public whose funds are wasted on unnecessary litigation. This huge number of cases though shows the rust and faith of the people in judiciary but is a black mark on the concept of good governance which is required to be followed.

Hence it is necessary to take inspiration from other model litigant countries like France and develop a system where government must necessarily act in the capacity of a welfare state for the utmost satisfaction and protection of its citizens. Developing more on the National Litigation Policy will definitely lead to better and efficient litigation in India.

There will be an established model of litigation to make sure less number of cases reach the courts and government pays heed to the claims made by the affected citizens. Any breach of this 'model litigant obligation' is unacceptable as the Government must be committed to achieving the highest professional standards in its handling of claims and litigation.

In the words of Justice T S Thakur:

*“Governance is not just army, police, road, building etc. but governance also is adjudicating rights of a citizen which is legitimately due to him,”*