

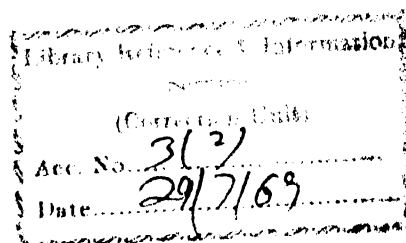
LOK SABHA

JOINT COMMITTEE

ON

**THE GOVERNMENT (LIABILITY IN TORT)
BILL, 1967**

EVIDENCE



**LOK SABHA SECRETARIAT
NEW DELHI**

January, 1969/Magha, 1890 (Saka)

Price : Rs. 1.65

COMPOSITION OF THE COMMITTEE

Shri A. K. Sen—*Chairman*.

MEMBERS

Lok Sabha

2. Shri K. Anirudhan
3. Shri N. C. Chatterjee
4. Shri R. R. Singh Deo
5. Shri Devinder Singh
6. Shri Anirudha Dipa

7. Shri Shri Chand Goyal
8. Shri R. M. Hajarnavis
9. Shri S. Kandappan
10. Shri Brij Bhushan Lal
- *11. Shri Baij Nath Kureel
12. Shri Srinibas Mishra
13. Shri H. N. Mukerjee
14. Shri Amrit Nahata
15. Shri K. Narayana Rao
16. Shri M. Narayan Reddy
17. Shri Mohammad Yunus Saleem
18. Shri A. T. Sarma
19. Shrimati Savitri Shyam
20. Shri N. Sethuramane
21. Shri M. R. Sharma
22. Shri Narayan Swaroop Sharma
23. Shri Biswanarayan Shastri
24. Shri T. M. Sheth
25. Shri Devendra Vijai Singh
26. Shri Mudrika Sinha
27. Shri G. Viswanathan
28. Shri S. Xavier

*Appointed w.e.f. the 30th July, 1968 in the vacancy caused by the death of Shri Mali Mariyappa.

(ii)

29. Shri Ram Sewak Yadav
30. Shri P. Govinda Menon

Rajya Sabha

31. Shri S. B. Bobdey
32. Shri Rama Bahadur Sinha
33. Shri Gulam Haider Valimohmed Momin
34. Shri Y. Adinarayana Reddy
35. Shri Krishan Kant
36. Shri M. P. Shukla
37. Shri Hira Vallabha Tripathi
38. Shri M. H. Samuel
39. Shri B. T. Kemparaj
- 40. Shri Chakrapani Shukla
41. Shri Dahyabhai V. Patel
42. Shri N. K. Shejwalkar
43. Shri Balkrishna Gupta
44. Shri C. Achutha Menon
45. Shri G. P. Somasundaram

LEGISLATIVE COUNSEL

1. Shri V. N. Bhatia, *Secretary, Legislative Department, Ministry of Law*
2. Shri N. D. P. Nambudiripad, *Joint Secretary, Legislative Department, Ministry of Law.*
3. Shri S.V. Sastri, *Addl. Legislative Counsel, Ministry of Law.*
4. Shri S. V. Subba Rao, *Attache, Legislative Department, Ministry of Law.*

SECRETARIAT

Shri M. C. Chawla—*Deputy Secretary.*

••Appointed on 13th August, 1968 vice Sardar Raghbir Singh Panjhzari resigned.

WITNESSES EXAMINED

S. No.	NAME OF WITNESSES	DATE	PAGE
I.	Indian Produce Association, Calcutta.	3-7-68	2
	<i>Spokesman :</i>		
	Shri V. S. Aggarwal		
	Shri R. S. Sharma		
II.	Supreme Court Bar Association, New Delhi.	3-7-68	9
	<i>Spokesman :</i>		
	Shri Sardar Bahadur Saharya, Secretary		
III.	Federation of All India Foodgrains Dealers' Association, Delhi.	4-7-68	26
	<i>Spokesman :</i>		
	Shri Bhani Ram Gupta, General Secretary		
IV.	Railway Board (Ministry of Railways)	5-10-68	34
	<i>Spokesman :</i>		
	Shri K. C. Sood—Member (Engineering)		
	Shri Kasturi Rangan,—Director (Establishment)		
V.	Ministry of Home Affairs.	5-10-68	34
	<i>Spokesman :</i>		
	Shri Uma Shanker—Joint Secretary.		
VI.	Ministry of Commerce.	5-10-68	34
	<i>Spokesman :</i>		
	Shri H. K. Kochar—Joint Secretary.		
VII.	Ministry of Finance.	5-10-68	34
	<i>Spokesman :</i>		
	Shri S. S. Shiralkar—Addl. Secretary.		

S. No.	NAME OF WITNESSES	DATE	PAGE
VIII.	Shri M. A. Ansari—Pro-Chancellor, Osmania University, Hyderabad.	24-10-68	43
IX.	Shri M. C. Setalvad, M.P.	24-10-68 & 26-10-68	59 126
X.	Shri K. L. Misra—Advocate-General, U.P.	25-10-68	74
XI.	Shri Purshottam Trikamdas, Senior Advocate, Supreme Court of India.	26-10-68	100
XII.	Shri C. K. Daphtary—Attorney General of India.	26-10-68	112

**MINUTES OF THE EVIDENCE GIVEN BEFORE THE JOINT COMMITTEE ON
THE GOVERNMENT (LIABILITY IN TORT) BILL, 1967**

Wednesday, the 3rd July, 1968, at 10.00 hours.

PRESENT

Shri M. H. Samuel—*In the Chair.*

MEMBERS

Lok Sabha

2. Shri R. R. Singh Deo
3. Shri Anirudha Dipa
4. Shri Shri Chand Goyal
5. Shri R. M. Hajarnavis
6. Shri S. Kandappan
7. Shri Brij Bhushan Lal
8. Shri Srinibas Mishra
9. Shri Amrit Nahata
10. Shri Mohammad Yunus Saleem
11. Shri A. T. Sarma
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22. Shri M. P. Shukla
23. Shri Hira Vallabha Tripathi
24. Shri B. T. Kemparaj
25. Sardar Raghbir Singh Panjhazari
26. Shri N. K. Shejwalkar
27. Shri Dahyabhai V. Patel
28. Shri Balkrishna Gupta
29. Shri C. Achutha Menon.

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2. Shri R. V. S. Peri-Sastri, *Addl. Legislative Counsel, Ministry of Law.*
3. Shri S. V. Subba Rao, *Attache, Legislative Department, Ministry of Law.*

SECRETARIAT

Shri M. C. Chawla—Deputy Secretary.

WITNESSES EXAMINED

I. Indian Produce Association, Calcutta

Spokesmen:

Shri V. S. Agarwal,

Shri R. S. Sharma.

II. Supreme Court Bar Association, New Delhi

Spokesman:

Shri Sardar Bahadur Saharya.

1. Indian Produce Association, Calcutta

Spokesmen:

Shri V. S. Agarwal .

Shri R. S. Sharma.

(Witnesses were called in and they took their seats)

MR. CHAIRMAN: Direction 58 issued by the Speaker reads as follows:

"Where witnesses appear before a Committee to give evidence, the Chairman shall make it clear to the witnesses that their evidence shall be treated as public and is liable to be published, unless they specifically desire that all or any part of the evidence given by them is to be treated as confidential. It shall, however, be explained to the witnesses that even though they might desire their evidence to be treated as confidential such evidence is liable to be made available to the members of Parliament."

We have received your memorandum, signed by Mr. Rastogi. I have gone through it and I find that it is a very helpful memorandum. You have referred to the whole Bill in your memorandum. The last paragraph containing an extract from the appeal of the vice-chancellors and so on was rather outside the scope of the Bill.

If in addition to what you have stated in your memorandum you would like to say something, you may do so.

SHRI V. S. AGARWAL: As far as I am concerned, I would like to take up first, item 11 (o). I am referring to page 3 of the memorandum. This clause provides immunity to Government against liability for any claim arising out of malicious defamation, prosecution or malicious arrest. It is mainly on this that we have to say something. We agree that the government and the officers have duties under which they are bound to arrest people. Sometimes they have to publicise things which are against the citizens, and if all these are done in the interest of the State as such or in a bonafide way, then it is something which we have to concede to the government and its officers. But we do not understand the words—in fact, we were surprised—"malicious prosecution". The Government has, as it is, very wide powers. But are we going to give powers to the Government for doing things maliciously? The Government is expected to use the big machinery, money, publicity, the

powers of arrest, etc., properly and not maliciously. While giving immunity to Government, Parliament has to strike a balance between the rights of the Government and the rights of the citizens. As long as the citizen does anything which is his duty or which is his right, then any of these malicious actions should not be accepted or provided for for the Government. We would not have gone into the details of all these things, perhaps we would not have noticed this phrase or sub-clause, but for the fact that there have been cases of grave misuse of powers that the Government has. I would like to say that under the D.I.R. and now under the P.D. Act, Government has powers which, I think, no other democracy in the world has; although ours is the biggest democracy, the older democracies do not have or have not enjoyed such powers to arrest which our Government had under the D.I.R. and which it has now under the P.D. Act. Even if we accept this principle that because we are not a very old democracy, our Government need such powers, I would like to say, and I would say that with sorrow, that these powers have been gravely misused often—these powers of arrest, defamation, etc. Defamation may be at a higher stage, but the powers of arrest are given or allowed to officers even at sufficiently junior level. If a Parliamentary Committee were appointed, then it would find that there are innumerable cases when these arrests have been made for personal vendetta or because of some unacceptable demands or for political reasons. I represent the foodgrain trade. They have been used against the people of foodgrain trade because the food situation went out of control as it would if there is a very big scarcity; many times these powers have been used against those people. This has been done sometimes to enable the Govt. to say that the government has done something; whether that something is right or wrong, momentarily the government feels that it has done something to quieten the opposition. My humble request is this. If the government has to use these for purposes of State, for genuine rea-

sons, then it is alright, but if it has to use these for malicious reasons, then I do not know where the liberty of the citizen lies, what is the difference between a democracy and a dictatorship. I would like to mention that in two or three cases recently decided, within a span of the last two or three months, by the Supreme Court, two people separately from Bihar were released by the Supreme Court and they said that if people have to be arrested like this under the P.D. Act, then the liberty of the citizen of India is in grave jeopardy. At present the law provides that the person who is a victim of such arrest can go and file a suit for wrongful detention. That provision itself acts many times as a bar for the officers and the governments from taking actions which are not justified. My fear is that, if these provisions are accepted by Parliament, then the governments and the government servants will have a much greater handle to take actions against citizens which are not justified and which, if taken to court of law as at present, would receive very strong comments from the courts and perhaps result in some compensations being awarded.

The third point, which I do not understand and which is not very clear to me, is that the government takes the responsibility for any of its government servants if any action is ratified by the government. If, for example, a case has been prepared against a citizen by the police and on the file the government finds that the case is good and it ratifies it, but later on it is found that the facts that were mentioned on the file are not correct, then whose liability will that be? I am not very clear about that. Will it be the liability of the officer who prepared it or will be the liability of the government?

SHRI SRINIBAS MISHRA: Before we proceed asking questions, I would like to make a submission. We had requested the Ministry to supply us with a note on how far the present Bill seeks to modify the present law.....

SHRI BHATIA: We have already supplied.

SHRI SRINIBAS MISHRA: You have not supplied us anything regarding the liability of the government servants, how far is the government servant liable for action in tort. Government and government servants are two separate things. If the government is not liable for malicious prosecution, will the government servant be liable? The Committee has to be known the position about law. If the government servant is liable, the government may not be liable. But somebody must be liable. We must have a note on that.

SHRI R. S. SHARMA: What is most important for the Members of Parliament to consider is that what has been provided in the Bill takes away every right that the people had been enjoying even during the British regime; all those rights which we were enjoying even during the British regime are being taken away. Is it proper to take away these existing rights? Instead of giving some more rights against government servants, they are taking away the existing rights. The effect of the provisions of this Bill is this. Whatever rights the citizens have against the government and the government servants are being taken away under the guise of immunity provided to the government.

SHRI BHATIA: Here this Bill is restricted to government's liability in tort. Whatever liability attached to government servants previously, will attach to them even now. What we are making clear here is to what extent the government is liable for the tortious acts committed by its employees but not in respect of sovereign functions; the Supreme Court has held recently that government is not liable in tort for its sovereign duties. This Bill does not touch about government servants at all; that is not within the scope of this Bill. Whatever liabilities attached to the government servants previously, attach to them

even now. Here this relates to Government only. We are not saying anything about government servants. I do not know why you are dragging government servants when there is no mention here about them.

SHRI R. S. SHARMA: Please see page 2, clause 3; sub-clause (ii):

"While acting beyond the course of his employment if the act constituting the tort was done by the employee or agent on behalf of the Government and is ratified by the Government...."

Here they are granted immunity....

SHRI BHATIA: Please read the Bill carefully. What is the law at present? If an act is done outside the scope of employment, then Government is not liable. Now we have gone a step further. Here we have said that in case government ratifies that act, the government will be liable.

SHRI SRINIBAS MISHRA: So far as the members of the Committee are concerned, we should know about the position of government servants. We should know the law regarding the liability of government servants in torts. In some cases, if the government servant is immune, the government should be made liable....

SHRI BHATIA: If the government servant is not liable, how can the government be liable for that? Obviously, if my agent is not liable, I cannot be liable....

MR. CHAIRMAN: I think, we can discuss this point among ourselves later on. Now let us take the points raised by the witness.

SHRI R. S. SHARMA: Somewhere in the Bill, there should be a clause to the effect that nothing in this Act will work to the prejudice of the citizens, of the rights that they held before the passing of this Act. I think that in the law on contempt of court it has been drafted. On the same analogy, I sug-

gest that one clause should be added that nothing in this Bill will work to the prejudice of the rights of the citizens that were available before the passing of this Act.

SHRI SHRI CHAND GOYAL: If any citizen is maliciously prosecuted or arrested by any Government official at the instance of the Government and after his honourable acquittal if he wants to approach a civil court and file a suit against that officer, what is the present position? Does he implead the Government in that suit so that the liability of paying damages is on the Government servant as well as on the officer?

SHRI R. S. SHARMA: The line of demarcation between when a Government official is acting in the course of employment and outside the course of employment is so thin that no citizen can get any damage against the government official. I think in 99 per cent of the cases, he can never get any damage from the government official. If he impleads government as a party it is quite possible that he may get it.

SHRI SHRI CHAND GOYAL: By the addition of clause 11(O) the position will be to the disadvantage of the citizen. After the passing of this Act, a citizen will not be able to proceed against the Government and the Government will not be fastened with any liability.... That will be the position.

SHRI V. S. AGARWAL: That is our apprehension.

SHRI SHRI CHAND GOYAL: Are you suggesting that clause 11(O) should be deleted in order to ensure the rights of the citizen so that it does not form part of the saving clause?

SHRI V. S. AGARWAL: That, I think, is a very clear position. That will leave no ground for confusion and the Government will know where they stand and the citizen will also know where he stands.

SHRI SHRI CHAND GOYAL: You have suggested in your memorandum that this Bill should not be an amending Bill because no law at the moment exists with regard to the Government's liability in tort and therefore you suggest that this should in fact be a codifying law rather than an amending law.

SHRI V. S. AGARWAL: Yes.

SHRI SHRI CHAND GOYAL: What is the position at the moment? May I know whether there is some law existing at the moment? Though in other statutes there may not be any law as such dealing with the Government's liability in tort there is certainly a law at the moment in various statutes which deal with the subject.

SHRI V. S. AGARWAL: There are the case laws and judicial decisions and the British laws are also there.

SHRI R. S. SHARMA: At the present moment, the position is that there is no statutory law, but the rights of the citizens are governed by judicial decisions and the case law. The position is quite clear. The British Parliament passed the Crown Proceedings Act in 1947. Before that, in India there was no law but after 1947, in England they had passed a statutory law where the Government's liability is defined in clear terms, and we are mostly following the British laws. So, at the moment, the position is that our Acts are also governed by those statutes.

SHRI HIRA VALLABHA TRIPATHI: In that case, would you like that the law as it is should continue to remain as it is? Or do you like that there should be some amendments? At the same time, you have also stated that certain things have to be amended. Which one of these things do you want?

SHRI R. S. SHARMA: If an amendment is to be made, it must be in favour of granting more rights to the citizens, because the laws were made during the British regime when we

had no fundamental rights. But now that we are having so many rights, I think that if we want to amend the law we must amend it in a manner that it gives the citizens more rights.

SHRI HIRA VALLABHA TRIPATHI: It would not be wrong to say that the law is to be amended; not codified only.

SHRI R. S. SHARMA: In that respect, it is right.

SHRI HAJARNAVIS: According to my understanding of the British Crown Proceedings Act, it is not a matter of substance but a matter of form only. It is not true that a subject who had suffered damages from the Crown did not have any remedy. All that he had to do was to file a suit or petition which went to the Attorney-General and the latter wrote there that it is justiciable or not. The whole thing was litigable and justifiable as if it was an ordinary civil suit. So, the difference, as my colleague would be able to say, was merely a form, not of substance. In the Constitution of ours, is that principle applicable? In England, the King could not be sued because it was his court and the King could not be sued in his own court, but here as the President is created by the Constitution itself and the courts are created by the Constitution itself, is that principle applicable at all here? The Crown Proceedings Act was merely to convert the petition of right into a suit. It did not give the right to claim as tort that which was not tort before. I would like to have a clarification on this.

SHRI R. S. SHARMA: It has been said that from the point of view of citizen's rights, what the citizens enjoyed before, that right will not be taken away by this attempt at codification. But from the explanation given by the officers, it is seen that previously the law was, if the acts of Government servants are not rectified by the Government, then the Government was not liable, but now, after

codification, there will be an improvement, and if the Act will be redrafted, the Government will be liable, and from the point of view the rights of citizens that certainly is an improvement. What is your opinion about it?

SHRI V. S. AGARWAL: If the Government takes the responsibility, the citizen does stand a better chance.

SHRI R. S. SHARMA: You referred to a Supreme Court judgment where the judge observed that there is no sort of citizen's freedom left in this country. Can you quote that case?

SHRI V. S. AGARWAL: I did not make such a sweeping statement. There is one case I remember—*Patwari vs. the State of Bihar*.

SHRI R. S. SHARMA: Was it a tortious liability?

SHRI V. S. AGARWAL: It was a case of detention under the P.D. Act. Fighting a case against Government is a very expensive thing, but now after the Supreme Court judgment, if a man has got the courage and means, he can file a case against Government. But if the Government is saved by this clause that even for malicious arrest, they will not be responsible, he will not be able to file a case.

SHRI HAJARNAVIS: Why is it that the laudable principle that the principal is liable for a tort committed by the servant if it is within the scope of his authority not applied to the Government *vis-a-vis* Government servant?

SHRI V. S. AGARWAL: A police officer is expected to arrest a person against whom he has got a warrant. If the person offers no opposition, to my mind the police officer is not entitled to give him a beating. If the policeman gives him a beating when there is no resistance, to my mind it will be the police officer who is responsible because he is doing something which is not necessary in carrying out his duties.

SHRI HAJARNAVIS: Does the Government's responsibility depend upon subsequent ratification or does it depend upon merely the question of fact to be decided *viz.*, was it an act in the course of employment or not? Is there any difference between Government *vis-a-vis* Government servant and private employer *vis-a-vis* private employee?

SHRI V. S. AGARWAL: As far as I can understand, if a Government servant does things as he is expected to do within his limits, Government is liable.

SHRI T. M. SHETH: You said Government should be liable for malicious arrest and malicious prosecution. I would like you to remember that Government will not ask anybody to prosecute a person maliciously. Therefore, it will be the act of the Government servant and not the Government. Government requires its servants to do things in a *bona fide* manner. It does not require that the servant should maliciously arrest or prosecute somebody. If there is malicious prosecution or arrest, it is not in the course of discharge of his duties as a Government servant. That is what is contemplated here.

SHRI V. S. AGARWAL: If the Government is not expected to act maliciously there is no need to provide immunity to Government for malicious arrest or malicious prosecution.

SHRI T. M. SHETH: Government acts through its servants. It may not intend to act maliciously, but its servants may. To meet that contingency, this provision is made.

SHRI R. S. SHARMA: A Government servant cannot prosecute anybody without Government sanction. In actual practice, there can be no malicious prosecution by a Government servant.

SHRI V. S. AGARWAL: An officer can arrest a citizen, but it is the Government which prosecutes. A police officer cannot prosecute. He will need the help of the public prosecutor for that.

MR. CHAIRMAN: It is not a question of prosecution. It is only a case of a suit being filed. Anybody can do it. In most cases it is the private citizen. It is not the Government which will be prosecuting.

SHRI V. S. AGARWAL: If the Government cannot do any such malicious act, why provide immunity to the Government for such things?

SHRI M. P. SHUKLA: Government does not act as an individual. It acts according to the rules, laws and procedures. If any Government servant misuses that law or procedure, then he should be responsible and not the Government.

SHRI R. S. SHARMA: Any prosecution launched against an officer will be defended by the Government. It is done at State expense through the Public Prosecutor. Then, how can the Government come and say 'you have prosecuted him maliciously' as if the officer is not part of the Government?

SHRI M. P. SHUKLA: According to you it is well nigh impossible for any party to prove maliciousness against the Government.

SHRI S. KANDAPPAN: In the last judgment of the Supreme Court, which prompted this Bill, there is a reference to sovereign and non-sovereign functions of the Government. Do you think that a clear demarcation is possible between them or is there a possibility of the non-sovereign functions becoming sovereign functions?

SHRI V. S. AGARWAL: That is a matter which I will leave to the courts of this country which enjoy almost universal respect for their fairness and judiciousness.

SHRI R. S. SHARMA: Sovereign functions or acts of the State have been explained as acts concerning aliens or those who are not citizens of this country or acts like declaration of war. Courts have interpreted these acts as acts of State. Acts of the State means those acts which relate to people who are not citizens of this country. Government can declare war or deal with the citizens of other coun-

tries in any manner they like. Those people have no right against the Government. But, as regards the citizens of this country the Government has no immunity.

SHRI SRINIBAS MISHRA: There are clearly demarcated views on the law of torts. One is that Government is not at all liable—the Crown can commit no wrong and the Crown cannot be sued in its own court. The other is that government will be liable as an ordinary individual. In between, there are two views. One is that Government will not be liable while exercising its sovereign rights. The fourth is that the Government will be liable even while exercising its sovereign rights when the public is benefited at the expense of the individual. To which one of these views do you subscribe?

SHRI V. S. AGARWAL: I would like to say that there is a distinction between the individual and the country as such. I do not subscribe to the view that government can do no wrong. It is very much different from the maxim that the king can do no wrong, because the king does nothing by himself. That may be true in our case about the President of the country. He does most of the things on the advice of the Government. So, the action of the President will not be liable for such acts in a court of law. I subscribe to the view that the Government in its action stands on an equal footing with the citizen. I subscribe to the view that in a democracy the ruler and the ruled have the same rights. Government is given certain powers because it does certain things on behalf of the entire citizens of this country. But, even in such cases, if the Government acts wrongly, the other parties or citizens should have equal rights to take the government to task. There are two other pending Bills on this subject—Lokpal Bill and Lok Ayukt Bill. I would subscribe to the view taken therein that the government has the same right as any adult citizen of the country. That is my conception of democracy. I do not agree to the

maxim that government does no wrong; it does wrong and, therefore, we are here to tell you that it should not be allowed these powers.

SHRI SRINIBAS MISHRA: In the Raliya Ram case in Rajasthan, the police took gold from him sealed it and kept it in the Malkhana from where it was stolen. After his release, Raliya Ram filed a suit in the Supreme Court to recover the price of the gold from the Government. The court held that he cannot recover it because it was a sovereign act of the Government. Do you think that there should be some provision in the Bill to enable persons like Raliya Ram to recover the gold or its price from the Government?

SHRI V. S. AGARWAL: If the gold originally belonged to him. I would say that as an ordinary citizen he should have that right.

MR. CHAIRMAN: But the Government has not taken that gold. Some man carried it away to Pakistan.

SHRI V. S. AGARWAL: It is because of the negligence of the Government.

SHRI BRIJ BHUSHAN LAL: Why do you object to clause 8? The Government can take the same plea which the citizen is taking.

SHRI V. S. AGARWAL: I will withdraw the objection. But I would like to give the genesis for this. I can sue the government for any claims only up to one year. But the Government can sue me for 60 years. I can sue another citizen within three years but I cannot sue the Government within three years. So, if we accept the theory of equal rights, then the government should have equal rights. Since the government have overriding rights over the citizen at present, this was a sort of attempt to get even with the Government. But I would say that I agree that this is putting a premium on the inefficiency of the government departments. If the government suffers, then we suffer. Therefore, I would like them to be as efficient as possible.

SHRI R. S. SHARMA: On page 7, line 15 there seems to be some mistake because in clause 11(i) (ii) it is said "a member of a police force; or". Perhaps the semi-colon is redundant. Because, if you separate the police force from those "whose duty it is to preserve peace", then this paragraph will become independent.

SHRI C. ACHUTHA MENON: Apart from the police force, there may be other kinds of public servants who may have certain functions to perform. This will cover them.

SHRI R. S. SHARMA: In regard to members of the police force also these qualifications would apply.

SHRI BHATIA: It is not running along with 'place'. That is a full para.

SHRI R. S. SHARMA: But, as it is, it would not apply. The semi-colon should be deleted.

SHRI BHATIA: No; it is not necessary to delete it.

SHRI KRISHAN KANT: I ask you whether you are satisfied with this construction, whether this construction is correct.

2. Supreme Court Bar Association, New Delhi:—

Spokesman: Shri Sardar Bahadur Saharya.

(Witness was called in and he took his seat)

MR. CHAIRMAN: Direction 58 issued by the Speaker reads as follows:

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SHRI R. S. SHARMA: It is wholly incorrect. It is the most defective drafting; it vitally affects the meaning of the paragraph; it should be recast. (i) and (ii) should be joined into one.

SHRI HAJARNAVIS: Let me first know where exactly is the semi-colon. You are challenging the draft. My experience is that the draftsmen that we have are some of the best people.

SHRI R. S. SHARMA: This is on page 7, line 15.

SHRI BHATIA: The full para will cover both (i) and (ii).

SHRI R. S. SHARMA: I think you should delete the semi-colon.

SHRI BHATIA: If 'for the prevention or suppression.....' had run along with 'place', then what you say is correct. But here it is a separate para and it covers both (i) and (ii). Otherwise, it will run along with 'place'. But as it is a separate para, it covers both.

SHRI R. S. SHARMA: If it covers both, then I have no objection.

MR. CHAIRMAN: That is all. Thank you very much.

(The witnesses then withdrew)

ble to be made available to the Members of Parliament."

Apart from the memorandum that you have sent, if you would like to add anything else, you may do so.

SHRI SAHARYA: With your permission, I would like to say a few words before coming to the clauses of the Bill, because I think it is necessary to be clear in my mind as to what according to my suggestion should be the policy of the statute, because our comments on the clause, are in the light of that policy as we consider to be. As everybody is aware, the matter was referred to the Law Commission and the Law Commission has already given some suggestions after considering the laws in various countries such as England, France, United States,

Australia, etc. The Law Commission found the existing position in the English law as not satisfactory for our purposes. They seem to prefer the system in the French law. The English system starts from the theory that the King can do no wrong. As against this the French theory is that the State is an honest person and this seems to have found favour with the Law Commission. They have not said that they prefer the French theory in so many words; but that seems to be their inclination. Therefore, I suggest that our law should be more or less on the lines of the French law. They consider the State as a collective body of citizens and if one citizen suffers an injury on account of an act of the rest of the citizens through the Government or its officers it is for the rest of us to share that burden. On the one hand we should not fritter away public funds by paying compensation on sentimental grounds; at the same time the law should make the others share the burden of the injured party, unless some dominating interest of the State requires something contrary to be done. I shall now proceed to the clauses.

SHRI HAJARNAVIS: There are three aspects which have to be kept separate, namely, whether a suit would lie against the State; secondly, whether there is a cause of action in the sense that the act complained of is a tort, actionable wrong and thirdly, whether there is any difference between a tort committed by the State and a tort committed by a private person. These three things should be kept separate.

In England no suit lies against the King or King's servants for tort because the king could not be sued in his own court. But there is still a remedy; only the form differs. A person can present a petition to the Attorney General and on a fiat being given the matter may be tried as if it was a suit before the King's Bench. So, the difference is merely one of form. Here, ever since the P&O

case, it has been ruled by the High Courts and the Privy Council that a suit does lie against the Secretary of State. The President who represents the executive power of the Union and the Governor who represents the executive power of the State and the Court—all are creatures of the Constitution and derive their authority from one document. Is there any doctrinal basis for a distinction that the President and the Governor cannot be a defendant in the court. Is there any justification for importing that kind of doctrine in our Constitution? Of course this question requires examination in greater detail and he may reply afterwards, if he so chooses.

SRI SAHARYA: If I may attempt an answer offhand, the question breaks into two parts—whether we should have the right to sue or whether we should have the old English law—Petition of Right and the Crown giving relief in his discretion. Secondly, if a suit lies, who is to be sued? Now, it appears that it will be good enough if the State is sued as is the case now, not necessarily the Governor. Then the question arises, in what cases the State can be sued. But there are several cases in which cause of action arose against the State and the State was sued. In the English law also, the Crown Proceedings Act has solved one difficulty and the English law has opened the door for filing a suit against the State; I do not know in what form they do it.

The Law Commission has said that we might liberalise our approach to the courts even when the State is concerned. They have mentioned some exceptions also. I think the first part of the question has been answered.

SHRI HAJARNAVIS: Do you think that the torts against the State should be limited and confined to a few cases as compared to torts of the private persons?

SRI SAHARYA: I would put the State on the same level as an indi-

vidual. If a State hurts somebody he should be entitled to claim damages from the State except where the larger interests of the people demand otherwise. That seems to be the general policy behind the Bill.

SHRI HAJARNAVIS: I venture to think that the rule against the king being sued in a court was not derived very much from the doctrine that the king can do no wrong—which has its counterpart in the constitutional responsibility of the ministers—but from the rule that the king could not be sued in his own court. But this is a matter which can be debated.

MR. CHAIRMAN: You can now proceed with what you wanted to say. Shri Saharya: I wanted to proceed with the clauses. I have made a suggestion with regard to clause 3(a) (i). The liability of the Government should not depend upon the Government's ratification of the act.

SHRI BRIJ BHUSHAN LAL: Clause 3(a) (i) says: "while acting in the course of his employment: whereas clause 3(a) (ii) says "while acting beyond the course of his employment". Is there no difference between the two? There is no need for any ratification in the case of (i) whereas there is necessity for ratification in the case of (ii).

SHRI SAHARYA: I agree that there is difference between (i) and (ii). An officer is appointed to do a certain work. He performs that duty without any further direction or instruction from the Government. He is functioning in the course of his employment. From all his acts, if a tort results, the Government is liable. There is no dispute about that, and we have made no comments on clause 1. There can also be a contingency where the Government officers, not functioning in the capacity for which he is appointed,—this will not be within the course of his employment—s asked to do something on behalf of the Government. If he is directed to do something on behalf of the Government, I take it that it is not open to him to say No. If he does something at

the instance of the Government, either on orders or through instructions, then there should be no need for further ratification.

MR. CHAIRMAN: Without instructions, he does certain public acts in the interests of the public beyond the scope of his employment which Government did not contemplate in his employment; that needs ratification.

SHRI SAHARYA: May I read the second sentence on clause 3(a) (i) from our comments? It reads:

"Of course, if the employee or agent does the act without instructions of the Government to do the act, he should not be considered to be doing it on behalf of the Government."

SHRI M. YUNUS SALEEM: Is there any distinction between non-sovereign functions and the sovereign functions of the Government?

SHRI SAHARYA: No, Sir.

SHRI M. YUNUS SALEEM: Nowhere does such a distinction exist; are you aware of it? I hope you are aware of the opinion of the judges in a leading case in the Supreme Court—Vidyarthi and Ralia Ram cases. One case was disposed of by Justice Sinha, and the other by the Chief Justice; one is of the opinion that such a distinction no longer exists. The other is of the opinion that this distinction still holds good. What is your opinion?

SHRI SAHARYA: I am aware of the cases, and I have got the cases here.

SHRI M. YUNUS SALEEM: You remember those points which received serious consideration.

SHRI SAHARYA: May I refer to the second case? The position was this. As I understand the case, the Supreme Court was considering in both these cases what the law is until the Parliament has made a law envisaged by article 300 of the Constitution. The Parliament making a law which is envisaged by article 300 of the Constitution. The Supreme

Court was considering what the position is without Parliament having enacted what the law on the subject is. They had to go back then to see what it was. The liability according to article 300 was this: that the Government will be liable in cases in which it was before the Constitution came into force. Then they had to go back to the Act of 1935 and that also referred them back to the earlier constitutional position. So much so that they had to go back to the position obtaining at the time of the East India Company, and on the basis of the position which existed at that time, they had to come to the conclusion that regarding the sovereign acts of the State there was no right to sue the State. That is the conclusion they have come to on the basis of the position as it existed at the time of the East India Company because the Parliament has at no time in the meantime given an indication to the contrary.

In the same judgment, Their Lordships have suggested that it does not seem to be a very satisfactory state of affairs and it is time that a proper law was enacted on this subject. That is why I take it that the Bill in 1965 was presented but that lapsed and it is now before Parliament again. Therefore, the distinction is certainly there in the decision of the Supreme Court. It is on the basis of the law which existed at the time of the East India Company which, the Supreme Court has now suggested, needs to be altered in the light of the present situation. I take it that the Bill is intended to alter that position.

Therefore, in my respectful submission, the question is this. What is the law we should now have? My submission is that now in the law which we propose to make, we should have no distinction between sovereign acts and non-sovereign acts. We may define the activity. If the activity is a commercial activity, even though an act is committed by the sovereign authority, you should treat it as a commercial activity and consider the

damages to be given on that basis. If it is a sovereign act in the sense that our defence forces, stationed somewhere, have to take certain action—some thing happens in connection with their activity, when tanks have to be run, when aeroplanes have to fly in defence of the country—and if the sovereign functions of the State require certain action to be taken, and if that results in tort, the position may be different.

SHI HAJARNAVIS: Now that the functions of the Government are expanding and running into each other, and in the P&O case, according to the judgment of Sir Barnes Peacock, there was a distinction between commercial activity and sovereign acts, can we have a clear concept as to what are called sovereign functions?

SHRI SAHARYA: In my submission, we need not consider now what are sovereign acts and what are not. Parliament is going to make a law in which they are making several clauses in which they can provide in which case the thing should be ratified and in which case it may not be. On that ground, in my humble submission, it may not be necessary to consider what are sovereign functions and what are not. You may also lay down in whatever language you like the cases in which the States will be liable.

SHRI SHRI CHAND GOYAL: You have suggested that this should not be made dependent on ratification by the Government. If a Government servant is doing something not in the course of employment but otherwise, then it should not be made dependent on ratification.

SHRI SAHARYA: It is not quite clearly put in my notes which were sent in a hurry if I may say so. Take a Government servant who is really employed in some particular job. For instance there is a medical officer. He has to attend on the patients in the hospital. In an emergency he can be asked to do something and if some tort results, then it should not require ratification by the Government.

SHRI SHRI CHAND GOYAL: Don't you think that it will be covered by the categories of acts which are being committed in the course of employment?

SHRI SAHARYA: I think the position is slightly different. "In the course of employment" means if a doctor is appointed in a hospital, he is doing something in the discharge of his duties as such.

SHRI BHATIA: Even if he is asked to do something else by the Government that comes in the course of employment. Under the conditions of service, we are asked to do what should not probably be done. What is the position then?

SHRI KRISHAN KANT: But a doctor has got to do some specialised work, he has to be an expert; it is expertise that is required. Your job is different. You can be changed from place to place.

SHRI SRINIBAS MISRA: Do you think that the clause on ratification will create difficulties for the plaintiff while filing a suit for damages, because he may not be aware of the ratification, whether it is ratified by the Government or not. Will it create difficulties in filing a suit and recovering the damages?

SHRI SAHARYA: The question of ratification is a wider question. I look at it this way. If an incident has happened and if you expect ratification after the happening of the incident, that will create difficulties in the way of the plaintiff.

MR. CHAIRMAN: If a person is acting in the course of employment Government's liability for tort is established. If he is acting beyond the course of his employment, Government's liability is not established unless it is ratified by Government.

SHRI SAHARYA: If the ratification is expected to be before the incident resulting in tort happens, I have no objection.

3035 L.S.—2.

SHRI SHRI CHAND GOYAL: Ratification is subsequent act; it cannot precede.

SHRI SAHARYA: In that case it will every time depend on the will of the Government as to whether it should be ratified or not.

SHRI S. KANDAPAAN: When a particular employee is not acting as instructed by the Government, but in his own capacity as an individual and it results in a tort, what is the necessity for ratification at all? If he acts on behalf of Government, he should be treated as acting in the course of employment.

SHRI H. V. TRIPATHI: We are here to know the viewpoints of the witness. We can discuss these matters amongst ourselves afterwards.

MR. CHAIRMAN: The doctrine of ratification should be made clear. Let the Law Secretary read out the law.

SHRI BHATIA: I am reading from *Salmond on Torts*:

"Ratification: If one person commits a tort while acting on behalf of another, but without his authority, and that other subsequently ratifies and assents to the act so done, he thereby becomes responsible for it, just as if he had given a precedent authority for its commission. When an illegal act done by one person on behalf of another but without his authority would have been legal had it been done with his authority, it becomes legal *ab initio* if he subsequently ratifies it. An Act may be thus justified by ratification, even after the commencement of an action against the agent; but the ratification must in all cases have taken place at a time when the principal still retained the power of lawfully authorising the act to be done. The following conditions must be fulfilled:

- (1) The wrongful act must have been done on behalf of the princi-

pal. No man can ratify an act which was done not on his behalf of the doer himself. In the case of contracts, it has been decided that there can be no ratification unless the agent not merely contracts on behalf of the principal, but also avows that intention at the time. Possibly the same rule applies in torts also. But the necessary avowal need not be expressed in words, but may sufficiently appear from the conduct of the parties and the facts of the case. It cannot be necessary for a railway official who arrests a passenger for defrauding the railway company to state in terms that he does so on behalf of the company."

So, two or three things are clear. The act must be done on behalf of another. If it is done on behalf of himself, the question of ratification does not arise. Secondly, even if he does the act on behalf of another but he is not authorised by that another person, then also the other person cannot be liable for the tort unless that act is ratified. That is what has been provided in this Bill.

SHRI SAHARYA: I do not dispute that the Government servants must be protected when they are acting *bona fide*. But here that is not the question. The question is how far a third person is entitled to proceed against the Government. This is with respect to the third party, and a category which fall under clause (1). One category is acting within the course of employment. There is a different category, persons who are acting on behalf of the government; not in the course of employment. If that category does something and a tort has arisen, then what happens? If there is no difference between the two, then I have no comments to make. But if the categories are different, as envisaged in the clause, then something should be provided for persons acting on behalf of Government.

MR. CHAIRMAN: If the government does not ratify that act, the person who has suffered gets precious little out of the person who had done that act. So, if the government ratifies it he gains by it.

SHRI SAHARYA: But if it is made conditional, government will not ratify it. May I give a crude example to explain my point? I ask my driver to park my car. He goes and parks it on a slope. I did not ask him to park it on the slope. He says he has parked it on the slope because there is good shade there. He says that, gives me the key and goes away. After half an hour the car has rolled down and killed a child. This is "an act which I have ratified before the incident has happened and I should be liable. But if you ask me to ratify after the child has been run over, it may be difficult to get any ratification.

MR. CHAIRMAN: You want government to be liable in tort even without ratification of that act?

SHRI SAHARYA: Yes, if the act is done on behalf of or at the instance of the Government.

SHRI H. V. TRIPATHI: Do you mean to say that there should be a presumption against the government that it has been ratified by a Government employee or is it your idea that every act done by the government official should be considered as done in the normal course of duty and the presumption should be against the government?

SHRI SAHARYA: No, I am not saying that. A Government Servant may be doing certain things of his own for which he alone should be responsible.

SHRI SHRI CHAND GOYAL: In the instance you have quoted if the driver comes and informs you that he has parked the car on the slope and you do not direct him to remove the car from the slope, it is presumed that you have ratified his act. But

you have suggested in your memorandum that if the act is being done at the instance of the government, then it should not be made dependent on ratification.

SHRI SAHARYA: If, for instance, I have told the driver to park the car on the slope, no ratification is needed.

SHRI SHRI CHAND GOYAL: Don't you think that it would be very difficult for the plaintiff to establish whether the act has been actually ratified or not because it was only in your mind?

SHRI SAHARYA: That is precisely the difficulty I am pointing out.

SHRI SHRI CHAND GOYAL: You have softened it by saying that if it is done at the instance of the government, it is all right. You have made a wise suggestion. But then you say that if it is done at the instance of the government, then it should not be made dependent on ratification. Would it not be very difficult for the plaintiff to establish whether it was done at the instance of the government or otherwise?

SHRI SAHARYA: I am proceeding on the assumption that the plaintiff is able to establish in court that it has been done on behalf of the Government which act ultimately resulted in tort. Then the plaintiff should not be asked further to establish that the act has been ratified by the government.

MR. CHAIRMAN: I think you have made your point very clearly.

SHRI SAHARYA: Clause 3 reads:

"Subject to the provisions of this Act, the Government shall be liable in respect of any tort.....

(b) committed by an independent contractor employed by the

Government or any of his servants or workmen in doing the act contracted to be done for the Government in any of the following cases (and in no others), namely:

- (i) where the Government assumes control of the act contracted to be done by the independent contractor;"

If the Government assumes control of that act which has been contracted to be done by the contractor, then what remains of the contractor? He is off the scene.

SHRI M. YUNUS SALEEM: Do you mean to say that by simply assuming control the relationship of the principal and the agency has been terminated?

SHRI SAHARYA: If the Government has assumed control of that act which the contractor has been engaged to do, then the Government is directly on the scene and the contractor has nothing to do with it. There is no necessity of mentioning that government is liable.

SHRI SHRI CHAND GOYAL: What do you mean by 'assumption of control'?

SHRI SAHARYA: I am trying to understand what 'assumption of control' means. If the Government has assumed control of that act which was contracted to be done by the contractor, then it is not a case of liability of the contractor but of the Government. It is clear. As I have suggested in my note, there can be various types of situations, various types of contracts, which an independent contractor may be asked to undertake. There are various stages at which the principal may come into

the picture either to control the action of the contractor or along with him.

Now, the one type of cases can be the turn-key contract. For example, the contractor has been given a contract to construct a building for the secretariat and he has been told what kind of building is wanted and everything has been settled. The Government keeps out of it. The contractor builds the whole thing and says, "The building is complete and you now take charge of it". Then, the Engineer goes and examines the building and finds it all right according to the contract.

This I will call a turn-key contract where the Government will become liable only when they have assumed charge of the building. Upto that time, it was the contractor who was responsible if something happened. Before the building is taken over by the Government, it is the contractor's responsibility. The Government does not come in.

Now, I come to the second type of cases. Suppose I give an order to the contractor saying, "You have to make this building with this material for the roof". I give him the material for the roof. He is not free to choose his material. The contractor may tell me, "Look here, with this material, the roof will not stand for more than six months: it will fall down". I say, "It is none of your business. I want this material to be used". He says, "All right". Here is a case where the contractor has not got the complete control of what he is going to do.

MR. CHAIRMAN: Then, he is not an independent contractor.

SHRI SAHARYA: He is independent contractor according to the definition here. If the roof falls against which he has warned me, I will be responsible and not the contractor alone. The contractor may be responsible for those who are buried under the roof if it falls. But the con-

tractor will certainly say, "I had warned you this roof will not stay here with this material. You did not let me have the material of my choice. So, you have controlled, to some extent, my act in this matter". If the Government has control to some extent on the contractor's activity in performing the contract, to that extent, I submit, the Government should take the responsibility.

So, this language, if I may say so, is vague.

SHRI BHATIA: This is the language which has been used by the Law Commission. If the employer exercises the control, it assumes the control, then he is liable. That is what I have provided. If you have better language to suggest, I will be very happy.

SHRI SAHARYA: To the extent you assume control.

SHRI BHATIA: To simply say it is vague, it does not help the matter. You suggest some better language.

SHRI SAHARYA: To the extent that the Government has control or the stage at which the Government has acquired control of the part of the contracted thing, the Government should be liable. I would say, to the extent the Government has control over the contract being performed by him.

SHRI KRISHAN KANT: It does not make anything. If you want, you can send the amendment later on.

SHRI SAHARYA: Yes.

I may explain from this point of view the third type of cases. For example, take the case of the building for the secretariat. There are so many things to be done inside the building. If you want to inaugurate the building at the end of July, you may say, "You give us the inside of the building cleared of all the things by the end of March so that we will call the carpenters to start making furniture, etc. You can go on plaster-

ing the building from outside." Now, in order to inaugurate it on a particular date, he is to hand it over to you the inside of the building, all clean, at the end of March. After the Government has taken over the inside of the building, if anything happens, so far as and to the extent to which, they have taken charge the Government is liable. For the rest of the building, the contractor is still operating. Therefore, I say, it is not enough to say, when the Government assumes control of the act contracted to be done, because in this kind of a case it will be at several stages that the Government will be assuming control of the various parts of the act contracted to be done. My submission is that the statute should provide for the extent or the stage at which the Government has taken it over.

SHRI BHATIA: The Law Commission has put this language.

SHRI KRISHAN KANT: We may agree to some changes. But you must give us the proper language.

SHRI SAHARYA: Then, I come to clause 3(b)(ii):

"Where the Government has authorised or ratified the act of the independent contractor alleged to constitute the tort;"

It is same thing regarding ratification. My remarks to earlier clause will apply here. My submission is this. I have no objection to ratification. But it must always precede the event which has resulted in tort.

SHRI BHATIA: I am prepared to remove this clause altogether.

SHRI SAHARYA: I would suggest ratification of the act which has resulted in a tort.

MR. CHAIRMAN: It cannot precede the event.

SHRI SAHARYA: If it is to succeed the tort, it will be difficult.

MR. CHAIRMAN: After the tort proceedings in a court of law. . . .

SHRI SAHARYA: We have to consider the position before a man goes to the court because we have to see what rights he has.

MR. CHAIRMAN: How will government know that the man is going to the court?

SHRI SAHARYA: I only wanted this to be modified a little . . .

SHRI BHATIA: You may indicate in what form you would like it to be modified.

SHRI SAHARYA: Yes.

Now I proceed to sub-clause (iii). Sub-clause (iii) says:

"Where the act contracted to be done although lawful is of such a nature that unless reasonable care is taken, it is likely in the ordinary course of events to cause personal injury or damage to property in the doing thereof and such care has not been taken."

By itself, the sub-clause is allright. But then there is a proviso which says:

"Provided that the Government shall not be liable under this sub-clause if there is an express stipulation in the contract between the Government and the independent contractor that—

(a) reasonable care in the doing of the act shall be taken by the independent contractor and not by the Government."

Here I will stop. This proviso talks of a contract between government and an independent contractor. The government and the contractor can enter into any contract between themselves, but the third person should not be expected to be bound by their contract. Between themselves they may agree that if any tort results in this

manner, the contractor will be liable; it will be like an indemnity clause; the contractor, may in every contract, indemnify the government for any loss on account of the default of the contractor. But so far as the injured party is concerned, he should not be restrained from recovering it from anybody.

MR. CHAIRMAN: This provision stipulates that the third party gets his damages only from the independent contractor.

SHRI SAHARYA: This is what it says. My objection to that is this. If you restrain a third party on account of a contract between the government and the contractor, that may amount to denying him justice. The government can always put a clause in the contract. It is always possible for the government to put in this clause in every contract. That means that in no case will the private person who is injured be able to have recourse to court against the government.

MR. CHAIRMAN: How does he lose? He gets from the contractor.

SHRI SAHARYA: The contractor may be a petty contractor. He may be there today but may not be there tomorrow. He is bound only to the government; he is bound to indemnify the government.

MR. CHAIRMAN: The third party can go to the court and cite the contractor as the person responsible.

SHRI SAHARYA: Suppose I am the injured party and 'A' is the contractor who is carrying out the work for government and 'B' the govt. is the second defendant. Suppose I file a suit against the contractor and the government. If this proviso remains, the defendant 'B' will come and say, "We have agreed that the government will not be liable; so, you cannot sue the government". That is not a fair proposition. It is at the most an indemnity clause between the government and the contractor, by virtue of

which the government may be able to recover the damages from the contractor. But why should I be prevented from claiming from the Government?

So, so far as the injured party is concerned, should the statute say, 'No, you cannot proceed against the government because the government and the contractor have agreed that the contractor alone is liable'? Should Parliament say so? I submit that the Parliament should say: whatever is the contract between themselves—the contractor may indemnify the government—if an individual citizen is injured, he should be able to claim damages from either.

MR. CHAIRMAN: But the act is done by the contractor. The government does not act; it only enters into a contract with the contractor.

SHRI SAHARYA: We are dealing with cases of independent contractors who work on behalf of government.

MR. CHAIRMAN: But the act itself is done by the contractor.

SHRI SAHARYA: The Bill seems to cover the types of cases where government may also be liable though the act is done by the contractor. Therefore, I am before the Committee on this clause.

MR. CHAIRMAN: These are cases in which you cannot go so far.

SHRI SHRI CHAND GOYAL: I think, the witness is suggesting deletion of this proviso.

SHRI SAHARYA: I am suggesting only deletion of the proviso. The question is what should be the policy of the government. Should the injured party be debarred from claiming from the government although the government may recover from the contractor?

SHRI M. YUNUS SALEEM: The Committee will give due consideration

to your suggestion.

SHRI BHATIA: In clause 3 (v) you want the deletion of the word 'absolute'. I think it is a drafting matter and we can consider it.

SHRI SAHARYA: If it is the duty of Government, then it need not be an absolute duty.

SHRI BHATIA: What is the existing position? Is it not absolute? I am only reiterating the existing position of law.

SHRI KRISHNA KANT: When it is absolute even now, why do you want to lessen the duty of Government?

SHRI SAHARYA: I feel that if you qualify the word 'duty' by the word 'absolute', it would mean reducing the liability of Government to some extent.

SHRI BHATIA: I am only reiterating the present position.

SHRI SAHARYA: The word 'absolute' duty, as I found in some English decisions, really came in in this way. There is a decided case which I can show you afterwards. A party working in a factory where some wood was being processed got injured by a piece of wood flying from the machine. That party brought a suit against Government. The case was put on this basis that the injury had been caused to her on account of the machine not having been kept in proper order, because of which the piece of wood had flown and hurt her. The House of Lords decided that there was a liability under the Factories Act—I think it was the Factories Act—for keeping the machine in such a condition that any person moving near it would not be able to touch the machine. The House of Lords said that they had complied with that statutory law, and there was no abso-

lute liability for those people apart from the statutory law to ensure that nothing would fly from the machine and hurt somebody outside.

The distinction made there was this. One is the statutory law under which you cover the machine or keep the machine in such a way that no person would be able to touch it while walking near the machine. The House of Lords said that that duty had been complied with; if they had not complied with that, then compensation could be claimed according to law. Then, they said that there was no absolute duty apart from that, namely keeping the machine in such a way that nothing would fly off from it and hurt anybody; and, therefore, the claim was disallowed. If you want the same thing to happen here also, then you may put in the word 'absolute'.

SHRI KRISHNA KANT: You want to lessen the liability of Government, by omitting the word 'absolute'.

SHRI SAHARYA: I want to increase the liability of Government. If you omit the word 'absolute', then it means mere duty.

SHRI SRINIBAS MISHRA: Do you know of any legislation under which Government have absolute duty to ensure safety?

SHRI SAHARYA: I cannot tell you offhand.

SHRI BHATIA: In clause 3 (v) you want the deletion of the word 'absolute'. I think it is a drafting matter and we can consider it.

SHRI SAHARYA: It is the duty of Government, then it need not be an absolute duty.

SHRI BHATIA: What is the existing position? Is it not absolute? I am only reiterating the existing position of law.

SHRI KRISHNA KANT: When it is absolute even now, why do you want to lessen the duty of Government?

SHRI SAHARYA: I feel that if you qualify the word 'duty' by the word 'absolute', it would mean reducing the liability of Government to some extent.

SHRI BHATIA: I am only reiterating the present position.

SHRI SAHARYA: The word 'absolute' duty, as I found in some English decisions, really came in in this way. There is a decided case which I can show you afterwards. A party working in a factory where some wood was being processed got injured by a piece of wood flying from the machine. That party brought a suit against Government. The case was put on this basis that the injury had been caused to him on account of the machine not having been kept in proper order, because of which the piece of wood had flown and hurt him. The House of Lords decided that there was a liability under the Factories Act—I think it was the Factories Act—for keeping the machine in such a condition that any person moving near it would not be able to touch the machine. The House of Lords said that they had complied with that statutory law, and there was no absolute liability for those people apart from the statutory law to ensure that nothing would fly from the machine and hurt somebody outside.

The distinction made there was this. One is the statutory law under which you cover the machine or keep the machine in such a way that no person would be able to touch it while walking near the machine. The House of Lords said that that duty had been complied with, if they had not complied with that, then compensation could be claimed according to law. Then, they said that there was no absolute liability apart from that,

namely keeping the machine in such a way that nothing would fly off from it and hurt anybody; and, therefore, the claim was disallowed. If you want the same thing to happen here also, then you may put in the word 'absolute'.

SHRI KRISHNA KANT: You want to lessen the liability of Government, by omitting the word 'absolute'.

SHRI SAHARYA: I want to increase the liability of Government. If you omit the word 'absolute', then it means mere duty.

SHRI SRINIBAS MISHRA: Do you know of any legislation under which Government have absolute duty to ensure safety?

SHRI SAHARYA: I cannot tell you offhand.

SHRI SRINIBAS MISHRA: Government cannot ensure it; it is the duty of the factory to ensure it.

MR. CHAIRMAN: I think the duty of Government is emphasised by the addition of the word 'absolute'.

SHRI SAHARYA: In my respectful submission, it means just the contrary, that is, the duty to maintain it and to ensure safety is not by itself enough to entail liability, but there must be an absolute duty to entail liability.

MR. CHAIRMAN: You want it to be statutory duty?

SHRI SAHARYA: I would be satisfied if the word 'absolute' is deleted. The phrase 'duty to ensure' is quite enough.

SHRI KRISHNA KANT: The example that you have given shows that the word 'absolute' is necessary here.

SHRI BHATIA: You are departing even from the English law.

SHRI KRISHNA KANT: If the word 'absolute' is not there, then Government can escape the liability saying that the duty is not absolute. If the word 'absolute' is there, then Government cannot escape their liability. So, I think it is better to retain the word 'absolute'.

SHRI BRIJ BHUSAN LAL: In sub-clause (v) towards the end the phrase is 'with that duty'. There, the word 'absolute' is not there. So, why are you emphasising the deletion of the word 'absolute'?

SHRI SAHARYA: It means the same duty as talked of earlier, that is, absolute duty.

SHRI BRIJ BHUSAN LAL: Suppose any duty is imposed by the Acts which are in force and nothing new is going to be added. Then, where is the objection?

SHRI SAHARYA: Supposing under a statute today there is an absolute duty to do this, will Government be absolved from the liability?

SHRI SHRI CHAND GOYAL: It would not have any liability in that case.

SHRI SAHARYA: In clause 4 I want the word 'by law' at page 3, line 34 of the Bill to be deleted.

If there is any duty attaching to the ownership, possession or occupation or control of the property, it should entail a liability. I do not want the word 'by law' at any time to be interpreted as if it was by statutory law. In my respectful submission, therefore, it would be safer to delete the words 'by law', and the effect will be the same. If the words 'by law' are retained, then it may raise some doubts sometime that it may mean statutory law. In that case, unless the statute provides to that effect, the liability will not be there.

SHRI BHATIA: Law means law prevailing. Even the judgment of the

Supreme Court is law under the Constitution.

SHRI SAHARYA: I am sure it is so.

SHRI SRINIBAS MUSHRA: We should say by law, custom usage.

SHRI BHATIA: May I quote to you the relevant provision in the Crown Proceedings Act of 1947? I am referring to section 2 relating to the liabilities of the Crown under torts, which provides that subject to the provisions of that Act, the Crown shall be subject to all those liabilities to which if it were a private individual or full agent it would be subject.

Then, I come to the question of property. There, the provision is:

"In respect of any breach of those duties which a person owes, in respect of any breach of the duties attached at common law to the ownership, occupation, possession. . . ."

SHRI SRINIBAS MISHRA: 'Common law' means usage and custom also.

SHRI BHATIA: If you want to extend the definition of the term 'law' to what is stated in the Constitution, and provide that law includes custom, usage etc. we can consider that point.

SHRI KRISHNA KANT: If the words are removed, is there any harm?

SHRI BHATIA: Removal is not good. It will be enhancing our liability in torts.

It may be by contract or it may be by anything else. What I am saying is that it should be by law. If the apprehension is that law means statutory law, then we can consider whether we could define law as in the Constitution, to include custom usage etc. But I am afraid we cannot omit those words. (Folded by R)

SHRI SAHARYA: "By law" seems to be putting a limit; it would be more in keeping with the British statute if you remove the words 'by law'.

I shall now turn to the proviso in clause 4. I want the following to be substituted after the words 'in respect of any period' in the proviso: "after the Government has acquired knowledge of such vesting, and is not prevented by reasons beyond its control from, in fact, taking possession or control of any such property, or entering into occupation thereof."

Take the case of the evacuee property which vests in the Government. There may be some buildings in a dilapidated condition. If it is left to the Government to determine the point of time from which they will take the responsibility, they may postpone the time until it suits them. In the meantime, it may cause damage to somebody. If a property vests in Government, it is the duty of Government to look after it. There may be some property, say in the eastern border where the Government may not be able to take charge of the property. But in other cases, when the Government knows about its being vested with the property, it should take the responsibility for the safety of the persons who may be hurt by it. The amendment I have suggested would meet the objection raised.

SHRI SRINIBAS MISHRA: Which of these terms is wider—exercise control over or having control of.

SHRI SAHARYA: I think 'having control of' is wider than 'exercise control over' I now turn to clause 10 which deals with exemptions. There are two things here. One condition is that at the time the thing suffered by that other person—whom we shall call B—he either is on duty as a member of the armed forces... The second condition is this. Government certifies that B's suffering that thing has been or will be treat-

ed as attributable to service. . . . Let me deal with sub-clause (b) first. If a certificate issued by the Government is produced, the suit will not lie; it will be dismissed. We do not know here what injury may be caused to a person or what benefit he will get under the scheme of the award. In every case where injury is caused, say, for instance in a factory or somewhere, the certificate should state what he is going to get. Then the court will be able to consider, in awarding damages, if any person was injured. The effect of the present language is, if the certificate does not give the extent of benefit he is going to get under the award, then the court is precluded, merely on seeing the certificate that he is going to get some benefit, from considering whether he is entitled to anything more than that or not. A certificate will result in the dismissal of the suit even if it is produced on the last day; when the Government might appear to be losing the case even in appeal. The moment the certificate is produced that he is going to get the benefit of the measure, the suit would be dismissed. That is one thing about sub-clause (b) if the language remains as it is.

SHRI BHATIA: Are you aware of any difficulty with regard to this, in England?

SHRI SAHARYA: I am not aware of any case, but I think since we are framing our laws now, we might consider what we would like to make in the light of what I have pointed out. This is regarding sub-clause (a). If you read it along with the rest, what do we find? Clause 10(1)(a) reads like this:

"(a) at the time the thing is suffered by that other person he either is on duty as a member of the armed forces of the Union or as a member of the police force or, though not on duty, is on any land, premises, ship, aircraft or vehicle for the time being used

for the purposes of the armed forces of the Union, or,"

and so on. Then, let me read sub-clause (3) on the next page, which says:

"The Government or an officer authorised by the Government in this behalf, if satisfied that it is the fact—

(a) that a person was or was not on any particular occasion on duty as a member of the armed forces of the Union or as a member of a police force; or

(b) that at any particular time any land, premises, ship, aircraft, vehicle, equipment or supplies was or was not or where or were not used for the purposes of those forces or that force,"—

Both these conditions are covered—

"may issue a certificate certifying that to be the fact; and any such certificate shall, for the purposes of this section, be conclusive as to the fact which is certified."

Therefore, reading all these together, it means that both these conditions depend on a certificate from the Government. Thus, under these two clauses, if either of the certificates is issued, the liability will not entail, and the court cannot do anything. The certificates are left completely to the discretion of the Government. Regarding liability also, the court will not know how much the man is going to get by award. So, I submit that although this may be on the lines of the English statute, still, this creates a difficulty. In fact, I do not find in the English statute anything about clause 3.

SHRI BHATIA: There, the word is "Admiralty". Supposing that it is "a fact that a person was or was not on any particular occasion on duty as a

member of the armed forces of the Crown" etc., "may issue the certificate certifying to the fact that any such certificate shall for the purposes of this section be conclusive." This sanction relates to the armed forces.

SHRI SAHARYA: The difficulty which I pointed out was beyond the English statute. The Law Commission has recommended that the English law as it is not sufficient for our own purposes. It is for you to consider what law we should have. I think the language in which this Bill is drafted in this clause will create difficulty for the injured inasmuch as this certificate will throw out the suit at any stage. Therefore it is that I have submitted my remarks in relation to clause 10.

MR. CHAIRMAN: In your remarks, I have not come across even one instance where you have appreciated the difficulty of the Government.

SHRI SAHARYA: If I may say so, I am not talking as a lawyer, but as a citizen, I am trying to assist the legislature in making proper laws. I appreciate the difficulty of the Government also.

Clause 12

I know there is a similar clause in the English statute. But my submission is this. This is a matter, as the Supreme Court has said, which can be traced back to the East India Company days. The first case was in 1962. At that time, it was suggested that the law should be modified and some guidance should be given by the legislature. A Bill was introduced in 1965 and it lapsed. This has come up now. For pending cases where the parties have suffered already and who may have already filed their suits and are trying to get relief, if the court feels that in view of the provision which you have passed ultimately the man is likely to get some relief, why debar the man from getting it? Therefore, I submit that this Act should be retrospective.

SHRI SHRI CHAND GOYAL: Is it the general policy to save the cases which have already been instituted, to determine and decide according to the law under which they were instituted?

SHRI BHATIA: He says the existing law might be more beneficial.

SHRI SRINIBAS MISHRA: Have you heard of Ralia Ram's case in Meerut? Do you think there should be something in this Bill itself to provide for some relief for such people as Ralia Ram? Perhaps for that reason the Supreme Court suggested that there should be some legislation to provide for such cases.

SHRI SAHARYA: That case was decided against the party on account of the act being of a sovereign nature. The Head Constable misappropriated the gold. He arrested somebody and caught hold of the gold and then misappropriated it and went away. The court found great difficulty in rejecting the claim. They said that unlike the case which arose in Rajasthan—I do not want to go into the details of it—here it was a direct, sovereign act of the State, and therefore, the court felt that in view of the position of the law which existed from the time of the East India Company, they could not grant relief. The court said that it is time that we laid down a proper law. If I may say so, this is the law which is now being made for meeting this kind of cases.

SHRI KRISHAN KANT: The question is, whether the present Bill as has been drafted will give relief to such persons.

SHRI SAHARYA: I have made my suggestions on the clauses of the Bill. So far as I can see, the present law makes no distinction between a sovereign act and a non-sovereign act. In a case like the one the hon. member mentioned, the present law will give relief.

SHRI SRINIBAS MISHRA: In your interpretation of clause 3(b)(1) have you taken into consideration the definition of "independent contractor" given in clause 2(d)?

SHRI SAHARYA: Yes.

SHRI SRINIBAS MISHRA: Will you agree if it is suggested that cases coming under clause 3(b)(1) will no longer be independent contractors according to the definition, when Government assumes control?

SHRI SAHARYA: So far as the definition is concerned, I read it as telling us what the legislature considers to be an independent contractor, i.e. "a person who contracts to do an act for the Government but who in doing the act is not under the order or control of the Government". This is the nature of the person with whom Government has to deal. When we come to clause 3(b)(1), we proceed to the subsequent events, after the contract has been made with this kind of person. When a tort occurs, the question first of all will be, is he an independent contractor? That will be answered by reference to the definition. Then the subsequent question will be who is liable for the tort? At that stage we come to sub-clause (i) and we have to see who is exercising control over his action which has resulted in tort. I do not see any clash between the two.

SHRI SRINIBAS MISHRA: If Government has assumed control, will that contractor remain an independent contractor according to that definition?

SHRI SAHARYA: Yes according to me. It does not depend upon the happening of the event. First we have to see whether he falls within the definition of 'independent contractor'. Then, what happens under sub-clause (i) is a different matter.

SHRI KRISHAN KANT: When Government exercises control, does he remain an independent contractor?

SHRI SAHARYA: He was an independent contractor when the contract was entered into. Then, as I have suggested, Government gradually takes over the performance of the contract or even part performance.

SHRI SRINIBAS MISHRA: There is some misunderstanding in terminology. It says "assumes control of the act". Act means construction of the building. When Government assumes control of the construction work, will the contractor remain independent?

SHRI SAHARYA: That was the first difficulty I have pointed out in my note. The language is not clear.

SHRI SHRI CHAND GOYAL: Don't you think he will cease to be an independent contractor as soon as the Government takes partial or full control of the act which is being done by him?

SHRI SAHARYA: To the extent Government is taking over control, the contractor's responsibility ceases to be exclusive and to that extent Government must take responsibility.

SHRI BHATIA: How can you split up control like that?

Suppose you remove this clause and Government assumes control of any nature. There is no independent contractor.

SHRI SAHARYA: I do not agree. In the example I gave, Government takes control of the building at the end of July. Government should be responsible even before July, when they take control of part of the building in March or April.

SHRI KRISHAN KANT: Will you send those amendments?

SHRI SAHARYA: Yes; I will pass them on to the Lok Sabha Secretariat.

SHRI SHRI CHAND GOYAL: Thank you. The committee has been very much benefited by your evidence.

SHRI SAHARYA: Thank you. This is an important work which the legislature is doing and I am only trying to assist.

(The witness then withdrew)

(The Committee then adjourned)

**MINUTES OF THE EVIDENCE GIVEN BEFORE THE JOINT COMMITTEE ON
THE GOVERNMENT (LIABILITY IN TORT) BILL, 1967**

Thursday, the 4th July, 1968 at 10.00 hours

PRESENT

Shri M. H. Samuel—In the Chair.

MEMBERS

Lok Sabha

2. Shri K. Anirudhan
3. Shri R. R. Singh Deo
4. Shri Anirudha Dipa
5. Shri Shri Chand Goyal
6. Shri R. M. Hajarnavis
7. Shri S. Kandappan
8. Shri Brij Bhushan Lal
9. Shri Srinibas Mishra
10. Shri Amrit Nahata
11. Shri M. Narayan Reddy
12. Shri A. T. Sarma
13. Shrimati Savitri Shyam
14. Shri M. R. Sharma
15. Shri Narayan Swaroop Sharma
16. Shri T. M. Sheth
17. Shri Ram Sewak Yadav.

Rajya Sabha

18. Shri S. B. Bobdey
19. Shri Rama Bahadur Sinha
20. Shri Y. Adinarayana Reddy
21. Shri Krishan Kant
22. Shri M. P. Shukla
23. Shri Hira Vallabha Tripathi
24. Sardar Raghbir Singh Panj hazari
25. Shri Dahyabhai V. Patel
26. Shri N. K. Shejwalkar
27. Shri Balkrishna Gupta
28. Shri C. Achutha Menon.

LEGISLATIVE COUNSELS

1. Shri R. V. S. Peri-Sastri, *Addl. Legislative Counsel, Ministry of Law.*
2. Shri S. V. Subha Rao, *Attache, Legislative Deptt., Ministry of Law.*

SECRETARIAT

Shri M. C. Chawla—Deputy Secretary.

WITNESSES EXAMINED

Federation of All India Foodgrain Dealers' Association, Delhi

Spokesman:

Shri Bhani Ram Gupta, Genl. Secretary, Foodgrain Dealers' Association.

(The witness was called in)

MR. CHAIRMAN: Introduce yourself.

WITNESS: I am Bhani Ram Gupta, General Secretary, Federation of All India Foodgrain Dealers' Association.

MR. CHAIRMAN: Do you follow English?

SHRI GUPTA: I would like to speak in Hindi.

MR. CHAIRMAN: But you can follow English. I shall read out to you the Direction of Speaker: "Where witnesses appear before a Committee to give evidence, the Chairman shall make it clear to the witnesses that their evidence shall be treated as public and is liable to be published, unless they specifically desire that all or any part of the evidence tendered by them is to be treated as confidential. It shall, however, be explained to the witnesses that even though they might desire their evidence to be treated as confidential such evidence is liable to be made available to the members of Parliament." Do you follow?

SHRI GUPTA: Yes, I like to speak in Hindi.

MR. CHAIRMAN: You can speak in Hindi.

SOME HON. MEMBERS: It is better if he speaks in English, or at least a translation is made into English, so that we can follow.

MR. CHAIRMAN: He can speak in Hindi. It may be translated into English.

श्री गुप्त : इस सम्बन्ध में मैं यह प्रार्थना करना चाहता था कि यदि आपने यह एकट बनाया तो उस हालत में सिटिजन्स के लिये कोई सुविधायें नहीं रह जायेंगी । अगर सरकारी अफसर मनमानी करने लगे तो फिर उनको कैसे रोका जायेगा ? मैं इस सम्बन्ध में कुछ इन्सटान्सेज देना चाहता हूँ । कोटा में लगभग 15 डीलर्स को पुलिस ने एरेस्ट किया और मैजिस्ट्रेट ने उनकी बेल नहीं ली । इसके खिलाफ बे लोग सेशनस कोर्ट में गये । सेशनस कोर्ट ने उनकी बेल ली और कोर्ट ने पुलिस और मैजिस्ट्रेट के खिलाफ स्ट्रिक्चर्स भी पास किये और कहा कि गलत एलिगेशन्स लगाकार इनको प्राजीक्यूट किया गया और हैरस किया गया ।

इसी तरह से बाम्बे में जो हमारे लेट प्रेसीडेन्ट मि० प्रेम जी थे उनको भी गलत तरीके से प्राजीक्यूट किया गया लेकिन उनको भी आनरेबली छोड़ दिया गया । अभी पिछले साल सन 67 में मि० वी० एस० अग्रवाल, जोकि हमारे प्रेसीडेन्ट हैं, उनको भी पुलिस ने गिरफ्तार किया—यह एलिगेशन लगाकर—कि आपने प्राइसेज बढ़ाई हैं लेकिन खुद पुलिस ने ही उनको 6-7 दिन के बाद बिना कोई चार्जशीट लगाये छोड़ दिया । इसी तरह की इन्सटान्सेज दिल्ली की हैं ।

श्री कृष्ण कान्त : उनको किसी अदालत में पेश नहीं किया गया ?

श्री गुप्त : उनको किसी अदालत में पेश नहीं किया गया । उसने कहा भी

था कि मुझे अदालत में पेश किया जाए अगर मेरे खिलाफ चार्ज शीट लगाना है । लेकिन उसको नहीं किया गया ।

श्री रान सेवक धादर : मैं समझता हूँ कि गवाह महोदय ने विधेयक को पढ़ा होगा । मैं उन से पूछना चाहता हूँ कि जो व्यवस्था विधेयक में की गई है उससे उनका जो मकसद है वह पूरा होता है या नहीं होता है? अगर नहीं होता है तो वह इस में क्या संशोधन करवाना चाहेंगे, इसको वह हमें बतायें ।

श्री गुप्त : इस सम्बन्ध में हमारा विचार यह है कि इस किस्म का बिल अगर पास हो गया तो जो सिटिज़न्स राइट्स हैं और खास तौर पर बिजिनेस कम्युनिटी के जो राइट्स हैं उन पर कुठाराघात होगा और उन पर अत्याचार होंगे । इस वक्त तो ऐसा है कि जो अक्रिम हैं और जो गलत बात करना चाहता है, मनमानी करना चाहता है, डिक्टेरी करना चाहता है उस पर कुछ भय है । वह ऐसा कर भी जाता है लेकिन उसके मन में भय बना रहता है कि अगर कोई आदमी डेमेजिज में जाएगा तो मुसिकल पेश आ सकती है । अब जब उनको पता लग जाएगा कि हमारा कुछ भी नहीं हो सकता है तो हमारी जो जिन्दगी है रोजमर्रा की वह दूबर हो जाएगी और हम आजादी से अपना कारोबार नहीं कर सकेंगे ।

श्री कृष्ण कान्त : आपने यह नहीं बताया है कि कौन-कौन सी क्लॉज़ इस में हैं जिनसे आपको नुकसान हो सकता है ।

श्री गुप्त : हमारा मंशा इस बिल की मुबालिफत करना नहीं है । हम यही चाहते हैं कि जो सिटिज़न्स राइट्स हैं वे सुरक्षित रहें । कोई भी क्लॉज़ या कोई भी सब-क्लॉज़ इसके खिलाफ जाती हो तो

नहीं रहनी चाहिये । ऐसी कोई बात नहीं होनी चाहिये जिससे यह पता चले कि फूडब्रेन ट्रेड करने वाले या कोई और ट्रेड करने वाले के राइट्स महफूज़ नहीं हैं या वे अपना कारोबार नहीं कर सकेंगे । आज यह होता है कि सब लोगों में तो नहीं लेकिन कुछ में बदले की भावना रहती है और कभी कभी ऐसा हो जाता है कि बदले की भावना से काम किया जाता है चाहे पोलिटिकली हो या सोशली हो ।

SHRI SHRI CHAND GOYAL:
आपने अपने मैमोरेण्डम में यह लिखा है :

“What the bill really aims at is to nullify the effect of certain laws and principles settled by the courts, to the extent that they have equal hold on a private citizen as well as on the Government and its officers in the matter of their liability under Torts.”

क्या आपका मंशा यह है कि आज जो कानून है उसमें नगरवासियों के अधिकार सुरक्षित हैं और अगर यह कानून पास हो गया तो सुप्रीम कोर्ट ने या हाई कोर्ट्स ने जो लोगों के अधिकार अपने फैसलों में सुरक्षित किये हैं, वे सुरक्षित नहीं रहेंगे और यह कानून और भी ज्यादा तकलीफदेह साबित होगा ?

श्री गुप्त : बिल्कुल यही बात है ।

श्री श्रीधर गोयल : आप इस नतीजे पर कैसे पहुँचे हैं ? आप बिल की क्लॉज़ 11, सब-क्लॉज़ ओ को देखिये ।

Clause 11. Nothing contained in this Act shall render the Government liable in respect of:

(o) any claim arising out of defamation, malicious prosecution or malicious arrest;

इस में कहा गया है कि कानून पास होने के बाद गवर्नमेंट की कोई जिम्मेवारी नहीं होगी

जहाँ तक डिफामेशन के केसिस या मैलिशस प्रासीक्यूशन या मैलिशस एरेस्ट का ताल्लुक है । आपको इसी से डर लगता है क्या ? बाकी कानून से तो कोई शिकायत नहीं है । अगर इसको डिलीट कर दिया जाए तब तो कोई एतराज नहीं है ?

श्री गुप्त : मेनली यह ही है ।

श्री एम० नारायण रेड्डी : आपने कहा है कि जहाँ आफिसर्स की तारीफ दी गई है, उस में पुलिस आफिसर्स को भी शामिल किया जाना चाहिये क्या आपका एतराज यह है कि इनको क्यों नहीं शामिल किया गया है ?

श्री गुप्त : पुलिस आफिसर्स भी इस में शामिल हैं । लेकिन जो पुलिस के छोटे कर्मचारी हैं जैसे ए एस आई या एस आई, मेरे ब्याल में उनको इस में शामिल नहीं किया गया है । प्रिलिमेनरी स्टेज पर वही केसिस के साथ डील करते हैं, वही केसिस बनाते हैं । सीनियर आफिसर्स किसी को फंसाना चाहते हैं तो इन्ही को इशारा करते हैं । वे लोग इसकी जद में नहीं आते हैं । पुलिस आफिसर चाहे वह किसी भी रैंक का हो, उसको इस में शामिल किया जाना चाहिये ।

SHRI S. KANDAPPAN: Obviously the witness would like the Bill not to be passed because it would affect the rights of the citizens. I would like to know from him supposing the Bill is not passed and we have not yet passed it . . .

What was the position prevailing now and before. In the two cases of Vidyawati and Ralia Ram—in one case Government was held liable for tort and in the other case Government was not held liable. Even there is a point. That is a sort of anomaly. It is quite likely that the citizens right would be adversely affected even if it is not passed. So, I would like to know how the witness can hold the

view that if the Bill is not passed, the citizens right will be protected.

श्री गुप्त : श्रीमान जी इस का जवाब मैंने पहले ही दे दिया है शायद मेरे जवाब का ठीक ट्रांसलेशन नहीं हुआ ।

श्री श्रीरन्द गोयल : उन के सवाल का जवाब नहीं आया । उन का सवाल यह है कि जो आज मौजूदा कानून है उस कानून के तेहत शहरियों के अधिकार कहां सुरक्षित है जो इस कानून के पास हो जाने से खत्म हो जायेंगे ।

श्री गुप्त : जहाँ तक मेरी निजी जानकारी है इस में ऐसा है कि आज हाई कोर्ट्स, सुप्रीम कोर्ट, सेशन कोर्ट्स सब इण्डीपेन्डेंट हैं, उन पर किसी का दबाव नहीं है । वे जो भी फैसला करती हैं ईमानदारी का फैसला होता है । इस के अलावा वे जब किसी आफिशियल के खिलाफ कोई स्ट्रिक्चर पास करती हैं, तो उन को अनुर किया जाता है और वे लारी बातें सही मानी जाती हैं, इस वजह से हम सिटिज़न्स उन के फैसलों से सैटिसफाइड हैं । यह दूसरी बात है कि उन के फैसलों में अगर कोई गलती रह जाय तो आपस में या पब्लिक तौर पर क्रिटिसिज्म करें, लेकिन उस के बावजूद भी उन फैसलों को अनुर किया जाता है ।

मौजूदा कानून के तेहत फूडबेन ट्रेड में अनेकों केसेज हुए, बम्बई में हुए, दिल्ली में हुए, दिल्ली में 53 केसेज हुए, प्रासीक्यूशन हुआ, एरेस्ट हुए, लेकिन एक भी केस में सजा नहीं हुई, ईमानदारी से छोड़ दिया गया । नागपुर में जो केस हुआ, उस में हाई कोर्ट ने स्ट्रिक्चर पास किया, झरिया में जो केस हुआ, उस में पटना हाई कोर्ट ने स्ट्रिक्चर पास किया । ऐसी हालत में अगर हम मौजूदा कानून में तरमीम करेंगे, तो हम ऐसा समझेंगे कि सिटिज़न्स के राइट्स को

वापस लिया जा रहा है एक तरह से डिक्टेटर-शिप कायम हो जायगी। डेमोक्रेटिक सैट-अप में चाहे कोई भी सिटिजन हो, गरीब हो या अमीर हो, बिजनेसमैन हो या आफिशियल हो, उस के राइट्स सुरक्षित रहते हैं। इस लिये अगर इस में तरमीम की गई और खास तौर से वह धारा लगाई गई, जो हम समझते हैं कि सिटिजन के राइट्स सेफ नहीं हैं।

SHRI S. KANDAPPAN: Courts are not always upholding the rights of citizens as is the case of Bhagwati.

MR. CHAIRMAN: There is no law now. Courts will not be able to help.

श्री गुप्त : श्रीमान जी हम इस से उल्टा समझें हैं। हम यह समझते हैं कि आफिशियल जो गल्ती करेंगे उन का प्रोटेक्शन होगा सिटिजन का प्रोटेक्शन नहीं होगा।

MR. CHAIRMAN: There is one point of view. Just now you said "Official" should be defined and it should include all officials. Please see clause 2 sub-section (b):

Any person who is a member of the Defence Service or of a Civil Service of the Union or of an All India Service or holds any post connected with Defence or any civil post in the Union or a member of the Civil Service of a State or holds any post under State. Does it not cover the entire Government? Does it satisfy you?

SHRI GUPTA: But they are gazetted officers.

MR. CHAIRMAN: No.

श्री एम० नारायण रेड्डी : आपने अपने मैमोरेण्डम में जो आन्वैकशन उठाया है क्या आपका यह मतलब है कि सेमीकोलन की वजह से सब-क्लाज में जो तारीफ दी गई है कि चन्द खास मकासिद की वजह से

एक्सेप्शन हो सकती है पुलिस आफिसरज चाहे कुछ भी करें वह माफी के तेहत आ जायगा।

श्री गुप्त : यह बात किसी हद तक सही है।

श्री एम० नारायण रेड्डी : सेमीकोलन की वजह से पुलिस आफिसरज कितनी भी नाजायज हरकत करें उन का हर काम इस बिल के तेहत जायज हो जाता है।

श्री गुप्त : जी हां इस की आड़ में ऐसा होने का अन्देशा है।

श्री एम० नारायण रेड्डी : हमारे संविधान में जो आर्टिकल 20 है जिसमें ऐसा है कि 24 घंटे से ज्यादा अण्डर अरेस्ट नहीं रखा जा सकता, इसी तरह से क्रिमिनल प्रोसीजर कोड में है कि 24 घंटे से ज्यादा नहीं रखा जा सकता है अर मैजिस्ट्रेट के सामने पेश करना पड़ता है। अभी जैसा आपने बताया कि 8-10 दिन हुआ किसी अग्रवाल को रखा था, तो यह काम भी इस क्लाज के तेहत जस्टीफाइड हो जाता है।

श्री गुप्त : आप ठीक कहते हैं। इस कानून के तेहत तो उन को कोई भय ही नहीं रहेगा, उस आदमी के लिये कोई प्रोटेक्शन ही नहीं रहता।

SHRI M. NARAYAN REDDY: If any police officer does irregularity, the citizen has right to go to the Court even as a tort & claim damages. By keeping or including this Clause under Section 11, any Act done by a member of the Police which is not justified under the Criminal Procedure Code, normally powers vested in them, become justifiable. Either since it was done *bona fide* or for any other reason, such an act becomes justified. The word 'any act' not in relation to those matters which are under Clause 2, so by putting semi colon the object of that act is taken away from Clause 2.

MR. CHAIRMAN: Some point was raised here yesterday and it was agreed that semi colon may be done away with and Article 11 under H(i) i&ii may become only one paragraph and I think that has been more or less agreed to by the Law Ministry.

SHRI M. NARAYAN REDDY: That may be done away with.

SHRI MENON: You were refering to many cases in which the persons were acquitted by the Court and you told that person can sue for damages, can you tell me where in such cases the person concerned can not sue for damages against an officer or Government in which they succeeded or what happened in the cases where they were discharged.

श्री गुप्त : जहां तक डिफेंशन का मामला है क्योंकि ट्रेडिंग कम्प्युनिटी कुछ ऐसी बैकवर्ड है वह डिफेंशन के लिए जाते हुए डरते हैं । ऐसे हम यह नहीं चाहते कि वह कानून बना रहे, हम तो चाहते हैं कि हमें प्रोटेक्शन मिले क्योंकि इतना वह झिझोड़ते हैं, इतना दबाव डालते हैं कि कोई करेज नहीं करता डिफेंशन के लिए जाने की । अगर कोई डिफेंशन के लिए जाने की कोशिश करता है तो दूसरे किस्म के एलीगेंस लगा कर उस को फंसाने की कोशिश करते हैं और इस तरह उनको डिस्करेज करते हैं । जो बहुत स्ट्रेटफारवर्ड हैं और इस की परवाह नहीं करते कि इस का रिजल्ट क्या होगा, वह जाते हैं । लेकिन ज्यादातर लोग जाने की करेज नहीं करते ।

श्री रा : सेक्टर बा'ब : हमारे व्यापारी लोग बहुत पिछड़े हैं वह क्या आप ने इस सन्दर्भ में कहा कि वह प्रगतिशील नहीं हैं या बैकवर्ड दूसरे सेंस में कहा ?

श्री गुप्त : नहीं बैकवर्ड उस सेंस में नहीं बल्कि इस सेंस में कि वह इतने ज्यादा डरे हुए होते हैं, गवर्नमेंट आफिशियल्स से उन को इतना भय होता है कि वह सोचते

हैं कि हम अभी तो एक पिजड़े में से निकले हैं, अब अगर डिफेंशन की तरफ जाने की कोशिश करते हैं तो वह दूसरे तरीके से फंसायेंगे ।

SHRI C. ACHUTHA MENON: What Shri Kandappan has raised, I am raising again. How can you say— unless in some cases at least you have sued the Government officers concerned for damages and got damages—that the existing law does not give more protection than what is contained in the Bill that is sought to be passed?

How can you say that?

श्री गुप्त : नहीं, श्रीमान जी, जहां तक सिटिजेन्स राइट्स की बात है वह रहने चाहिए । उस में यदि कोई नहीं जाता डिफेंशन के लिए, तो भी फर्ज कीजिए किसी हाईकोर्ट ने स्ट्रक्चर पास किया है, वह डिफेंशन में जा सकता है, वह जाना नहीं चाहता यह दूसरी बात है, कुछ लोग जाते भी हैं, तो इस से वह एक गलत काम करते हुए डरेगा, गलत तरीके से किसी को फंसाने की कोशिश करते हुए डरेगा । अब इस बिल के पास हो जाने से उस को भय नहीं रह जायगा । कुछ इन्स्टांसेज ऐसे भी हैं कि जिन में लोग डिफेंशन में जाते भी हैं । इस समय मेरे पास इन्स्टांसेज नहीं हैं लेकिन ऐसे लोग भी हैं जो जाते हैं । अगर आप कहें तो मैं सुप्रीम कोर्ट के, हाई कोर्ट के सेशन कोर्ट के फैसलों की सर्टिफाइड कापीज बाद में भजवा सकता हूं जिस में उन्होंने स्ट्रक्चर्स पास किए हैं ।

SHRI T. M. SHETH: Do you say that persons affected don't go to civil court because they are not only afraid of the officers—that is point number one—but if they go to the court, they will get some damages because of the structures passed by the courts. After the passing of the Act they will not be able to get that because of sub-clause 11(o).

श्री गुप्त : बिकूल ठीक है ।

MR. CHAIRMAN: The object of the Bill is to give protection to the citizens. Before, there has been no law on the subject. Even when you go to the courts., they are not able to help the citizen very much because of absence of any law.

SHRI M. NARAYAN REDDY: There was the common law. When there is exercise of jurisdiction and prosecutions are launched, the courts invariably granted damages, unless it is a sovereign act or something like that.

MR. CHAIRMAN: This Bill does not alter the present position.

SHRI SHRI CHAND GOYAL: Now it is possible for a citizen to succeed in the case of damages. But after the passing of this piece of legislation this will be a bar in their way.

SHRI M. NARAYAN REDDY: Any Act of the State—this is a comprehensive term. Unless it is an act in exercise of the sovereign function, as defined by the Supreme Court—till it is understood that it is an act which was done in exercise of the sovereign powers of the State, then the other thing comes in. There are these other sub-clauses. Sub-clause (e) relates to emergency powers taken during the emergency. Sub-clause (f) is also justified, (g) also. The controversy revolves round (i) and (o). If they continue to be in the Bill it alters the present position. It not only does not incorporate all the recommendations of the Law Commission but also very much alters the present position of law. The Government officer cannot indulge in defamation, malicious prosecution or malicious arrest under the existing law.

MR. CHAIRMAN: Regarding 11(i) and 11(o)—what is your opinion? That is the point.

श्री गुप्त : 11 (ग्री) प्रीर 11 (ग्राई) को हटा दिया जाय तो काफी हद तक कठिनाई दूर हो जाती है ।

श्री गोयल : 11 (ग्राई) का ता हटाने की जरूरत नहीं है, उस की तो केवल रीडाफ्रिटिंग करना है ।

श्री गुप्त : जी हां, रीडाफ्रिटिंग से काम चला जायगा ।

श्री टी० एम० शेट : (ग्राई) में भी एन० ऐक्ट का डिफाइन करना चाहिए ।

SHRI M. NARAYAN REDDY: We are giving sanctity to all the illegal things. See Clause (f) under 11. They used the word 'Acts of judicial nature'. You see that that goes without saying. Even though they have put down specifically that the acts of judicial nature are only exempted, in regard to other officers malicious arrests and malicious prosecutions may take place.

SHRI SHRI CHAND GOYAL: I agree that this will certainly open up floodgates for malicious prosecutions and malicious arrests.

MR. CHAIRMAN: We are going to discuss it tomorrow. We had a little discussion on that.

SHRI KRISHAN KANT: The witness has given his view.

MR. CHAIRMAN: I agree that it is capable of different interpretations. Now, I want to ask you about clause 11(a) where it speaks of any act of State which you say is very comprehensive. Supporting we say 'any act of State in the exercise of sovereign function', will it satisfy your point of view? Are the rest of the provisions valid after that?

SHRI M. NARAYAN REDDY: The rest of the portion in regard to proclamation and prorogation is all right. But please see (j) where they have

specifically said about act of a judicial nature. Normally speaking it was not necessary.

MR. CHAIRMAN: Where have they said about 'judicial nature'?

SHRI M. NARAYAN REDDY: In sub-clause (j) they have taken care to mention ". . . to discharge any responsibilities of a judicial nature vested in him". They have taken sufficient care to define what kind of responsibility will be discharged by the judge or magistrate. Similarly, with reference to arrest, prosecution and defamation there should have been some clearcut definition.

SHRI RAM SEWAK YADAV: That we can discuss among ourselves. Let us first hear the witness, if he had anything to say.

MR. CHAIRMAN: Have you got anything else to say?

SHRI GUPTA: I have nothing else to add.

MR. CHAIRMAN: Thank you very much.

(The witness then withdrew).

(The Committee then adjourned)

**MINUTES OF THE EVIDENCE GIVEN BEFORE THE JOINT COMMITTEE ON
THE GOVERNMENT (LIABILITY IN TORT) BILL, 1967**

Saturday, the 5th October, 1968 at 10.00 hours.

PRESENT

Shri A. K. Sen—Chairman.

MEMBERS

Lok Sabha

2. Shri N. C. Chatterjee
3. Shri Shri Chand Goyal
4. Shri S. Kandappan
5. Shri Brij Bhushan Lal
6. Shri Baij Nath Kureel
7. Shri Srinibas Mishra
8. Shri H. N. Mukerjee
9. Shri K. Narayana Rao
10. Shri M. Narayan Reddy
11. Shri Mohammad Yunus Saleem
12. Shri A. T. Sarma
13. Shri M. R. Sharma
14. Shri Narayan Swaroop Sharma
15. Shri T. M. Sheth
16. Shri Mudrika Sinha
17. Shri G. Visanathan.

Rajya Sabha

18. Shri S. B. Bobey
19. Shri Rama Bahadur Sinha
20. Shri Gulam Haider Valimohmed Momin
21. Shri Krishan Kant
22. Shri Hira Vallabha Tripathi
23. Shri M. H. Samuel
24. Shri Chakrapani Shukla
25. Shri N. K. Shejwalkar
26. Shri Balkrishna Gupta
27. Shri C. Achutha Menon
28. Shri G. P. Somasundaram.

LEGISLATIVE COUNSEL

1. Shri R. V. S. Peri-Sastri, *Addl. Legislative Counsel, Legislative Deptt. Ministry of Law.*
2. Shri N. D. P. Namboodiripad, *Jt. Secy. Legislative Department, Ministry of Law.*
3. Shri Subbarao, *Attache, Legislative Department, Ministry of Law.*

SECRETARIAT

Shri M. C. Chawla—*Deputy Secretary.*

WITNESSES EXAMINED

- I. Railway Board (Ministry of Railway)—
Shri K. C. Sood, Member (Engineering),
Shri Kasturi Rangan, Director-Establishment.
- II. Ministry of Home Affairs—
Shri Uma Shankar, Joint Secretary.
- III. Ministry of Commerce—
Shri H. K. Kochar, Joint Secretary.
- IV. Ministry of Finance—
Shri S. S. Shiralkar, Addl. Secretary.

(The witnesses were called in and they took their seats)

MR. CHAIRMAN: We have to move a condolence resolution expressing our sorrow at the passing away of Shri Krishnamoorthy Rao. All of us knew him, a very dear friend of all of us. He discharged his functions as Deputy Speaker with admirable ability and impartiality. This is the resolution which I put before you:

"This Committee place on record their deep sense of sorrow over the passing away of Shri S. V. Krishnamoorthy Rao, former Deputy Speaker, Lok Sabha at New Delhi yesterday morning.

The Committee send their heartfelt sympathies to the bereaved family."

I propose that we all stand up for a minute.

[The Committee stood in silence for a short while].

I also propose that you authorise me to convey this resolution to his family under my signature.

MR. CHAIRMAN: We have invited representatives of different Ministries to come and help us with their views. The Members of the Select Committee felt that it would be better to have the representatives of different Ministries appear before the Committee so that there could be exchange of views rather than deal with their written opinions. I would request Mr. K. C. Sood, Member (Engineering), Railway Board to start his discussion first. We would very much appreciate his views on the Bill, because Railways is very much concerned, as it is a commercial concern, which is generally liable for the tort of Government servants.

SHRI K. C. SOOD: Being a commercial concern we are already paying compensation. In fact I am greatly concerned with this Bill. The first thing I have to mention is about the responsibility of the Railways as an employer. A reading of the Bill gives me an impression that employer alone is responsible and not an employee or agent or the independent contractor. We would very much prefer

that there is collateral responsibility because if an employee is negligent or does a negligent act, he should not have the feeling that he is not responsible and the employer alone is responsible. Disciplinary action is taken against persons doing that. That is one thing.

MR. CHAIRMAN: For the moment it is better to leave it to the Department concerned to deal with the delinquent officers departmentally or take disciplinary action, rather than putting it in the law. It is best to say that the Government will be liable, as we have stated here. But this will be without prejudice to the Government's action, and the Government is always entitled to take such action as it may think necessary against those officers on account of whom it has suffered. I think it is not proper to put it in the law, because we are dealing with the citizen's rights. It is much better to leave it as it is. I think the Home Ministry, in consultation with the concerned ministries, may make proper rules for dealing with such delinquent officers. It is not a deliberate commission. Any Government servant should be normally liable to the Department.

SHRI SOOD: It is only for negligence.

MR. CHAIRMAN: Negligence may be deliberate; negligence may not be deliberate. It is only the deliberate negligence for which a departmental officer may be held responsible. You can only punish a government servant for deliberate commission. You better leave it to the department concerned.

If it is an independent contractor, then the Department will not be liable. It is only for the action of his employees in the course of their duty that the master is liable.

SHRI SOOD: This Bill gives the impression that an independent contractor will also be liable.

MR. CHAIRMAN: No. We have defined it. You may look at section 2, clause (a) in relation to an agent. Read the definition of 'agent'. And then if you come to section 3(b), i.e. in relation to tort, you will find, 'Provided that the Government shall not be liable under this sub-clause, if there is an express stipulation in the contract between the Government and the independent contractor', and then, "(b) the independent contractor shall, and the Government shall not, be liable for any personal injury or any damage to property caused in the doing of the act by the failure on the part of the independent contractor to take such care".

He may have no money to answer the claim for damages. He may be of no consequence. That's why it is necessary. The Government will be liable for tort only where the Government has stipulated.

SHRI N. C. CHATTERJEE: An independent contractor can never be caught.

MR. CHAIRMAN: Some provision should be made that where such provision is inserted by the Government relating to the Government's liability, the Government should take enough security.

SHRI SOOD: That, of course, is always done.

MR. CHAIRMAN: Supposing a citizen has to proceed against the contractors, not against the Government, in many a case the contractor may not be able to answer the claim. It is the feeling of many members of this committee that a suitable policy of insurance or other forms of security should be taken from the contractors.

SHRI KRISHAN KANT: The Government may pay compensation recovered from the contractor.

MR. CHAIRMAN: If it is a policy of insurance, it is better. Otherwise the Government will be faced again with several suits.

SHRI K. NARAYANA RAO: Mr. Sood, what are the various situations in which you engage an independent contractor?

SHRI SOOD: Building of a bridge, putting up a building, or the sinking of a well, building of houses, etc.

SHRI SHRI CHAND GOYAL: I suggest that the witnesses may first express their views and then we may raise our points.

MR. CHAIRMAN: That's right. That is what I was going to suggest.

SHRI SOOD: The second thing I would like to point out is that Government property should not be attached. It has happened sometimes that Government property has been attached.

MR. CHAIRMAN: The law is that two months' time is always allowed to the Government to pay. It is always considered that the Government machinery moves slowly. But it has happened that in many cases not months but years have lapsed.

SHRI SOOD: We have seen that a locomotive is attached.

MR. CHAIRMAN: They have a time of two months.

SHRI SOOD: We own land all over the country. I am afraid I have not been able to see anything in the Indian Railways Act to deal with this situation. A trespasser may enter where the land is not fenced, get injured and may sue us. Even cattle graze all over. Somebody files a suit against the Railways because the land has not been fenced and cattle have been run over.

MR. CHAIRMAN: The law is quite clear; it is only an invitee who can hold the owner of the land or building liable in tort. Invitees will know. If you want to prevent trespassers from coming and claiming damages, you should put up notices at prominent places warning that trespassers will be prosecuted.

SHRI SOOD: We do put up such notices at level crossings and so on. But to do so all over the place is impossible—all along the 50,000km. track.

MR. CHAIRMAN: A general notice is enough. I think you should frame rules under the Railways Act for this purpose, making trespassing an offence.

SHRI SOOD: Yes.

SHRI SHRI CHAND GOYAL: The independent contractor works for the benefit of the Government. So far as third parties are concerned, the entire liability should be on the principal employer, that is on Government, rather than on the independent contractor. If Government feel that they have to be reimbursed by the independent contractor, it can deal with it separately.

MR. CHAIRMAN: In law, the primary responsibility is on the person engaged as independent contractor. If this is not done, he will be relieved of all liability and he will never take any care and precaution. The primary liability must be on the man actually executing the works. Therefore, I am suggesting that Government should be made liable to take appropriate security in the form of insurance policy and so on so that the independent contractor's liability may be properly answered.

SHRI KRISHAN KANT: Why? Ultimately Government will recover from him.

MR. CHAIRMAN: It is very difficult even for Government to prove. There are various other things.

SHRI KRISHAN KANT: He works as agent of Government.

MR. CHAIRMAN: Suppose a contractor engaged on a building work in your house commits tort by negligence in not putting proper scaffolding and a pedestrian who crosses is.

injured. You have engaged him not as servant but as independent contractor. He has his own precautions to take. His operations cannot be controlled every minute by Government or the employer.

SHRI SHRI CHAND GOYAL: In clause 3 (b) (ii), we have 'where the Government has authorised or ratified the act of the independent contractor alleged to constitute the tort'.

MR. CHAIRMAN: He has not said anything on that. He may not possibly have come prepared for this.

SHRI N. C. CHATTERJEE: It is an important point which should be answered.

SHRI SHRI CHAND GOYAL: Why ratification is necessary, because after commission of a tort, we cannot expect any Government to ratify. Government is likely to take a shield under this. This may deprive third parties of their right to recover damages from the Government.

MR. CHAIRMAN: It is a legal question which we can discuss amongst ourselves. I have my own views about it. Possibly all these clauses about ratification may have to be suitably clarified. Witness is hardly capable of answering it. This is in line with English legislation where the Crown was not liable in tort. Nobody is liable ordinarily for the tort committed by independent contractors. Exceptions provided to that immunity in tort committed by independent contractors are now sought to be suitably limited. One of the limitations is mentioned here. For instance, an independent contractor has committed tort by injury to a person by a particular scaffolding. After that, he does not even rectify that defect. In such a case, the person who engages the independent contractor will be liable. Let us discuss it among ourselves.

SHRI SHRI CHAND GOYAL: Then take the proviso following (iii). My apprehension is that Government will

include such a stipulation in every contract.

MR. CHAIRMAN: I agree. We will have to have suitable safeguards against that. I put it to witness. They do not object to that.

SHRI SHRI CHAND GOYAL: Then take item (v) of the proviso. Why this reference to 'absolute'?

MR. CHAIRMAN: Because in some cases under the Factories Act and various other things, there is an absolute duty cast. All reasonable care should be taken to avoid accidents. This is a healthy provision really in the interest of the citizen.

SHRI SHRI CHAND GOYAL: Why make it 'absolute'? Will not 'duty' be enough?

MR. CHAIRMAN: Where a Manager has not taken enough precaution, where there is an absolute duty for fencing machines etc. the Manager may be liable; Government is also made liable now as the employer of the manager. This is a very healthy provision.

SHRI KASTURI RANGAN: The Limitation Act 1963 in part VII lays down the period of limitation for suits relating to tort.

MR. CHAIRMAN: It is the same; those principles will apply. There is no amendment of that.

SHRI K. NARAYANA RAO: What are the various remedies now available under the Railways Act for pilferages and injuries caused to persons?

SHRI SOOD: In the case of accidents, certain compensation is required to be paid to the passengers who were injured in the accident. In the case of freight booked, if the damage takes place on the way, certain compensation is required to be paid to the person who has booked the freight. These things are covered by the Indian Railways Act.

MR. CHAIRMAN: I think the law is quite clear. In the case of railways and other common carriers, the principle of *Res Ipsa Liquatur* applies. Unless the contrary is proved, negligence is assumed and in all such cases the Railway has to prove the contrary. About pilferage and other things the law is clear.

SHRI K. NARAYANA BAO: In awarding damages the court has to take into consideration whether any other payments are to be made under any other law.

MR. CHAIRMAN: But pilferage is not tort; it is by a third party. The railways will be liable if a railway servant commits pilferage and that is covered under clause 3. Take for instance a worker in a workshop who has got compensation under the Workman's compensation Act. That compensation should be taken into account before awarding damages. Are there any more questions to be asked from the Railways? I find none. Now, the Home Ministry. Have you any comments?

SHRI UMA SHANKAR: We have no comments to offer from the Ministry of Home Affairs.

SHRI KRISHNA KANT: I shall refer to clause 3 which says:

"While acting in the course of his employment; "or (ii) while acting beyond the course of his employment . . ."

Now, take the specific instance of what happened in the CPWD office. The Superintendent of Police was there. The policemen went into the office. Some persons are plain clothes. Now, the SP says: we told them not to go in but they have gone. Suppose, the SP does not ratify the action done by the ASI or the constable, what are we to do?

MR. CHAIRMAN: The question of ratification is irrelevant where an act is done in the course of the duty. Law is clear. The employer is liable. You have given a clear case. Whoever

has committed tort by beating up people, if he could not justify the beating by the necessity of self-defence or preservation of law and order, will be liable in tort and the Government will be liable. No Government upholds unlawful acts done by its officers. Nobody has a duty to commit tort.

SHRI KRISHNA KANT: Sub-clause (ii) says:

"While acting beyond the course of his employment if the act constituting the tort was done by the employee or agent on behalf of the Government and is ratified by the Government".

MR. CHAIRMAN: That is different. Supposing he is going home on a bicycle. A policeman has duty hours from 10 to 4 P.M. He is going home on a bicycle after 4 O'clock. In the course of his journey he knocks down somebody with his cycle and injures the man. The tort is committed by a Government employee outside the course of his duty. The question is this. When will the Government be liable in such cases?

SHRI KRISHAN KANT: The point is this. Suppose, an act is done beyond the course of employment, you say that the Government will never ratify the act, in which case this ratification will be hindering the administration of justice to the citizens of the country.

MR. CHAIRMAN: We will have to think about it. You remember in the very beginning, I told hon. Members that we have to think suitably about it.

SHRI KRISHAN KANT: I thought that the Ministry of Home Affairs would say something about it. If they think that they will ratify we will know.

MR. CHAIRMAN: I do not think any Government will ratify it, unless there is a conflict of ideologies between one Government and another.

SHRI KOCHAR: I want one clarification. Will the Government be involved if one of its employees in connivance with somebody else does something which he ought not to have done?

MR. CHAIRMAN: It would be tort. Connivance is as much an act of tort as direct tort. Instead of assaulting someone not employed, another man is made to assault him. It would be equally attracted by tort.

SHRI KOCHAR: So, as I understand, there is no question of ratification.

SHRI M. YUNUS SALEEM: It will be a matter between the employer and the employee. If it goes to the Government it will be the responsibility of the Government. Otherwise, it will be the direct responsibility of the other man.

MR. CHAIRMAN: It will be only academic. I personally feel that no Government is going to ratify anything. On the contrary, this might possibly open the loophole for contending that this was outside the scope of employees' duty. In every case, the Government will take a decision.

SHRI KRISHAN KANT: I would like to refer to clause 11(i) which says:

"Nothing contained in this Act shall render the Government liable in respect of—

- (i) any act done by—(i) a member of a police force; or
- (ii) a public servant whose duty it is preserve peace and order in any area or place or who is engaged in guard, sentry, patrol, watch and ward, or other similar duty in relation to any area or place....."

So, the CPWD incident will again become relevant here.

MR. CHAIRMAN: Let us not refer to it now. It is under investigation.

SHRI KRISHAN KANT: The clause goes on to say:

"for the prevention or suppression of a breach of the peace, or a disturbance of the public tranquillity, or a riot, or an affray, or for the prevention of any offences against public property."

If the Bill is passed as such, then no enquiry can be held in such a case as has happened in Delhi, or in Pathankot. Overriding powers are being taken by the Government. No enquiry can be held.

SHRI K. NARAYANA RAO: It can be held for the purpose of taking disciplinary action. But I agree with you.

MR. CHAIRMAN: I think we will have to discuss it within ourselves. The Home Ministry is happy about having it as it is.

SHRI SRINIBAS MISHRA: The hon. Member perhaps was not present at the previous meeting where there was almost unanimous agreement that this clause has to be redrafted by omitting the semi-colon and the word 'or' and the two sub-clauses must be combined together, so that the clause would read:

"a member of a police force whose duty it is to preserve peace and order in any area or place" etc.

The whole thing will become one. There was a consensus on that.

MR. CHAIRMAN: We shall think about it later on when we deliberate. We will have to think about it suitably. I think that finishes our business for today.

SHRI M. N. REDDY: Let us ask the witness what he has to say about the Bill finally.

MR. CHAIRMAN: He says he has nothing to say.

SHRI SHRI CHAND GOYAL: That means they agree with the provisions of the Bill, in toto.

MR. CHAIRMAN: It means they have no comments to offer. Neither the Home Ministry nor the Finance Ministry—the two important Ministries—has anything to say. The paying Ministry and the liability Ministry are both happy about it.

SHRI M. N. REDDY: If you discuss it when the witnesses are there, they may not be wishing to take a different view.

MR. CHAIRMAN: They say they have nothing to say.

SHRI KRISHAN KANT: May be when the Bill was drafted, they had the opinion of both these Ministries.

MR. CHAIRMAN: At the time of drafting many things may not have been noticed and they become noticeable after the Bill has been discussed.

SHRI KRISHAN KANT: I think the trade unions also should be invited to give evidence because there will be employers and contractors.

MR. CHAIRMAN: We are giving an additional liability to Govern-

ment. The trade unions have nothing to say.

SHRI KRISHAN KANT: Labourers have got unions. I think they are vitally concerned with compensation business.

MR. CHAIRMAN: They will be quite happy if the Government is made liable.

SHRI KRISHAN KANT: Under this Bill, the Government is made less liable.

MR. CHAIRMAN: There is no liability at the present moment with regard to torts. The independent contractors have no liability whatsoever today. I do not think there is any use in calling them.

SHRI KRISHAN KANT: Some of them have already appeared on the last occasion.

MR. CHAIRMAN: We were able to hear the Government now.

Thank you very much.

(The witnesses then withdrew)

The Committee then adjourned

**MINUTES OF THE EVIDENCE GIVEN BEFORE THE JOINT COMMITTEE ON
THE GOVERNMENT (LIABILITY IN TORT) BILL, 1967**

Thursday, the 24th October, 1968 at 14.00 hours.

PRESENT

Shri N. C. Chatterjee—In the Chair.

MEMBERS

Lok Sabha

2. Shri Anirudha Dipa
3. Shri Shri Chand Goyal
4. Shri S. Kandappan
5. Shri Brij Bhushan Lal
6. Shri Baij Nath Kureel
7. Shri Srinibas Mishra
8. Shri H. N. Mukerjee
9. Shri Mohammad Yunus Saleem
10. Shri A. T. Sarma
11. Shrimati Savitri Shyam
12. Shri M. R. Sharma
13. Shri Biswanarayan Shastri
14. Shri T. M. Sheth
15. Shri Mudrika Sinha
16. Shri Ram Sewak Yadav

Rajya Sabha

17. Shri S. B. Bobdey
18. Shri Rama Bahadur Sinha
19. Shri Gulam Haider Valimohmed Momin
20. Shri Krishan Kant
21. Shri M. P. Shukla
22. Shri Hira Vallabha Tripathi
23. Shri M. H. Samuel
24. Shri B. T. Kemparaj
25. Shri Dahyabhai V. Patel
26. Shri N. K. Shejwalkar
27. Shri Balkrishna Gupta
28. Shri C. Achutha Menon
29. Shri G. P. Somasundaram.

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2. Shri N. D. P. Namboodiripad, *Joint Secretary, Legislative Department, Ministry of Law.*
3. Shri R. V. S. Peri-Sastri, *Addl. Legislative Counsel, Ministry of Law.*
4. Shri S. V. Subba Rao, *Attache, Legislative Department, Ministry of Law.*

SECRETARIAT

Shri M. C. Chawla—*Deputy Secretary.*

WITNESSES EXAMINED

I Shri M. A. Ansari—*Pro-Chancellor Osmania University, Hyderabad.*

II. Shri M. C. Setalvad, M.P.

(*Shri N. C. Chatterjee in the Chair*)

I. Shri M. A. Ansari

The witness was called in and he took his seat

MR. CHAIRMAN: Mr. Ansari, I have to draw your attention to Direction No. 58 of the Directions by the Speaker. That says:

“Where witnesses appear before a Committee to give evidence, the Chairman shall make it clear to the witnesses that their evidence shall be treated as public and is liable to be published, unless they specifically desire that all or any part of the evidence tendered by them is to be treated as confidential. It shall, however, be explained to the witnesses that even though they might desire their evidence to be treated as confidential such evidence is liable to be made available to the members of Parliament.”

Have you prepared any note?

SHRI ANSARI: I have not prepared any note.

MR. CHAIRMAN: If you want to say something, you can say before we proceed further.

SHRI ANSARI: There are two preliminary remarks, which I would

like to make, before I deal with the important provisions of the Bill. One is my gratefulness at being called upon to give evidence on an important enactment. Generally those who have gone into retirement and who have studied the law for nearly 40 years back become out of date unless, of course, some are in actual practice or are Members of Parliament. It is my good fortune that I have been out of practice for nearly 20 years. I am now practically in retirement. Therefore, whatever observations I shall make will be subject to correction, subject to elucidation. That is my proposition.

MR. CHAIRMAN: Your University is Oxford? You are practically my contemporary.

SHRI ANSARI: Next thing that I would like to say is that this draft Bill is something which is new to our country. The law of Tort, so far as we are concerned, is practically a new subject. Those who study the law reports find very few cases of tort in India. A large majority are English cases and American cases. It is a new subject. But we Indians have had the fortune and distinction of being very good lawyers. We had dealt with the Anglo-Indian Code in a very efficient manner. We have dealt with the Constitutional problems that have arisen in a highly efficient

way therefore, I have every confidence that whatever responsibility is cast on the Government or on the judiciary it will certainly be discharged in an efficient manner.

I have a few remarks to make about the provisions of the Bill.

The first thing that strikes me is the definition of the words "agent", "employer" and "contractor". If you have gone through some of the comments on the English Act, you would have found two limitations on the definition in the English Act. One is that the servant must be appointed by the Crown, the Agent must be appointed by the Crown and the contractor must be appointed by the Crown . . .

MR. CAIRMAN: Are you suggesting any amendment of section 2(a)?

SHRI ANSARI: It appears to me that we have given a somewhat wider scope than the English Act.

AN HON. MEMBER: Why should we follow the English law? We should look to our own conditions.

SHRI ANSARI: The reason is that sometimes we borrow comments on that Act rather than we our own Act. Then there is one more thing which strikes me as somewhat wider. The modern administrative tendency is to have administrative agencies, that is to say, to special statutory bodies under Acts like the health Act, the Transport Act etc., with statutory rights, liabilities and with statutory limitations. They are for purposes of classification, not constitutionally speaking, but in general terms, termed as administrative agencies, because they do the executive act, of the executive and they are controlled. Nevertheless they are statutory bodies and with distinct statutory authorities. It seems that our Bill while defining the word 'agent' or 'agency' seems to attract the tortious acts of those administrative agencies also and makes the government respon-

sible. That is a somewhat wider connotation. It is open to the Members of the Joint Committee to accept that wider connotation but the general practice is that the rights and liabilities of these statutory bodies are distinct from those of the executive. These are the three observations that I would like to make so far as the definitions part is concerned.

So far as the liability is concerned, it appears to me that it causes three-fold liabilities upon the State. One is the vicarious liability of the master for the acts of the servant, and in the word 'servant' nowadays is included agent as well as the contractor. That liability covers all forms of torts, whether it to be to person or to movables or immovable properties. In general words we have got this in our Bill. In the English Act they have gone a step further, and as a general-rule of liability of the State for the tortious acts of its employees, they have specially provided for the tortious acts of the owner of the immovable property. We have also got that here. This means that if you are in possession of the property or control of the property and some tortious act is committed by your servant or by you on the immovable property, then you are liable. That is the definition. I have got nothing to add to it. That is the second form of new liability that is being put on the State. At this stage, I am a little bit hesitant at one aspect. You, Sir, have been a distinguished academician at the Bar and on the Bench, and you would recall that the rule of *Rylands Vs. Fletcher* was never accepted in this country as a correct proposition. The rule of *Rylands Vs. Fletcher* is a rule of very doubtful validity here. Suppose you have water on your land but beyond any control of yours the water escapes and causes damages to the property of another you are liable. Elsewhere the rule of *Rylands vs. Fletcher* is still part of the tort; it still attaches to the owner of the property. If you have big dams and the

water escapes from there, the consequences of the rule of *Rylands vs. Fletcher* will be there. That is the second liability.

The third liability that we have under this Bill is the responsibility of the master for wrongs committed on his employees. That is also there in the Bill. These are the three liabilities.

Therefore, today the position is that the State will be vicariously liable for the acts of its servants employees, agents, or contractors, and it will be liable for the tortious acts of the main owner and will be responsible for the injuries suffered. We have accepted its rules on that line, and I have nothing to say. But there is one thing which I am not very clear about. So far as the grounds of exemption are concerned, they have been enumerated in the Bill, and they relate to acts of State etc. etc., There is also provision to exempt judicial proceedings, acts of magistrates, acts of judges or persons exercising judicial authority from tortious liability. The difficult proposition that arises is this. What is the position of a statutory tribunal that is discharging quasi-judicial functions? Are the acts committed by the members of those quasi-judicial tribunals or those who carry out their orders exempted from liability? On that point, the text-book writers on administrative law are inclined to the view that they are also exempted. They say that the word 'judicial' does not mean merely deciding.

MR. CHAIRMAN: One need not be a Chief Justice or Judge, but one may be merely discharging that function somewhere and that would be enough.

SHRI ANSARI: But the position is this. There a case has been cited where one of the judges has said that even if you decide something administratively with the application of your judicial mind that is also judicial. If that be the proposition, then the exemption that is provided for

judicial acts would confer a somewhat wider scope.

The fourth thing that has appeared to me is this. I am out of date and I do not know whether we have also acts similar to the Law Reforms Acts in England. They have made some enactments there about contributory negligence and about contribution in torts. I do not think we have similar enactments. There are certain provisions in the Bill about Government being entitled to contribution of damages etc. With great respect, I would say that where the State is being made vicariously responsible for the acts of its employees, there should be absolute liability on the persons who have caused the loss or who have committed the act to compensate the State. After all, a servant, or an agent, or a trustee, or an executor carries a certain responsibility to those whose property he works and whose powers he exercises that is, not to do things negligently, and to be honest and to take good care and if he fails, in doing that duty, then my respectful submission is that he must be made responsible to the State for compensation or whatever it may be. Those are the few things that I have to urge.

SHRI SHRI CHAND GOYAL: You have suggested certain modification in the definition of agent. I would like to know whether the definition of employee of Government given in clause 2 (b) could be amended to include public undertakings and corporations.

SHRI ANSARI: The difficulty about public undertakings is that they will have their own statutory rights and they have their own statutory liabilities. If we bring them also within the scope of this, it must be in view of the special duties that they have got. But I think it is better to exclude them altogether giving the necessary safeguards in the special legislation against the tortious acts of these public undertakings.

SHRI SHRI CHAND GOYAL: You have suggested that in all text-books it has been observed by various authors that the acts of magistrates and judges and even acts performed by tribunals which perform quasi-judicial functions and which follow judicial procedures should be exempted, and that may be made clear....

SHRI ANSARI: I have just been looking into the two books on the subject namely *Garner's Administrative Law* and *Weide's Administrative Law*. If you get those books here I shall give you a reference to the relevant pages. That is the view advocated there. The modern tendency is that the administrative authorities sometimes take decision after a judicial determination of pros and cons. For example, suppose the Ministry of Health wants to demolish a building. A particular report of the inspector is quoted; then the comments on the report are called for, and then the evidence of the person affected is taken. After sifting all these things the authority decides one way or the other.

SHRI SHRI CHAND GOYAL: Do you not think that the position of the chairman of a tribunal substantially differs from that of a judicial authority in the matter of judicial training etc.? A judge because of his training and education applies his mind differently, but a tribunal is not likely to exercise the same sort of judicial principles. We have seen the working of many of these tribunals, and we know that they are more interested in protection of the departmental interest, and the impression that has been given at least in some cases is that they do not dispense even-handed justice but they only protect the departmental interests. Do you not think that it will not be safe to exempt their acts?

SHRI ANSARI: I am not saying that they should be included in it. But what I am just pointing out is that the definition of the term 'Judicial' in

this provision relating to exemption is wide enough to cover that.

SHRI SHRI CHAND GOYAL: So, we should try to exclude it from it?

SHRI ANSARI: It is so good of you to exclude it.

SHRI A. T. SARMA: Do you support the Bill wholeheartedly?

SHRI ANSARI: My personal view is that the State was responsible for torts. After all, contract and tort were legally speaking linked together. It was only a later development that separated tort from contract. If you want to make a State responsible in case of violation of contract, why should it not be made responsible in the case of torts also? After all, the basic principle of the law of torts was that the King could do no wrong, which was a feudal concept. The only thing is that you must not have an Act wider than elsewhere.

SHRI A. T. SARMA: Could you suggest improvements to the Bill?

SHRI ANSARI: I would certainly restrict the responsibility of the State to those over which it has strict control. That is to say, I would not make the State responsible for the acts of the contractor, nor would I make it responsible for the acts of an agent. When we appoint a person to watch the conduct of some work right through, then we entrust him with a particular job and we just appoint him on a contractual basis as an agent or a contractor.

SHRI A. T. SARMA: There is difference of opinion in regard to the provisions made to safeguard the interests of Government in this Bill. Do you agree to that step?

SHRI ANSARI: I do not think so. Why should it be thought that way? After all, the responsibility of the Governments as the owner of the immovable property is equated with that of a private citizen. The respon-

sibility of the Government as regards the vicarious responsibility of the worker has been equated with that of a private person. The liability of Government so far as its employee is concerned has been equated with that of a public servant. So, I do not think that that view is justifiable.

श्री राम सेवक दादव : कोई काम सरकारी अधिकारी करता है तो उस की जिम्मेदारी सरकार की होनी चाहिये, क्या आप ऐसा महसूस करते हैं या उस की जिम्मेदारी कुछ सरकारी अधिकारी पर भी डालनी चाहिये, क्योंकि सरकारी अधिकारी बहुत ही लापरवाही करते हैं, यह समझकर कि इस की जिम्मेदारी सरकार पर आयेगी, हमारे ऊपर नहीं आयेगी ।

श्री अन्सारी : मैंने यह अर्थ किया है कि हमारे यहां जो एम्प्लॉयमेंट दी गई है, कन्ट्रिब्यूशन की, वह तोड़ी जाती है । दो जिम्मेदारियां होती हैं—एक जिम्मेदारी सरकार की स्ट्रेन्जर के, आउटसाइडर के, सिटिजन के खिलाफ होती है, दूसरी जिम्मेदारी सरकार की उस शख्स के खिलाफ होती है, जो उस का एम्प्लॉई होता है, जिसने हरकत की है । जहां तक सरकार का हक अपने एम्प्लॉई के खिलाफ है, अपने एजेंट के खिलाफ है, अपने कान्ट्रैक्टर के खिलाफ है, वह बहुत सख्त होना चाहिये । मेरी नाचीज़ राय में—इस 20 साल में—

there has been a greater emphasis on the rights of an employee rather than on the duties of the employee.

श्री राम सेवक दादव : तो आपके स्थान से यह होना चाहिये ।

श्री अन्सारी : बेशक होना चाहिये और बहुत सख्ती से होना चाहिये ।

After all, the State is run and can be run only if the employees of the State are efficient.

SHRI H. N. MUKERJEE: I am sure the learned witness will agree that we have to work out, as far as we can, a golden mean between the right of the State and the right of the citizen. In view of the fact that we have already, in article 300 of the Constitution, a very definite provision that wherever the Secretary of State used to be liable in torts, Government would continue to do so, in view of this provision,—would you consider it an improvement on the position as far as this Bill is concerned? Would the Bill be making the position really and truly better both for the citizen and for the State?

SHRI ANSARI: At present there ought not to have been any exemption from tortious liability at all. The view that the State was tortiously liable is a somewhat correct view. That is my personal view, but now that the pronouncement of our highest tribunal is otherwise, we have to see the position as has been clarified by the pronouncement of the Supreme Court.

SHRI H. N. MUKERJEE: The difficulty is we have different pronouncements by the Supreme Court. The judgment of Chief Justice Sinha and the judgment of Chief Justice Gajendragadkar are different. It is quite on the cards that another judgment might conceivably be different. My position is, when we have in the Constitution already a sort of a safeguard, would it be better to have legislative sanction behind some kind of law, because our experience is that we have got a plethora of legislation which requires to be corrected. That is why I wish to know your views.

SHRI ANSARI: My difficulty is that there is a pronouncement of the Supreme Court, and we have not got or aware as a legislative body of what the Supreme Court may decide later on which no one can say. In the context of the pronouncement, this measure is the best.

SHRI B. T. KEMPARAJ: You were pleased to inform us that the officials or the servants that have been employed by the Government are so appointed because they know their responsibility as to how they have to discharge their functions. While discharging their functions, if there is a slackness on the part of the official and consequently there will be some tortious act committed by him, how can the vicarious liability be fixed upon the Government, and how far the act of the official is liable, which was committed by thinking that his act has been sanctioned by the Government, and when he acted over and above the jurisdiction conferred by the law, how can the vicarious liability be fixed? Would it be fixed on the official or on the Government, for the tortious act?

SHRI ANSARI: The proposition of the rule, so far as the law of torts is concerned, is that as against the stranger, the master is liable, no matter how dishonest or negligent the servant may be. That is a well-settled rule of law on torts. If we apply the law of torts to the State, then, all the principles of the vicarious liability of the master will have to be brought in. As against the stranger, as against the person who has suffered the loss, the master is liable, because he has put the person in a position to commit the act. So far as the master and servant are concerned, so far as the State and servant are concerned, or the servant himself is concerned, the liability being joint in tort, it is open; can get all the money that one can from any of the tort doers, but evidently, the official will not have the money, while the State has the money. Therefore, the question of contribution comes in. I say there should be no contribution. The servant must not say, "You take half and give the other half to me." Because the rule of efficiency and the rule of the contract and the rule of service and the rule of the law says that you must guard your master against your negligent act. Therefore, you must pay.

SHRI KRISHNA KANT: Prof. Mukerjee has raised a very relevant point, and I would like to go further. Do you think that the Act, as drafted and as it is before the Joint Committee, in anyway curtails the liability, which otherwise article 300 already gives, and if it curtails, will it not be, as Mr. Seervai and some others have suggested, *ultra vires* of the Constitution? If the judicial interpretation of the law as it stood before 1947 or as it has continued since 1947 is that the Secretary of State was not liable, there is nothing to prevent Parliament from saying that henceforward the successor of the Secretary of State will be liable.

SHRI KRISHNA KANT: You gave us an idea that the definition clause No. 2 is wider. Could you suggest any amendment to it?

SHRI ANSARI: I would confine it strictly to those persons who are appointed by the Government and paid from the public exchequer.

SHRI KRISHNA KANT: Clause 3 (a) (ii) says that the Government shall be liable in respect of any tort committed by an employee while acting beyond the course of his employment if the act was done by the employee on behalf of the Government and is ratified by the Government. Do you think ratification is necessary?

SHRI ANSARI: Yes, Sir.

SHRI KRISHNA KANT: Earlier the words "if the act constituting the tort was done on behalf of the Government" are there. In view of that, is it necessary that it should be ratified by the Government?

SHRI ANSARI: Yes, Sir. There is such a thing as tortious liability so far as course of employment is concerned. If you go beyond the course of employment, there must be some act of the Government to ratify it.

SHRI SHRI CHAND GOYAL: Our apprehension is that Government will never ratify.

SHRI ANSARI: So would be a private individual. If the agent of a private individual commits some tort beyond the scope of his employment, the master will not be liable.

SHRI KRISHNA KANT: The paraphernalia of Government is increasing so vastly and Government being the biggest employer it should have more liability than the private individual.

SHRI ANSARI: After all, it is the tax-payer's money. If you have a rule of law, it must apply to all.

SHRI KRISHNA KANT: Clause 11 says:

"Nothing contained in this Act shall render the Government liable in respect of—

- (i) any act done by a member of a police force or
- (ii) a public servant whose duty it is to preserve peace and order in an any area or place or who is engaged on guard, sentry, petrol, watch and ward or other similar duty in relation to any area or place."

Suppose there is a lathi charge and a judicial enquiry is ordered. Government can take protection behind this clause and say that they are not liable.

SHRI ANSARI: So far as the exemptions are concerned, the legislature is the final authority. If they feel that it is a sufficient ground for exemption and it is rational, it can be there.

SHRI KRISHNA KANT: Supposing that ultimately we adopt this Bill, do you think that this clause 11(i) (ii) should be there or should we exclude it? I feel that if we keep it there, our rights as a citizen are gone.

SHRI ANSARI: My personal view is that innocent persons should be given compensation and exemption from the liability for compensating should be as little as possible.

MR. CHAIRMAN: Therefore this should be changed. As it is, you cannot sue the Government. We are thinking now of the legal right. We want to go to the Chief Justice and not to the Minister.

SHRI ANSARI: I would rather desist; personally I would not. That is my personal feeling. But I would have as few grounds of exemption as possible.

SHRI KRISHNA KANT: Suppose, a very simple law could be there saying that exemption for the Government would be there only for an act of State which you can define and the rest of it is left open with equal rights as between citizen and citizen and between Government and citizen, would that not be better?

SHRI ANSARI: The law of torts is not simple.

SHRI H. N. MUKERJEE: As you say, the law of torts is not simple and, as far as we know, the British practice has been of a particular order. We think of the British idea and the law of torts at the same time. Since we very largely follow the British jurisprudence, would it not be better to leave it as it is so that with reference to precedents every case could be fought out on its merits rather than delineate everything so specifically and put the citizen in jeopardy? Our fear is that the citizen might be in danger because of these qualifications.

SHRI ANSARI: For the last hundred years we have been following the precedents system and we will have to have an entirely new system of procedure and guidance for the judges and the lawyers if we are to get out of that.

SHRI H. N. MUKERJEE: Is it not better not to disturb the present way of doing things of recourse to precedents, citations and judicial findings than to have a law which will make things much more rigid and hide-bound?

SHRI ANSARI: When a client comes to you for your advice, if you do not have precedents and authorities, how would you advise? I am not speaking of when the case actually goes before the court but when a client comes for advice whether he should file a suit or whether he should compromise.

SHRI KRISHAN KANT: The purposes of this Bill are, firstly, the individual citizen's rights should be safeguarded against acts of tort committed by the Government; and, secondly, the Government should not be prohibited from taking any steps which might be in the interest of the State. To serve these two purposes, if the Act provides that these are the acts of State which are important and for which the Government will have protection and for every other thing they will be liable in torts, would it not be better?

SHRI ANSARI: The position today is that the law of torts has certain exemptive powers.

SHRI KRISHAN KANT: We are not in any way questioning whether we should exempt the State for any acts of State which are required for the purposes of defence etc. The main thing is that other exemptions need not be there.

SHRI ANSARI: But then the same rule of law will not be there. Our object is to have one rule of law covering all. I would prefer the latter.

SHRI S. KANDAPPAN: You have very lucidly put certain points but still we have got doubts as to the protection that is given to the citizen in

this Bill. As previous Members have pointed out, the exemption that has been given in some cases can be overstretched and anything can be construed as the sovereign function of the Government.

SHRI ANSARI: I would entrust to the courts of law the task of assessing whether that plea is correct or not. I would keep that and leave it to the courts of law to decide. And I think, you can trust them to decide whether that is a substantial plea, a correct plea or not.

SHRI S. KANDAPPAN: Probably in the present context that is the only way out. So we would have to leave it at that.

SHRI ANSARI: We would leave it to the lawyers and the judges to decide.

SHRI S. KANDAPPAN: In certain spheres we find that, in the present political structure in India, there are certain departments where the State as well as the Centre come into the picture. In certain executive functions there is overlapping. Take, for example, the railway police. It is the police of the State but they are functioning on the railways and are under the jurisdiction of the station masters and others. Or, take the activities of the Food Corporation in collaboration with the food departments of the States. In such spheres some tortious acts are committed. Where will you fix the liability in such cases and how will it be fixed?

SHRI ANSARI: The liability of the tort is joint, that is to say, if two persons have committed a wrong, the consequences are far the acts of both the persons each is liable to the whole extent. That way, the compensation will come partly from the Centre and partly from the State.

SHRI S. KANDAPPAN: Take the concrete example of the Railway Police. Though the Police belongs to the State, the execution is controlled

by the Railway authorities. When there is a tortious act committed the statement very well says that it is the act of the Railways, that is, the Centre.

SHRI ANSARI: We will approach it from a different angle. We will see whether the particular act was in the course of the employment of the State or the Railways or the Centre. If it is in the course of the employment of the Centre, the Centre pays. The vicarious liability means that you are responsible for the act of your servant if it is done in the course of your service.

SHRI ANSARI: We lawyers are taught that before we haul up any exception whatsoever, on behalf of the State or for the benefit of the State, the whole community will compensate the individual who suffers damage. Is it so?

SHRI ANSARI: We lawyers are taught that before we haul up any person for being responsible, we see what duty has been infringed. If it is a Government's duty to guard against every loss, yes. The duty of the Government, so far as tort is concerned, is vicarious of the employee. That is all.

SHRI SRINIBAS MISHRA: My question was, when any individual suffers any loss or injury for the benefit of the State while somebody is acting on behalf of the State, whether the State will compensate the individual for the loss without any exception whatsoever.

SHRI ANSARI: May I put it in a different way? Supposing my servant goes and purchases things on my behalf although he is not employed for the purpose, must I pay merely because he is my servant? There must be some limit to my liability so far as the acts of my servant are concerned.

SHRI SRINIBAS MISHRA: This legislation has become necessary because of the decision of the Supreme Court in Ralia Ram's case.

MR. CHAIRMAN: I quote the judgment:

"It is time legislatures in India should seriously consider whether it should not pass any such enactment to regulate and control any cases like this on the same lines as has been done in England...."

He says that this is based on the theory that the King commits no wrong. The Chief Justice has strongly recommended that Parliament should consider it immediately.

SHRI ANSARI: It is something on the lines of the English law

SHRI SRINIBAS MISHRA: I may narrate the facts of the case. Mr. Ralia Ram was arrested by the police. The valuable articles and gold were seized and put in *Malkhana*. After that the constable who seized all this absconded with the property. Mr. Ralia Ram filed a suit for the recovery of the value as compensation which was dismissed on the ground that it was a sovereign act of the State and, therefore, he could not get it. To remedy such a defect, this legislation is being brought forward. After going through the clauses, do you find that Mr. Ralia Ram will get relief under this law?

MR. CHAIRMAN: As you know, Mr. Seervai is a very big lawyer and he has published the book, *The Constitution Law of India*, possibly, the best book on the subject. He says that that judgment is clearly wrong. You read this paragraph. He says that it is wrong law. That man ran away with a number of silver and gold articles. And they said that nothing can be done because it is not covered by it. He is agreeing with Justice Sinha's he is not agreeing with the Chief Justice.

SHRI KRISHAN KANT: This is what Mr. Seervai says here:

"If this is the correct position, the Bill merely asserts a liability which already existed so far as the Secretary of State for India was concerned and, to that extent is not open to any objection and, in fact, is in consonance with article 300 as correctly interpreted in *Vidyawati's* case. To that extent that any provisions of the proposed Bill curtail the liability to which the Secretary of State would have been subject, in my opinion, the Bill would be *ultra vires* of article 300 of the Constitution."

MR. CHAIRMAN: You are a Chief Justice of a High Court. I want to know your view. Do you think Mr. Seervai is right or he has gone too far?

SHRI ANSARI: The Constitution says that we have got to give full faith and credit to the pronouncement of the Supreme Court.

MR. CHAIRMAN: The Supreme Court has spoken in two voices.

SHRI ANSARI: We do not see it as an appellate authority . . .

MR. CHAIRMAN: What is your view? We want to know your view.

SHRI ANSARI: The position is this. There is a pronouncement of the Supreme Court. Consistent with the pronouncement of the Supreme Court, the Bill seeks to bring the law . . .

MR. CHAIRMAN: Let us have your view. Do you think that Mr. Seervai was right? What is your personal view?

SHRI ANSARI: The basis of the English rule was that the King can do no wrong. If the King can be sued for damages in contract, why not in tort?

MR. CHAIRMAN: Do you think that Mr. Seervai was right?

SHRI ANSARI: There are two recent books on administrative law, one is by Garner and the other by Wright. They have dealt with the thing on the same lines, i.e., the whole thing emanates because of the feudal position.

SHRI SRINIBAS MISHRA: After going through the Bill, do you feel that people like Ralia Ram will get relief under this Bill? I am drawing your pointed attention to Clause 11(i).

MR. CHAIRMAN: Your question would not come under this. This is an exemption that you get for the prevention or suppression of a breach of the peace or a disturbance of the public tranquility . . .

SHRI SRINIBAS MISHRA: "... for the prevention of any offences against public property". In Ralia Ram's case, it was for stealing public property . .

SHRI M. YUNUS SALEEM: That was not public property.

SHRI SRINIBAS MISHRA: Suppose it is a public property, does he get any relief under this?

SHRI ANSARI: The position is this that if you treat the police force as an agent, perhaps he will be liable.

SHRI M. YUNUS SALEEM: In view of this exemption, what will be the position?

SHRI ANSARI: The exemption is not general. The exemption is only in limited cases.

SHRI SRINIBAS MISHRA: Please refer to Clause 11(n). Will Ralia Ram get relief under this?

MR. CHAIRMAN: Can 11(n) apply here?

SHRI ANSARI: No.

SHRI SRINIBAS MISHRA: This law will not apply to Jammu and

Kashmir. So, will it create confusion so far as the forum of institution and cause of action is concerned? Under the ordinary law, a suit can be instituted where the defendant resides. Suppose a person belonging to Jammu & Kashmir does something liable here, are the Jammu & Kashmir Government liable? Will a suit lie?

SHRI ANSARI: It depends on what kind of law you are enforcing.

SHRI SRINIBAS MISHRA: For instance, Kashmir Emporium here in Delhi. Does the Jammu & Kashmir Government become liable under tort?

SHRI ANSARI: Yes. *Lex loci.* The law of Delhi will apply.

SHRI SRINIBAS MISHRA: In Clause (2), the definitions of 'agent' and 'independent contractor' are given. What is your view about the position of the independent contractor?

SHRI ANSARI: The only proposition I will cite is this. Now it has come to my mind. That is, there should not be any curtailment of the liability so far as the 3rd person is concerned between the government and the contractor. You can't get out of your duty to the person who has suffered the loss by saying that by the undertaking of the contract to you the Government will not be liable. That is not the case.

SHRI SRINIBAS MISHRA: Would it require a little more clarification regarding order and control?

SHRI ANSARI: Yes, order and control in this way, because so far as the agent is concerned. So far as the sub-agent is concerned he is not under the control of the government.

SHRI SRINIBAS MISHRA: Yes. Now there are the words 'while acting in the course of his employment....' Also, 'beyond the course of employment'. Now, would it cover the whole period of his service?

SHRI ANSARI: I would put it in this way. The liability is committed

during the employment of the man and the word is "course of". But course of liability depends upon the thing being done within the scope of the authority assigned to the servant.

SHRI SRINIBAS MISHRA: In course of is wider than in connection with.

SHRI ANSARI: Yes.

SHRI SRINIBAS MISHRA: While somebody is acting, during that whole period the Government will be liable for any action committed by him during the course of employment.

SHRI ANSARI: I have not understood you. The position is this. If a wrong is committed in the course of the employment, if once it is committed the Govt. is liable. Liability has arisen. It will cover if the thing is committed during the course of his employment. He will be liable.

MR. CHAIRMAN: Whole-time.

SHRI SRINIBAS MISHRA: The contractor engages an agent to close up a breach in an embankment. He brings earth from other lands. He closes the breach. Is that in the course of his employment or beyond the course of his employment?

SHRI ANSARI: If the necessary incidental of his employment is that he must bring in earth from somewhere else, yes.

SHRI SRINIBAS MISHRA: He has brought timber from somebody else's land, would it be in the course of employment or beyond the course of his employment?

SHRI ANSARI: I would say this. The words 'course of employment' is a term which I would leave it to the court to say whether some work is in the course of employment or not.

SHRI SRINIBAS MISHRA: Should it be clarified or not?

SHRI ANSARI: It has always been that course of employment mean certain things.

SHRI SRINIBAS MISHRA: Please see also clause 3(b) (i)—What would be the nature of assuming control? Is it taking delivery of the building after it is constructed? The words here are 'assume control of the act contracted to be done by the independent contractor.'

SHRI ANSARI: The point is this. The contractor generally is somebody who does the work as he thinks fit. There is a particular thing. He just agrees to general direction. But how he does it, when he does it, from how many persons he gets it, that is beyond the control; the Govt. does not interfere. But if Govt. assumes that part of the contract and gives directions than it is different.

SHRI SRINIBAS MISHRA: You are trying to do what the courts could do. Should it not be made clear? That is all.

SHRI ANSARI: Incidentally, this thing also will go before a court of law.

SHRI SRINIBAS MISHRA: Once he assumes control he is no longer independent contractor. Once Govt. assumes control he will not be independent.

SHRI ANSARI: Therefore the liability..

SHRI SRINIBAS MISHRA: You have stated control and order. That is always there whether contractor is independent or not.

SHRI ANSARI: There are various kind of controls. You have no control over somebody. You have some control over somebody. You have lesser control over the agent, and all that.

MR. CHAIRMAN: Degree of control.

SHRI SRINIBAS MISHRA: Would you prefer 'management' to be substituted for control and order'?

SHRI ANSARI: That would be introducing into the law of torts something that has not been there.

SHRI SRINIBAS MISHRA: The law is in the anvil,

SHRI ANSARI: It is better to have terms understood better by lawyers and judges.

SHRI SRINIBAS MISHRA: Under 3 (b) (iv) Government is under the obligation to do the act itself. During your career as lawyer and judge, have you come across any legal obligation on the part of the Government to do the act itself?

SHRI ANSARI: Legal obligation, I would say, as compared to the contractor or agency. The position is this: Certain things you are under the obligation to do it yourself. That is to say you can't get it done by any other. That is the case so far as trust is concerned. That is the case so far as painting is concerned. You have got to do it. There is no other agent. You can't utilise an agent or outsider or contractor.

SHRI SRINIBAS MISHRA: Can you cite an example? Any example of any legal obligation when the Govt. is bound to do the act itself?

MR. CHAIRMAN: He cannot think of.

SHRI SRINIBAS MISHRA: One last question. There is this exception, under clause 11 (n). You might have come across of reports of one young man of 18 and an old man of 40 brought together by the doctors and vasectomy was performed. Please say whether such actions are coming under clause 11 (n).

SHRI ANSARI: I have read it.

SHRI SRINIBAS MISHRA: Are those two persons—young and old entitled to get compensation?

SHRI ANSARI: This applies to a case where the statute authorises the doing of something and that something cannot be done without loss. For example, Railways are run; the engine has sparks; it throws sparks while running and those sparks burn an adjoining land. The statute should authorise and that authorisation may be carried out without damages.

SHRI SRINIBAS MISHRA: I could not quite follow. Here, vasectomy is authorised.

SHRI ANSARI: An enactment must say that. It must say that you must do this thing and that thing cannot be done without loss.

SHRI SRINIBAS MISHRA: Vasectomy operation cannot be done without loss?

SHRI ANSARI: There is no authorisation by a statute.

SHRI SRINIBAS MISHRA: You are making this distinction.

SHRI ANSARI: This thing was perhaps followed when the Railways Act was introduced in London. They say: If the law says "do this", then you must do it carefully, without causing negligence. But if it is impossible to do it without loss, then that is exempted.

SHRI SRINIBAS MISHRA: You are thinking of rule in tort as followed in England.

SHRI ANSARI: We have been taught law according to English pattern.

श्रीमती सावित्री श्याम : क्या डॉ. अंसारी बतलायेंगे कि अक्सर सरकारी अधिकारियों से विशेषकर पुलिस से ज्यादती होती है और वह माफ़ लेते हैं पब्लिक इंटरैस्ट

की गुड फेथ की और डिस्क्रीशनरी जजमेंट आदि की और उन के सार को गवर्नमेंट स्वीकार कर लेती है और रिकॉम्पेंस कर देती है तो मैं जानना चाहता हूँ whether the Government is responsible or Government servant is responsible for the tortious act? May I know your views?

श्री अंसारी : मैं यह मान लेता हूँ कि एक टॉर्ट हुई। अब जिस आदर्श ने टॉर्ट कमिट किया है वह लाएबुल है।

SHRIMATI SAVITRI SHYAM: At the time of performing his duties, he has committed a wrong. But he is taking shelter under good faith, public interest, and so many things.

श्री अंसारी : यह जो ऐक्ट है यह गवर्नमेंट के ऊपर उस आदर्श के खिलाफ ऐक्शन लेने की जिम्मेदारी सौंपता है। यह आदर्श जिसने टॉर्ट कमिट किया है वह अपने पैसे से और रुपये से जिम्मेदार है हर तरीके से जिम्मेदार है। यह जिम्मेदारी जो आप आज प्रायद कर रहे हैं यह गवर्नमेंट के लेजिस्लेचर के पैसे के ऊपर और अपने पैसे के ऊपर आप प्रायद कर रहे हैं। टैक्सपेयर के ऊपर प्रायद कर रहे हैं।

SHRIMATI SAVITRI SHYAM: Action has been ratified by the Government.

SHRI ANSARI: So far as Government is concerned, it is not the legislating authority. Legislating is the job of Parliament. Government ratification must be on some legal grounds. इस की जिम्मेदारी गवर्नमेंट और गवर्नमेंट सर्वेंट दोनों पर आती है और गवर्नमेंट सर्वेंट हर सूरत में लाएबुल है।

SHRI BRIJ BHUSHAN LAL: In this Bill, 'tort' is not defined. Is it not necessary that it should be defin-

ed? I would like to have your valuable opinion on this.

SHRI ANSARI: We know what is the meaning of certain terms.

समझा यह जाता है कि बह करैट कंटेक्ट में यूज किया गया है ।

The understanding is that it has been used in the current context.

श्री बृज भूषण शर्मा : यह ठीक है कि जब आप ऐक्ट बनाना चाहते हैं जोकि अब तक नहीं था तो उस तरीके से उस की डेफिनिशन को यहां पर रख देने में क्या आपत्ति है ?

श्री अन्सारी : जरा मुश्किल यह है कि टोर्ट अनडिफ्राइनेबुल है । ला कमिशन ने भी यही कहा है ।

Everybody knows what is tort. Loss caused by wrongful act of a person—you may define it like that. But that is a very vague definition.

SHRI T. M. SHETH: Reverting to the points raised by Mr. Mukerjee, so far as liability of the Government to the tortious acts is concerned, it is laid down under Article 300. It says that the law which was in force before that date when Constitution came into force is the law on the subject.

Now, when we look at the history of the law in this country, we find that there are two trends of contrary decisions. One trend started with Hari-banji's case and ended with Vidyavati's case. The other trend started with P&O's case and ended with Rallia Ram's case. Therefore, so far as the law on the subject is concerned, before Rallia Ram's case, there were two contrary trends going on. Now the judgment of the supreme court in the case is the latest law on the subject. The present law on the subject is as per the Rallia Ram's case. And this Bill is also introduced on the basis of that case. The Bill is intended to define

and amend the law. Our attempt to-day is to see what sort of amendment we should introduce in the law which is existing at present.

In this context I would like to know from you, Dr. Saheb, whether the latest judgment of the Supreme Court is the correct one in the law on the subject or not.

SHRI ANSARI: Unfortunately, our position is that we can only give our views. There is no decision; the pronouncement of the Supreme Court is there. We may say that we differ from that. It may be right or wrong.

SHRI T. M. SHETH: This Bill is brought forward to amend the existing law. In that context, it is necessary for us to know whether the latest judgment of the Supreme Court is the correct one.

SHRI ANSARI: Well, Sir, it is a question of opinion. The pronouncement of the Supreme Court as it stands to-day stands unless the law is amended.

SHRI T. M. SHETH: That is true.

SHRI ANSARI: We cannot say whether the judgment as such is correct.

SHRI T. M. SHETH: We are here to consider amending the law. For the present, the latest judgment of the Supreme Court is the law on the subject. We are therefore thinking of amending the law on the subject. We would like to know whether the judgment of the Supreme Court is correct and according to Article 300 of the Constitution, what should be the law. That is my point.

SHRI HIRA VALLABHA TRIPATHI: Should it be changed?

SHRI ANSARI: I would say that under Article 300 of the Constitution, it is for the Supreme Court to pronounce the judgment and it is open to you—the Legislature—to modify it according to your views. If you feel that the pronouncement of the Supreme Court is not correct according to your

views, you are the legislative authority and you can amend the law.

SHRI T. M. SHETH: On that point, we want to know what exactly we should do in your opinion.

SHRI ANSARI: According to the Supreme Court, they have said that the law should be like this.

SHRI MOHAMMAD YUNUS SALEEM: The question is: when the enactment would be *ultra vires* the Constitution under Article 300, what should be done about that.

SHRI ANSARI: Firstly the Supreme Court is to say what was the law in 1948. And the Supreme Court said that this was the law in 1948.

MR. CHAIRMAN: And the Parliament also can alter it if it likes.

SHRI MOHAMMAD YUNUS SALEEM: For your benefit, I may draw your attention to Article 300 of the Constitution.

It says: "The Government of India may sue or be sued by the name of the Union of India and the Government of a State may sue or be sued by the name of the State and may, subject to any provisions which may be made by Act of Parliament or of the Legislature of such State enacted by virtue of powers conferred by this Constitution.....".

This proviso confers powers on Parliament and the State Legislature to make law.

SHRI ANSARI: If the law says that the State is responsible, then it would not be very rationale for the Legislature to say that the State is responsible. If the State was responsible, it was responsible.

SHRI MOHAMMAD YUNUS SALEEM: I am asking about the powers. You know why this question arose. Mr. Seervai has made an observation that if there is any enactment

to that effect, it will be *ultra vires* the Constitution according to him.

SHRI KRISHNA KANT: He has replied to my question that it was not *ultra vires* the Constitution.

SHRI ANSARI: Surely, so far as tortious liability of the State is concerned, I say that it is for the Supreme Court to say.

SHRI T. M. SHETH: You know we have two judgments of the Supreme Court. Of course, the latest judgement is the law on the point. We are here considering an amendment defining the tort; we are amending the act. Therefore, in that context, we would like to know from you which of the two judgments of the Supreme Court has correctly laid down the law.

SHRI ANSARI: My personal view is that the State was always correct. But, personal view is of no value having regard to the latest pronouncement of the Supreme Court.

SHRI T. M. SHETH: It has some value.

SHRI ANSARI: You may say that view has no value having regard to the latest pronouncement of the Supreme Court.

SHRI HIRA VALLABHA TRIPATHI: It has some value and it can form part of the future law. It has a great value and it can be included in the law that is going to be enacted.

SHRI ANSARI: That will be essentially the decision or the opinion of the Members of Parliament.

SHRI DAHYABHAI V. PATEL: That is the function of this Committee.

SHRI HIRA VALLABHA TRIPATHI: There is another question. I am putting to you an extreme case. There is a provision in the Bill—clause 11(o) 'any claim arising out of defamation, malicious prosecution or malicious arrest.' Looking to the large scale prosecutions and arrests, do you think that when a Police Officer or some other officer authorised in this behalf makes such prosecutions which are considered to be malicious, the Gov-

ernment has no part to play in those cases and the citizen has no remedy? The Government machinery is used by the prosecuting agent and the citizen suffers much on account of that. The Government can punish the officer for the malicious prosecutions or malicious arrests. What I say is this, Has the citizen no remedy against this?

SHRI ANSARI: I won't have any exemption—not against government but against the person who has done it.

SHRI HIRA VALLABHA TRIPATHI: If the citizen suffers?

SHRI ANSARI: As I said in the beginning, I would reduce the exemption grounds to the minimum.

MR. CHAIRMAN: That is what you said.

SHR ANSARI: I would reduce the exemption grounds to the minimum if I was given an opportunity.

SHRI M. P. SHUKLA: On going through the Bill and having come to know your views we are not yet clear whether in your opinion the savings provided in Section 11 provide any remedy to the cases specified in Rallia Ram's case or it still bars any remedy.

SHRI ANSARI: I think it will be actionable. The Government will be liable.

SHRI M. P. SHUKLA: That you think so. But the saving clauses in the Bill, as has been pointed out by several hon. Members, for any action by the Police or a member of the Police force or public servant, provide no remedy in cases like Rallia Ram's case.

SHRI ANSARI: I think that exemption is well circumscribed about public order or public peace but in regard to exemption, then of course the court of law has to decide whether the occasion was there for him to use that power. If there is any occasion, he can use it. If the occa-

sion was not there, it is merely what they call colourable use of power. The lawyers have come to use the word, colourable use of power; that is to say doing something to achieve what you cannot do.

SHRI M. P. SHUKLA: Upto this time there has been no definite law on torts in our country and only Art. 300 governs the cases of torts so far as the liability of State was concerned. In codifying a law like this, I think, the Government is only fortifying itself rather than providing any remedy so far as the law is concerned.

SHRI ANSARI: I do not think so. That would not be fair.

SHRI DAHYABHAI V. PATEL: Any way that is the general view of the Committee.

श्री राम सेवक दादव : इस बिल का मकसद यह है कि अगर सरकार या उसके अफसरों ने किसी शहरी के साथ ज्यादती की है तो उसको राहत पहुंचाई जाए ; लेकिन इस में जो रैट्रिफिकेशन का प्राविजन है और इस में जो एग्जैम्पशन हैं, क्या आप इससे सहमत हैं कि इन दोनों ने इस चीज को बिल्कुल खत्म कर दिया है ? अगर आप सहमत हैं तो आप क्या कोई तरमीम बता सकते हैं जिससे यह चीज खत्म हो जाए ?

श्री अंसारी : मेरी जिम्मेदारी तो बिल्कुल महसूस है । मैं तो अपनी राय का इजहार ही कर सकता हूँ । मेरे एवीडेंस को आप एक्सीट करें या न करें, यह आपको मर्जी है । एमेंडमेंट करना आपके हाथ में है ।

श्री राम सेवक दादव : आप एवीडेंस बिल की रोशनी में देने आए हैं । मैं आपकी राय पूछ रहा हूँ । जो मकसद है क्या उसको यह बिल खत्म नहीं करता है ? हम आप से यह आशा करते हैं कि आप इसके बारे में कुछ सुझाव देंगे ।

श्री अन्सारी : दो चीजें हैं आपके सामने । दो इन्फोर्सेंट आदमी हैं । एक तो टैक्सपेअर है और दूसरा वह आदमी है जिसके साथ फ़ाड हुआ है । टैक्सपेअर का कोई कसूर नहीं है । जो फ़ाड किया है वह टैक्सपेअर के रिप्रिजेंटेटिव ने किया है । टैक्सपेअर भी इन्फोर्सेंट है और उसका रुपया ले कर आप जिसको देते हैं वह भी इन्फोर्सेंट है । इन दोनों के बीच में आपको स्केल आफ जस्टिस को होल्ड करना है अब आप यह तय करिये कि क्या आप हर सूरत में टैक्सपेअर से रुपया निकाल कर देंगे या यह है कि उसको सरकमसक्राइब करके, उसको करटेल करके उसको सेफगाड करेंगे ।

MR. CHAIRMAN: If you have any constructive suggestions to make you may do so and your opinion is entitled to the highest regard.

SHRI ANSARI: I would request time for it, not on the spur of the moment.

SHRI KRISHAN KANT: He may be requested to send his views.

MR. CHAIRMAN: You can send it in 10 days or a week.

SHRI ANSARI: I will require 2 weeks time.

SHRI M. YUNUS SALEEM: If you consider it necessary at all.

SHRI KRISHAN KANT: He has given very valuable evidence. In the light of the evidence he has given, he has thrown out a number of suggestions.

SHRI ANSARI: The difficulty is that before I make any suggestion, I must have every aspect of the case.

MR. CHAIRMAN: You can take some time.

I should thank you on behalf of myself as well as other members of this Committee.

SHRI ANSARI: I will reduce it in writing and then send it on to you.

(The witness then withdrew.)

II. Shri M. C. Setalvad, M. P.

(The witness was called in and he took his seat).

MR. CHAIRMAN: Mr. Setalvad, I have got to do my formal duty in reading out Direction No. 58 of the Speaker:

Where witnesses appear before a Committee to give evidence the Chairman shall make it clear to the witnesses that their evidence shall be treated as public and is liable to be published, unless they specifically desire that all or any part of the evidence given by them is to be treated as confidential. It shall however be explained to the witnesses that even though they might desire their evidence to be treated as confidential such evidence is liable to be made available to the Members of Parliament.

You are leader of the Bar and also ex-Attorney General. We want your opinion on this Bill. If you start with a few words, the questions by Members will start later on.

SHRI SETALVAD: I am somewhat familiar with the subject because I was the Chairman of the Law Commission when we made the report, which is with some modifications being given effect to by this legislation. In that report, as you must have noticed, we studied various other systems of law including the law relating to this subject in England, the United States, Australia, France and so forth. We made proposals, broadly speaking, falling in line with the law in the United Kingdom and that I think is what the proposed legislation does and that is all I have to say about it. I am willing to answer questions put to me.

SHRI SHRI CHAND GOYAL: We are really very grateful to you for giving us an opportunity because you were the Chairman of the Law Commission and some of the recommendations which were made by the Law

commission have been accepted while drafting this Bill. For instance, the definition of the word "Agent" as suggested by the Law Commission under your chairmanship was the definition given in the Indian Contract Act, which ought to be adopted here. But, what has been done in the present Bill is that instead of adopting the definition of "Agent" given in the Indian Contract Act, another definition has been provided which excludes "independent contractor".

SHRI SETALVAD: "Independent contractor" is provided for separately under the Bill.

SHRI SHRI CHAND GOYAL: But the two provisions are not similar. The provision which has been made for "Independent Contractor" does not give as much relief as the act done by an Agent.

SHRI SETALVAD: If the Agent were regarded as Independent Contractor the relief would be greater. That is the point you are making out.

SHRI SHRI CHAND GOYAL: Don't you think that we should have followed the advice of the Law Commission on this point and the definition of the Agent ought to have been the one which is given in the Indian Contract Act?

SHRI SETALVAD: What is the page of the Report you are referring to?

MR. CHAIRMAN: Middle of page 42: "Agent" shall have the same meaning as under the Contract Act of 1872.

SHRI SETALVAD: This is my first impression. The Agent under the Contract Act will be a person who will cover a more restricted field. He would not include an independent contractor excepting for certain purposes, in the manner you have defined the term in the Bill, e.g. if he is authorised or his acts ratified and so forth. Similarly if you merely adopt the definition of Agent as in the Con-

tract Act, that will not cover all Independent Contractors. It will only cover an Independent Contractor who is acting, when he is doing an act under the directions of a particular person who would be the principal and so forth. I don't quite follow why you are putting this question to me.

MR. CHAIRMAN: On page 58 of the Report is mentioned the liability of an employer for torts by an independent contractor, his servants or agents.

SHRI SETALVAD: Except in the cases mentioned below the employer of an independent contractor is not liable for torts committed by the contractor or his servants or agents.

The employer of an independent contractor shall be liable for torts committed by the contractor or his servants or agents in doing the act contracted for as if they were committed by the employer himself or by his own servant or agent in any of the following cases:

(a) where the employer assumes control as to the manner of performance of the work—that is exactly what you have got in the Bill;

(b) where the wrongful act is specifically authorised or ratified by the employer—that again you have got in the Bill;

(c) where the work contracted with the independent contractor is itself unlawful—that itself would make the Government a party to authorising an unlawful act;

(d) where the work contracted to be done, though lawful in itself is of such nature that it is likely, in the ordinary course of events to cause injury to another unless care is taken or that the law imposes upon the employer an absolute duty to ensure the safety of others in the doing of the work—this you have in the present Bill.

There is no substantial difference in what we recommended and what the

bill provides for, so far as I can see. I may be wrong.

SHRI SHRI CHAND GOYAL: In Section 3 of the proposed Bill under sub-clause (ii) it is stated that while acting beyond the course of his employment if the act constituting the tort was done by the employees or agent on behalf of the Government and is ratified by the Government. We want your views on this because the line between the course of employment and beyond the course of employment being very thin, will not the Government, after the tort has been committed, try to take shelter under these words and not ratify. Don't you feel that these words "is ratified by the Government" should be deleted so that a citizen gets his remedy and is not deprived of it?

SHRI SETALVAD: I do not think so. So far as I can see, in this Bill an attempt has been made to place the Government in the same position as ordinary persons. Now supposing, not the Government but some other person had authorised a person to do an act, then that person would be doing it in the course of his employment. Supposing he did not authorise him, but he did it on his own and the other person accepted it or ratified it, then he would be liable. So the same principle should be applied to Government. I do not see any reason why Government should be placed in a worse position than ordinary citizens. If what you suggest is accepted, in my view, the Government would be placed in a more onerous position than an ordinary person. That's what I feel.

SHRI SHRI CHAND GOYAL: A citizen is in a better position.

SHRI SETALVAD: May I explain at this way? Forget the Government. Supposing a private person—may be a private employer—has not authorised a certain person to do an act. Will that private person, be liable? As far as I can see, the act being not authorised by him or not done by

the agent in the course of the employment the private person will not be liable. The same rule is applied to Government. Why should there be any objection to the same rule being applied to the Government? That is my point. I wonder if you agree with me as to the scheme of this Bill. The objects and reasons say so, and our Report also said the same thing. The object of the Legislature is to place the Government in the matter of torts in the same position as any other person. If that is so, that object is carried out by this provision. There is no difference made. And why should the Government be exposed to a greater liability than an ordinary person? That should not be.

SHRI SHRI CHAND GOYAL: Now, the office hours are from ten to five. Supposing, this act takes place at 5-30. The Government can take the decision that since the office hours are only up to 5-00, the act has not been done in the course of employment, though the Government employee may be acting, of course, in the interests of the Government.

SHRI SETALVAD: There is a mass of case law as to the meaning of the expression "acts done in the course of employment". All these distinctions have been dealt with, and they are inevitable. Even in the case which you mention if the office hours are from ten to five and the Government employee does something at half past five, but the act done is something in the course of his duties, I think the act would be done in the course of his employment.

SHRI SHRI CHAND GOYAL: This is with regard to section 10. Police men have been kept on par with the members of the Armed Forces whereas in the U.K. this provision is confined only to the members of the Armed Forces. We feel that so far as the Armed Forces are concerned, there is hardly a conflict between the Armed Forces and a citizen, but so

far as police men are concerned, their interests sometimes come into conflict with the interests of the citizens. So don't you feel that we ought to have kept in line with the provision in the UK Act and not included these members of the Armed Forces within the scope of section 10?

SHRI SETALVAD: I do not recollect what the provision in the U.K. is. I will accept what you tell me that the UK does not make any exception in the case of the Police Force doing its duty.

MR. CHAIRMAN: They are not paid out of the Consolidated Fund.

SHRI SETALVAD: What I feel is that having regard to what is generally happening in the country these days it is much better to give the protection to the Police Force which has been given under section 10 while they are doing their duty, because the Police has to be much more active now than in the earlier days.

SHRI KRISHNA KANT: Then we may turn into a Police State.

SHRI SETALVAD: We have to if there are acts of lawlessness.

SHRI N. K. SHEJWALKAR: I refer to page 7 of the Bill. Here in the saving clause, a member of the police force has been exempted from the liability. Now, in the light of what has happened in the Indraprastha Estate building on the 19th of September last, are you of the opinion still that they should be exempted?

SHRI SETALVAD: No, they would not be exempted. That certainly would not be covered by this clause so far as I can see. There the police ran amuck and started maltreating the public servants. So they would not be covered by this clause.

SHRI N. K. SHEJWALKAR: If the lines are carefully read, I think only the motive action has been exempted; the total action has not been exempted.

SHRI SETALVAD: I am sorry I do not agree because those wanton acts of Police such as you are thinking of will not be protected by this clause.

MR. CHAIRMAN: Actually, the semi-colon is wrong. That should cover both.

SHRI BHATIA: We will make it more clear.

SHRI YADAV: If you look at page 8 sub-clause (n):

"any Personal injury or any damage to property caused by an act which by its nature is likely in the ordinary course of events to cause such injury or damage."

Suppose in order to maintain peace the Police personnel were authorised to enter that building and they performed that act will that not be covered by it.

SHRI SETALVAD: Supposing some people are wrongly and offensively start setting fire to a building. The building is to be protected against miscreants. Then the Police from outside try to rush inside. Supposing the gate is locked. Then they may break open the lock and go in. That damage to property will be protected because that is necessary for the purposes of giving entry to the Police into that building.

SHRI YADAV: Because of this provision Government would like to cover the acts of the Police in this manner. What is the check inspite of this provision?

SHRI SETALVAD: May we read it again?

"any personal injury or any damage to property caused by an act which by its nature is likely in the ordinary course of events to cause such injury or damage, if the doing of the act is authorised by any enactment for the time being in force;"

SHRI YADAV: Enactment is there to maintain law and order.

SHRI SETALVAD: The words are: "if the doing of the act"—it is a particular act.

SHRI YADAV: There are various exemptions provided in this Bill on pages 6, 7 and 8. Do you think that these exemption will bar the citizens to come in the court of law to get the remedy?

SHRI SETALVAD: Certain bars are necessary. For example, the entries are mentioned. I am referring to (b) "any act done by the Government in the discharge of its functions in relation to any of the matters enumerated in entries 10, 11, 12, 13, 14, 15 and 16 of List I in the Seventh Schedule to the Constitution;" These are necessary. If you look at those entries those relate to foreign affairs, United Nations Organisation and various other things and those should not be exposed to attack. These would normally not concern the citizen so far I can see.

SHRI N. K. SHEJWALKAR: Under clause (j) of section 11 Magistrate has not been exempted for his executive actions while the Police has been so exempted under section 11 clause (i). Why this discrimination between the two?

SHRI SETALVAD: There again we will read it:

"any act done by—

- (i) a member of a police force; or
- (ii) a public servant whose duty it is to preserve peace and order in any area or

place or who is engaged on guard, sentry, patrol, watch and ward, or other similar duty in relation to any area or place."

And then comes the important provision...

"for the prevention or suppression of a breach of the peace, or a disturbance of the public tranquillity, or a riot or an affray or for the prevention of any offences against public property".

If he is acting for these purposes, he (the police) now is protected, not otherwise.

SHRI RAM SEWAK YADAV: What else remains?

SHRI KRISHNA KANT: They go only for these.

SHRI SETALVAD: It is not my province; it is the province of legislators.

SHRI KRISHNA KANT: You are also a legislator.

SHRI SETALVAD: The remedy for it lies elsewhere, not in this Bill.

SHRI A. T. SARMA: A tort is committed and a man is aggrieved and he deserves compensation for it. The action has been done by a government employee. Whether the action of the government employee is ratified or not, the man aggrieved deserves compensation. So why should there be ratification?

SHRI SETALVAD: Let us compare the Government again with a private person. If a private employer has got an employee who is working for a particular purpose in a particular manner, and if in the course of his duties he does something or other which the employer has not ratified, you cannot make the ordinary employer also liable. The Government is in the same position as the ordinary employer.

SHRI A. T. SARMA: My question is different. I say the man has been aggrieved by the action of the employee of government. This makes the government responsible. So why should there be ratification?

SHRI SETALVAD: Was the government employee acting in the discharge of his duty?

SHRI A. T. SARMA: He is expected to be. Whatever he has done is in the capacity of employee of government.

SHRI SHRI CHAND GOYAL: He is referring to a government employee working in the course of his employment.

SHRI SETALVAD: Then government would be liable.

SHRI A. T. SARMA: But why should there be ratification? Government may realise the compensation from the employee. But the man aggrieved must be given compensation without being subjected to it being available on the government ratifying the act of the employee.

SHRI SETALVAD: May I cite an extreme case? I employ a servant and he, not in the course of his duties, but after his duties goes out and murders somebody. Am I as a private person liable? No, I would not be liable for any compensation to be paid to the murdered person's relatives. Why should the Government in that case be liable?

SHRI A. T. SARMA: Here the question is different.

SHRI SETALVAD: Why is it different? We seem to be at cross purposes.

SHRI SETALVAD: Everything a government servant does he does not do 'in the course of his employment'. He does not strike against government 'in the course of his employment'.

SHRI A. T. SARMA: Government has to realise the compensation from him.

MR. CHAIRMAN: His point is: why should ratification by government become necessary?

SHRI A. T. SARMA: I am asking for your valuable opinion.

SHRI SETALVAD: I am sorry I am not able to assist; I have not fully understood your question. You are referring to a case where the government servant acts not in the course of his duties as a government servant, but outside it. Is that so?

SHRI A. T. SARMA: No.

SHRI SHRI CHAND GOYAL: If the government employee does that in the course of his employment, government is not saved; it will have to pay compensation. But, if the person is not acting in the course of his employment entrusted to him by government, and he does something outside that employment, what happens?

SHRI A. T. SARMA: There also why should there be any ratification? Suppose a government employee has done something wrong. The man has been aggrieved. He deserves compensation. The employee has done it as a government servant, not in his individual capacity.

SHRI SETALVAD: That is the whole point.

SHRI RAM SEWAK YADAV: He means to say this. Suppose a government officer has acted beyond his limit and a tortious liability is attracted. According to the Bill, ratification by government is necessary. The hon. member asks: What is the need? He will go to the law court which will give judgment. For an act done within the limit, ratification is not necessary.

SHRI SETALVAD: Ratification is not provided in such cases.

SHRI RAM SEWAK YADAV: No. But here he will go to court. Here according to the Bill, though the act done is beyond his duty, ratification is necessary. Ultimately will have to go to court. The court will give judgment and may give some relief to him. What is the need for ratification?

SHRI SETALVAD: Relief against whom? You are thinking of relief against government. Government, like any other employer, can rightly say, 'Yes, if my servant has acted in the discharge of my duty and in the course of employment, I am liable; but if he goes on a spree of his own and does something, I am not liable, just like a private person'. Why should that be quarrelled against?

SHRI RAM SEWAK YADAV: Suppose the man wants to go to court. There may be a dispute. Government may contend that it was done beyond his duty.

SHRI SETALVAD: Every person can go to a court of law. The court, in this case, will first see: whether the government servant acted in the course of his employment? If he has, government would be liable. The second question the court will ask itself, though the act was outside the course of employment, has Government in any manner ratified it? Again, if it is so ratified, the Government would be liable. But if it is neither the one nor the other, the Government will not be liable.

SHRI RAM SEWAK YADAV: It is the court that has to see to it. Why does the Government come in?

SHRI SETALVAD: The Government does not come in.

SHRI A. T. SARMA: You are saying two things: one is that if the Government employee has acted within his jurisdiction, then there is no necessity of ratification. Do you agree?

SHRI SETALVAD: Yes; then the Government is bound to pay.

SHRI A. T. SARMA: There is no necessity of ratification in that case.

SHRI SETALVAD: No.

SHRI A. T. SARMA: We must define clearly that in case a Government employee has acted according to his office, there shall not be any necessity of having this action ratified by the Government.

SHRI SETALVAD: But the Bill says so. The Bill provides for it.

SHRI H. N. MUKERJEE: Would it be correct for me to assume that you do not agree with Mr. Seervai's contention which he openly made in his book that the citizen's position would be very much worse under the law as suggested in this present Bill? Would I be correct in assuming that you do not agree with this and you think that the citizen would not be in a worse position than today?

SHRI SETALVAD: I am sorry, I confess that I have not read the passage in that book. I am not able to answer that question.

SHRI H. N. MUKERJEE: I want a general idea. I do not want you to apply your mind to it just at present. What I wanted to know was this. You have gone through the Bill more or less, and having been the Chairman of the Law Commission, you know whether or not they have departed from its recommendations. But, on the whole, are you ready to tell us that this Bill does not diminish the right of the citizen in anyway?

SHRI SETALVAD: I think it enlarges the right of the citizen. I have not seen what Mr. Seervai has said.

SHRI H. N. MUKERJEE: I want a certain clarification. There are a number of exemptions in the Bill, but the exemptions that the Law Commission have recommended both in the body of their report and in Appendix I, where it refers to cases where the State was held not liable for torts.

do not correspond with the very exhaustive list of exemptions which there are in this Bill. This matter has already been brought to your notice. For example, there is a rather extravagant immunity given to members of the police force or public servants entrusted with the duty of preserving law and order. This is so comprehensive, and is such an omnibus endowment of powers as has been witnessed in the recent Indraprastha incidents which were brought to your notice, and you told us that the law was frowned upon in that particular behaviour. But as far as the promulgation of the law in this particular Bill is concerned, I fear that when a member of a police force or a public servant acts for the prevention or suppression of a breach of the peace, or a disturbance of the public tranquillity or for the prevention of any offences against public property, and it comes under the exemption, then the citizen is very much in difficulty. Besides, the Law Commission nowhere suggested that the police force functioning within the municipal limits of the country should have a kind of exemption which a police force might, for security purposes, be endowed with. What is your view about this?

SHRI SETALVAD: I shall answer it in two parts. First, your question is based on an assumption that the Law Commission's proposals were exhaustive proposals. As I have already said, they were not exhaustive, and the Commission's report also said so. It was not drawing up a piece of legislation. Secondly, I do not agree with your apprehension that this clause is too wide, because there are sufficient safeguards in the clause itself, and if you have in mind the recent event, surely that outrageous event would not be exempted by this clause so far as I understand it.

SHRI H. N. MUKERJEE: Then, I would very much like to have another clarification from you. I know very well that the Law Commission was

not drafting legislation, and therefore they would be making verbal changes, but the spirit of the Law Commission's report has got to be pursued and they say they are doing it. But I find no reference—I may be wrong—at all to exemptions to be given to the police, and the police operating in a law and order situation does not come into the picture at all, but they are being given this particular kind of authority which was being pointed out by our Members here. We are only trying to ascertain from you your views. Do you think that in spite of this inclusion in the Bill all the extravagant exemptions for the police force and similar authorities, it would not redound to the disadvantage and against the interests of the citizens?

SHRI SETALVAD: No; I do not think so.

SHRI H. N. MUKERJEE: Then there arises the other point which was raised by Mr. Ram Sewak Yadav also. Can we in this country equate the citizen of the State in the manner of the definition of the tortious act when the Government servant remains a Government servant in the eyes of the law even when he acts beyond or in the course of employment? I am not blaming anybody. But it might happen that a Government servant, acting quite blatantly in excess of the authority performs a certain thing which aggrieves an ordinary citizen. The ordinary citizen does not know the niceties and refinements and the difference between "in the course of employment" and "outside the course of employment" and so on. Are we in a position in this country to treat the Government servant on a par with a citizen in so far as exemptions from tortious liability are concerned? Have you applied your mind to this matter?

SHRI SETALVAD: Is it your suggestion that the Government should be in a worse position than the ordinary citizen? Let us not forget that when you impose a liability, you are

really imposing a liability on all citizens. Who is going to pay the compensation? It is the taxpayer who is going to pay the compensation. When you are advocating a larger or a greater burden in the matter of liability for torts on Government, you must not forget the ordinary citizen who pays the tax and whose money is paid as tax.

SHRI H. N. MUKERJEE: The money comes from the coffers. But the point is the aggrieved person is not in the picture. In our country, what happens is this; Government's misbehaviour whether the act is done in the course of employment or outside the course of employment, is a common occurrence. From that point of view, the question is whether this Bill is not going a little beyond the ambit of legislation. Have you applied your mind to this? Can you suggest any way?

SHRI SETALVAD: I think it would be injurious to include these ideas, assuming that what you say is really the correct position. Even so, it would not be correct to legislate from that point of view. What we should do is to correct the evil of Government servants wantonly acting even outside the course of employment in some other manner; that would not be the purpose of this legislation.

SHRI H. N. MUKERJEE: My next question is in relation to the ratification by Government and the responsibility of the Government for acts done beyond the course of employment. I discover in Appendix I of the Law Commission's report—page 4—a reference to cases where the State was held not liable for torts arising out of a different matter. It refers to Number 11: acts done in the course of official duty where it may be proved that the impugned act was authorised by the Crown or that it profited by its performance. The criterion, therefore, seems to be profitability to the Government, the fact of profit having accrued to the Gov-

ernment rather than a formal ratification by the Government. It may be done beyond the course of authority, as profiting the Government, but the Government keeps mum about ratification. Therefore, the citizen is deprived of his rights. I do not know whether you can give us a clarification on this.

SHRI SETALVAD: Ratification is not necessarily formal. Ratification may arise in various ways. It may be by conduct. If the government knows of the act and acquiesces in it that by itself would be ratification. It need not be a formal act at all. For instance, it may be derivation of profit or advantage to government. So, the government having known that the servant has done it acquiesces in it; that is ratification. If the government takes some benefit or advantage out of the act of the government servant that would be a case of ratification.

SHRI H. N. MUKERJEE: I feel sometimes that codification by itself piecemeal may not be the remedy but a rationalisation of the entire system of our law is more important. But, pending that, we try to proceed piecemeal by way of codification. Here in regard to liability on torts we have a certain position. Article 300 of the Constitution provides some kind of a guarantee to the citizen's right against the government. Now we follow also the Indo-Anglican idea of judicial procedure which means citation and all that sort of thing which means the hazard of occasional judicial pronouncements which are contradictory to each other. Now could you tell us if it is really more profitable for the country to have legislation which, I am sure, is going to be amended in the near future—we shall need amendment in the legislation several times; later we shall have amending legislation almost *ad infinitum*—or would it be more profitable to have a definite law at this moment of time on the lines of the recommendations of the Law Commission? Would it be better to leave the matter as it is and just

carry on since we have the procedure of the Indo-Anglican system in spite of the judicial controversies that have arisen over the years with different High Courts pronouncing different judgments?

SHRI SETALVAD: Is not the present legislation in line with the recommendations of the Law Commission?

SHRI H. N. MUKERJEE: Another High Court may give a different judgment.

SHRI SETALVAD: Judges are human beings and they are likely to err. But in matters of law they are less likely to err than others. That is all what I can say.

SHRI B. T. KEMPARAJ: Is it not necessary to have a clear-cut definition of 'tort'?

SHRI SETALVAD: The Law Commission tells us how difficult it is to define torts.

SHRI B. T. KEMPARAJ: Unless the word 'tort' is clearly defined, how is it possible for a citizen to decide against what acts of the government or its servant he can claim damages?

SHRI SETALVAD: Well, remedies for torts have been found for over 200 years in England and many other countries without there being any definition of the word 'tort'. I suppose the same thing will happen in our country also.

SHRI B. T. KEMPARAJ: Then we will have to depend entirely on case laws reported in foreign countries. Is it not possible for us to find out a clear definition of the word 'tort' on the basis of the cases that have been decided by our Supreme Court and other courts?

SHRI SETALVAD: Several writers, including Clerk, have applied

their mind to the task of framing a definition and they have given it up.

SHRI B. T. KEMPARAJ: Section 3 (a) (ii) of the Bill reads:

"while acting beyond the course of his employment if the act constituting the tort was done by the employee or agent on behalf of the Government and is ratified by the Government;"

The term "beyond the course of his employment" implies that he has not been authorised to do certain things. So, he is acting beyond the orbit of his authority. How could it be ratified by the government? Is it a duty cast upon the government to ratify an action of the government employee when he has acted beyond his jurisdiction?

SHRI SETALVAD: Government is not bound to ratify it. But, in some cases, government may ratify it, though not formally. I will give an illustration. A government employee is given certain duties. Suppose he acts beyond his duties and the government, knowing full well that he has acted beyond his duties, takes advantage of that act or gets some benefit out of that act. Then, should the government not be held responsible, even though the act of the Government servant was beyond the scope of his authority? That is the principle behind this provision.

SHRI B. T. KEMPARAJ: Here the presumption is that the act of the government servant beyond the course of his employment is always beneficial to government. Suppose it is detrimental to the interests of the government and the government is made to suffer on account of the act of the official. Why should that act be ratified by the government subsequently?

SHRI SETALVAD: Government is not bound to ratify it; government may or may not ratify it. If the government ratifies it it becomes liable; otherwise not.

SHRI B. T. KEMPARAJ: Here we are making it incumbent on the government to ratify all such acts of the government servant.

SHRI SETALVAD: No, I do not think you need have any such misapprehension. It is left to the option of the government either to ratify it or not.

SHRI B. T. KEMPARAJ: Clause 11 (n) reads:

"any personal injury or any damage to property caused by an act which by its nature is likely in the ordinary course of events to cause such injury or damage, if the doing of the act is authorised by any enactment for the time being in force;"

Under this sub-clause, a government servant acting in the course of his employment or while discharging his duty may act in excess, thereby causing injury or damage to a person or his property. So will this exemption clause not mean that the right of the citizen who might suffer at the hands of these officers is taken away and that the citizen will have no redress?

SHRI SETALVAD: No. This deals with a case where the law provides that a particular act shall be done. The term used is "authorised by any enactment for the time being in force". Therefore, when a government servant is carrying out his duty in accordance with law and during the course of it some injury is caused to some citizen or some damage to some property, that is not actionable, because he is carrying out the law.

SHRI B. T. KEMPARAJ: Suppose under the garb of carrying out his duties a government servant acts excessively and thereby causes some injury or damage to a citizen or his property; what is the remedy open to the citizen?

SHRI SETALVAD: If he acts in excess of his powers that will not be

covered by this clause. Only those injuries caused by the performance of his duties will be covered by this provision.

SHRI B. T. KEMPARAJ: Who is going to decide it?

SHRI SETALVAD: The court naturally.

SHRI B. T. KEMPARAJ: Will it not follow that the rights given to a citizen under clause 3 will be taken away by this clause 11 (n)?

SHRI SETALVAD: No, I do not agree.

SHRI KRISHAN KANT: I would refer you to the extracts from Shri. Seervai's opinion where it is stated:

"The assumption made in *Kasturi Lal's case* that the *P&O Case* has always been followed is patently incorrect and in my view, on an appropriate occasion the Supreme Court would be entitled to hold that *Kasturi Lal's case* was wrongly decided and was productive of public mischief. The result of this discussion is that the State is liable in tort as held by Sinha C.J. in *Vidhyawati's case*. If this is the correct position, the Bill, merely asserts a liability which already existed so far as the Secretary of State for India was concerned and to that extent is not open to any objection and in fact is in consonance with Article 300 as correctly interpreted in *Vidhyawati's Case*. To the extent that any provisions of the proposed Bill curtailed the liability to which the Secretary of State would have been subject, in my opinion, the Bill would be *ultra vires* article 300 of the Constitution, if the decision in *Kasturilal's case* is subsequently overruled. Because, no Act of the Legislature can reduce the liability of the State contrary to an express provision of the Constitution."

I would like to have your opinion on this point.

SHRI SETALVAD: I have not read this passage. I have heard it now. I have not considered it. I would not venture an opinion without considering it.

SHRI BHATIA: Article 300 says:

"(1) The Government of India may sue or be sued by the name of the Union of India and the Government of a State may sue or be sued by the name of the State and may, subject to any provisions which may be made by Act of Parliament or of the Legislature of such State enacted by virtue of powers conferred by this Constitution, sue or be sued in relation to their respective affairs in the like cases as the Dominion of India and the corresponding Provinces or the corresponding Indian States might have sued or been sued if this Constitution had not been enacted."

In your report also you have stated:

"It would be noticed that under this article the liability of the Union and the States are the same as those of the Dominion and Provinces of India before the Constitution come into force. But it is, however, subject to legislation by Parliament or the Legislature of a State."

"Since it will be "subject to any provisions which may be made by Act of Parliament or of the Legislature of such State enacted by virtue of powers by this Constitution" it cannot be *ultra vires*."

SHRI SETALVAD: I do not quite understand that passage. That is all I can say. I am referring to the observation about *ultra vires*. I do not think it will be *ultra vires*.

SHRI KRISHAN KANT: Coming back to clause 3, sub-clause (a) (ii) reads:

"while acting beyond the course of his employment if the act constituting the tort was done by the employee or agent on behalf of the Government and is ratified by the Government;"

When it is "on behalf of the Government" where is the need for ratification?

SHRI SETALVAD: I myself think, subject to what the draftsman may say, that the term "on behalf of the government" seems to be a surplusage. If he is acting as an agent on behalf of the government, then he is acting in the course of his employment.

SHRI BHATIA: Ratification can take place only when the act is done on behalf of the government. If the employee acts on his own not on behalf of the government how will the government ratify it? It is on the lines of section 196 of the Contract Act. So unless the act is done on behalf of another person, the question of ratification can never arise.

SHRI KRISHAN KANT: While replying to Professor Mukerjee you said that there was a lot of case law on ratification and that verbal ratification or knowledge of the act or some other thing though it may not be in writing means ratification. When you say that then "on behalf of Government" includes ratification and if we say here only "on behalf of Government", the objection of many of the Members will be removed and it will satisfy most of the people.

SHRI SETALVAD: I think, this is a matter for the draftsman of the Bill to consider. The draftsman has followed the phraseology of the Contract Act.

SHRI BHATIA: Even otherwise, the cardinal principle is that ratification can be done only when the act is supposed to have been done on behalf of the person ratifying it. The phrase "on behalf of Government" will not govern ratification; it will only qualify that the tort was done

by the employee on behalf of Government.

SHRI KRISHAN KANT: What is the need for ratification if it is done on behalf of Government?

SHRI SETALVAD: What is contemplated is an act which the servant purports to do on behalf of the Government and, in fact, does on behalf of the Government but outside the course of his employment. In such cases ratification comes in.

SHRI KRISHAN KANT: We know how the Government and its various departments function.

SHRI SETALVAD: Make them function better.

SHRI KRISHAN KANT: The law represents the present functioning of the Government. When society changes we will change the laws; torts may not be required at that time. But here our fear is that acts which do not suit the Government will never be ratified by them because they know the consequences of that.

SHRI SETALVAD: If a servant acts outside the course of his employment and makes Government liable, how can that be allowed? Could that be allowed in the case of a private employer? The whole scheme of the Bill is to put the Government in the same position as that of the private employer.

SHRI KRISHAN KANT: If he is not doing it on behalf of the Government, let the Government say later on that it was not done on their behalf.

SHRI SETALVAD: If the act is done in the course of employment, nothing more is needed. We are dealing with acts done outside the course of employment. In such cases two things are necessary: firstly, it must be done on behalf of the Government—the servant must not be acting for his own benefit or purposes but must

be acting for the Government—and, secondly, because he acts outside the course of his employment, the Government must ratify it orally or by conduct or otherwise.

SHRI H. N. MUKERJEE: If he does something on behalf of the Government, according to the common-sense view—it may not be the legal view—he is the agent of Government.

SHRI SETALVAD: No man can constitute himself an agent without the authority of the principal or the master.

SHRI H. N. MUKERJEE: If an employee of Government allegedly on behalf of the Government does something beyond the course of his employment which is a tortious act, we wish the citizen to have his guarantee and, therefore, the question of ratification need not arise. If it was done not on behalf of the Government, the Government can contest the matter in a court of law and get out of the liability. You keep either the one or the other, either "ratification" or "on behalf of Government".

SHRI SETALVAD: So far as I can see, if you omit the ratification part and put only "on behalf of Government", the courts will always say that an act done by an employee on his own outside the course of his employment is not an act done on behalf of Government.

SHRI H. N. MUKERJEE: Let the courts say that.

SHRI SETALVAD: Then, a person who goes to the court claiming damages will have to prove that the man was acting on behalf of the Government.

SHRI KRISHAN KANT: He will produce evidence that he had been doing all those things.

MR. CHAIRMAN: Will it do if "and" is made into "or"?

SHRI SETALVAD: That will destroy the very principle of ratification the basis of which is, as the Contract Act lays down, that you can ratify only something that is done on your behalf. That is why these two phrases come together jointed by the conjunctive "and".

SHRI KRISHAN KANT: Then the whole purpose of the Bill to give safeguard to the citizen is completely frustrated. I think, Shri Setalvad himself was in two minds.

SHRI SETALVAD: I had lost sight of the principle that ratification can be done only of an act which is done on behalf of the master.

SHRI KRISHAN KANT: The purpose of the Bill is to safeguard the right of the citizen as well. But here we are safeguarding the Government's right only and not that of the citizen. In your report this was there. Could you say what was the purpose of including this sub-clause in it when it is not included anywhere else? Do you think that the present law in the country is not sufficient to safeguard the interests of the police or others who act for maintaining law and order?

SHRI SETALVAD: You are safeguarding the interests of the Government and not of the police in respect of compensation claimed against Government.

SHRI KRISHAN KANT: But you are not safeguarding the Government only. You are excessively against the citizen.

SHRI SETALVAD: You are preventing the citizen from claiming compensation in respect of acts done by the police which are not beyond their authority. I have already pointed out that the clause will not cover excesses like the one's we have talked about. Only proper acts done for the purpose of maintaining peace will be covered.

SHRI KRISHAN KANT: Again, the citizen will be at a disadvantage to prove to the court that that was excessive. They will say that there was no other situation for them and the whole thing will be put in such a way that we know what will happen. As you said, about breaking open the doors and going into the C.P.W.D. building, there was no other way. It is in pursuance of the Act that they are doing. This clause will always protect them. I think, the Law Commission never came to think of this eventuality that the Government will take advantage of this recommendation to include this black clause in this Bill also.

SHRI BHATIA: This is also there:

"In order that ratification of an unauthorised act should make the principle responsible, the following conditions must be fulfilled, namely, the wrongful act must have been done on behalf of the principal; no one can ratify an act which was done not on behalf of the principal but on behalf of the doer...."

SHRI KRISHAN KANT: When we say, on behalf of Government, that satisfied it. We need not follow all the case history and all that. We are legislating for the present-day society and present-day Government of the country.

SHRI SETALVAD: As I said we are mixing up the two things in this matter. Firstly, about the excesses of the police, the remedy is to be found not in this Act but somewhere else. That is what is troubling you all.

SHRI KRISHAN KANT: Why does the Government want to have the remedy from the citizen? This is very important. If a person like Mr. Setalvad supports this black clause, it becomes very difficult for the common people and public workers

to do all that. His support to this clause is very detrimental to public cause. He has been the champion of civil liberties and all that. I think, his support to this clause is a very detrimental thing to public cause.

MR. CHAIRMAN: Let us finish quickly. Shri Srinabas Misra.

SHRI H. N. MUKERJEE: May I make a suggestion? It is very important for us to have elucidation of the discussion that we are having with Mr. Setalvad. If there is no time to-

day, let us have another sitting with Mr. Setalvad.

MR. CHAIRMAN: That is all right. Will Saturday suit you?

SHRI SETALVAD: Yes.

MR. CHAIRMAN: We will meet again on Saturday, 26th October, 1968 at 4 P.M.

SHRI SETALVAD: Yes.

(The witness then withdrew)

(The Committee then adjourned)

**MINUTES OF THE EVIDENCE GIVEN BEFORE THE JOINT COMMITTEE
ON THE GOVERNMENT (LIABILITY IN TORT) BILL, 1967.**

Friday, the 25th October, 1968 at 10.00 hours.

PRESENT

Shri M. H. Samuel—*In the Chair* (Upto 10.30 hrs.)

Shri N. C. Chatterjee—*In the Chair* (from 10.30 onwards).

MEMBERS

Lok Sabha

3. Shri Anirudha Dipa
4. Shri Shri Chand Goyal
5. Shri S. Kandappan
6. Shri Brij Bhushan Lal
7. Shri Baij Nath Kureel
8. Shri Srinibas Mishra
9. Shri H. N. Mukerjee
10. Shri K. Narayana Rao
11. Shri Mohammad Yunus Saleem
12. Shri A. T. Sarma
13. Shrimati Savitri Shayam
14. Shri M. R. Sharma
15. Shri Narayan Swaroop Sharma
16. Shri Biswanarayan Shastri
17. Shri T. M. Sheth
18. Shri Mudrika Sinha
19. Shri Ram Sewak Yadav

Rajya Sabha

20. Shri S. B. Bobdey
21. Shri Rama Bahadur Sinha
22. Shri Gulam Haider Valimohmed Momin
23. Shri Krishan Kant
24. Shri M. P. Shukla
25. Shri Hira Vallabha Tripathi
26. Shri B. T. Kemparaj
27. Shri Chakrapani Shukla
28. Shri N. K. Shejwalkar

29. Shri Balkrishna Gupta
 30. Shri C. Achutha Menon
 31. Shri G. P. Somasundaram.

LEGISLATIVE COUNSELS

Shri R. V. S. Peri-Sastri, *Add. Legislative Counsel, Ministry of Law.*

SECRETARIAT

Shri M. C. Chawla—*Deputy Secretary.*

WITNESS EXAMINED

Shri K. L. Misra, *Advocate General of Uttar Pradesh.*

The Witness was called in and he took his seat

MR. CHAIRMAN: I have to read out to you one of the directions from the Speaker, just for your information.

Where witnesses appear before a Committee to give evidence, the Chairman shall make it clear to the witnesses that their evidence shall be treated as public and is liable to be published, unless they specifically desire that all or any part of the evidence given by them is to be treated as confidential. It shall, however, be explained to the witnesses that, even though they might desire their evidence to be treated as confidential, such evidence is liable to be made available to the Members of Parliament.

SHRI K. L. MISRA: I do not think that any occasion will arise for me to say that it should be treated as confidential.

MR. CHAIRMAN: You should be aware of this. This is one of the directions from the Speaker that I should read it out.

We are grateful to you for having taken the trouble of coming here. You have not sent any Memorandum....

SHRI K. L. MISRA: No; I have not sent. Has the U.P. Government sent any Memorandum?

MR. CHAIRMAN: No.

SHRI SHRI CHAND GOYAL: Other State Governments have sent but your State Govt. has not sent anything.

MR. CHAIRMAN: Is it because your State Government feels that it is not concerned with this Bill?

SHRI K. L. MISRA: It could not when this kind of liability is fixed upon it.

MR. CHAIRMAN: What is the justification or necessity for this Bill? Are you satisfied with this Bill? What are the adequacies or inadequacies? Later on we will come to questions.

SHRI K. L. MISRA: You know the law of torts at present not merely with respect to Govt. liability, but even with respect to other matters is based on case law and textbooks, generally speaking. In the case of Govt. liability particularly, the historical background of Govt. liability in India has been so compiled and from our Government of India Act of 1919 and all that upto the constitution they merely go on referring to the nature of things as it was before with the result that today the question of liability of the Govt. for tort remains in a fluid state mostly on the interpretation of case law. To that extent I do think that enactment of the law making it more precise would be useful. Then all kinds of problems would arise in the course of interpretation of words which can't be envisaged at all at this stage of drafting and enactment of this Bill. It may happen that because of

certain words used the liability may be lessened or increased than what you intend to put. That danger is there for every enactment, but provided that such dangers are avoided as far as possible, I personally think that enactment of the liability of the Govt. for torts would be desirable.

MR. CHAIRMAN: How do you find this Bill. Is it adequate?

SHRI K. L. MISRA: On the whole it is satisfactory. I will make my comments on particular clauses when I come to them. You have read the Commission's Report and the Crown Proceedings Act of 1947 in England.

MR. CHAIRMAN: Do you wish to make reference to any particular clause?

SHRI K. L. MISRA: In Clause 2, you have defined an agent. You say, employed to do any act for the Government. The word 'act' is used in various places in this Bill, sometimes, as meaning the act which constitutes a tort; sometimes meaning a responsibility which has been placed upon another person. Here itself it says 'who is being employed to do any act for the government', if in doing the act under the act or control of the Govt. A person is not necessarily employed for doing an act in the sense we can't always precisely say this particular thing would be done by him. It may be a kind of general implication. I was wondering whether the word act was a little too restrictive. If you say, if a person is employed for doing an act for the Government, it might create difficulties of interpretation. It is not possible in the particular cases to say that a particular act has been required to be done by an agent. You can say, any particular purpose or function rather than the word 'act'. Then you can say in doing an act.

MR. CHAIRMAN: That is, 'being employed for any particular purpose for the Government and in doing so.'

SHRI K. L. MISRA: The act is a little restrictive.

MR. CHAIRMAN: Legally in courts of law does it present any difficulty? Is there any different interpretation?

SHRI K. L. MISRA: It might create difficulty. I am not saying that it would necessarily create difficulty. But why do you have a difficulty if it is likely to arise?

MR. CHAIRMAN: What difficulty do you envisage?

SHRI K. L. MISRA: A person is employed as agent for such a general purpose that you can't specify the general purpose as an act. You cannot speak as an act at all. That difficulty will arise.

SHRI KRISHAN KANT: The person is generally employed for general purpose. At a particular moment he has to do a particular act.

SHRI K. L. MISRA: He may do a specific purpose. It is not necessary that every agent should be for general purpose. You may say, in doing act for which he has been employed by the Govt. If you put it that way the Act will be all right. Then the act would come within the course of employment. I have only put question marks here. These are just for your consideration.

MR. CHAIRMAN: We will think about them.

SHRI KRISHAN KANT: After this evidence, if you could send us any possible amendment, it will be useful to the Committee.

SHRI K. L. MISRA: I will do it.

Regarding clause 2(b) (1), I would like to know why the words 'any post connected with defence' have been used. Probably this has been copied from Art. 310 of the Constitution.

SHRI SHRI CHAND GOYAL: This is the definition given in the Constitution:

"...a member of a defence service or of a civil service of the Union or of an all-India service or holds any post connected with defence or any civil post under the Union...."

SHRI K. L. MISRA: Then we will pass it on.

MR. CHAIRMAN: They have exactly reproduced.

SHRI K. L. MISRA: In 2(c) you have defined 'Government'. If a tort is committed by an employee of the Central Government but while acting in connection with the affairs of the State Government, or an employee of the State Government but while acting in connection with the affairs of the Union, could it be that both the Governments are liable? I only want to know. The idea of having (i) and (ii) is to separate them. But I am pointing out a case of an employee of the State Government acting in connection with the affairs of the Union.

SHRI YUNUS SALEEM: Then he is an agent to the Union Government even though he is an employee of the State Government.

SHRI K. L. MISRA: I am not quite on the question of responsibility. You say that 'Government' would mean in one case Central Government and in another case State Government.

SHRI YUNUS SALEEM: If it is done on behalf of the Union Government then Union Government is responsible irrespective of the fact whether he is an employee of the State or the Centre. There is no difficulty.

SHRI K. L. MISRA: May I point out the difficulty? Take the case of an employee of the Central Government acting in connection with the affairs of the State Government, both (i) and (ii) will be applicable. Sub-clause (i) will apply because he is an employee of the Central Government....

3035 LS—6.

SHRI NARAYANA RAO: For that there is a personal aspect and a functional aspect. If a tort is committed by an employee in connection with the affairs of the Union, then Union Government is responsible. If a tort is committed in connection with the affairs of a State, then State Government is responsible. No matter whether it is committed by a State employee or a Central employee.

SHRI K. L. MISRA: If he is an employee of the State Government working for the Central Government which is the relevant clause?

SHRI NARAYANA RAO: These are governed by Art. 258.

SHRI K. L. MISRA: I am not on the question of responsibility. I am on the definition.

SHRI NARAYANA RAO: At certain times Central Government can function for the State and under certain circumstances the State can function on behalf of the Union. If a tort is committed in connection with the affairs of the Union, the Union Government is responsible.

SHRI K. L. MISRA: If a tort is committed by a servant of the State Government in connection with the affairs of the Union, which is the Government that will be liable?

SHRI YUNUS SALEEM: Will you kindly consider this definition of 'Government' along with the definition of 'agent' given in 2(a)?

SHRI K. L. MISRA: I am not at present on the question of responsibility of the Government.

SHRI YUNUS SALEEM: Clause 2 (a) defines 'agent' thus:

"agent", in relation to the Government, means a person (other than an employee of the Government) who being employed to do any act for the Government is, in doing the act, under the order or control of the Government.

If an employee or a servant of the State Government is enjoined to do certain work under the control and order of the Central Government, he would deem to be the agent of the Central Government for all practical purposes. Therefore, there is no difficulty.

SHRI K. L. MISRA: May I point out the difficulty? The position of such a person would be that of an agent of the Central Government because he is working for the Central Government and therefore he would come under c(i). Would he come under c(ii)?

SHRI YUNUS SALEEM: State Government can also function as the agent of the Union Government.

SHRI K. L. MISRA: You have not quite followed me or I am not able to make myself clear. If an employee of the State Government acting in connection with the affairs of the Union commits the tort, then c(i) would apply. My question is, would he not come under c(ii) also. If he comes under c(ii) also, then the Governments concerned will be both the Central Government and the State Government.

SHRI YUNUS SALEEM: Even a State Government, as such, can function as the agent of the Central Government.

(Shri N. C. Chatterjee—in the Chair).

SHRI MOHAMMAD YUNUS SALEEM: (contd.) Therefore, if a State employee functions as an agent to the Union Government, it won't make a difference at all.

SHRI K. L. MISRA: Difference in what?

SHRI MOHAMMAD YUNUS SALEEM: for throwing the responsibility.

SHRI K. L. MISRA: We are not talking of responsibility; we are at the moment in definition only.

SHRI MOHAMMAD YUNUS SALEEM: Definition is for what purpose?

SHRI K. L. MISRA: My point is that definition should be made clear.

MR. CHAIRMAN: What is your suggestion? I could not follow that because I came here just now.

SHRI K. L. MISRA: I was referring to clause 2(c) definition of government. May I put it more clearly? Is it the idea that an employee of the Government must come either under (c) (i) or (c) (ii) or he should come under both? If he comes under both there will be confusion. I am suggesting here that the government may define that with reference to two things—acting of the employee in connection with the affairs either with the Union or with the State; the second criterion is whether he is an agent or an independent contractor or an employee of the Central Government. What I was trying to say was this. Suppose there is a servant of the State.

SHRI MOHAMMAD YUNUS SALEEM: You may first consider the first phrase of clause 2(c)(i) viz., "where a tort is committed by an employee of the Government while acting in connection with the affairs of a State." That means when a State employee is working as an agent to the Central Government, he ceases to be an employee of the State Government.

SHRI K. L. MISRA: How can it be?

SHRI MOHAMMAD YUNUS SALEEM: For other purposes he may be. But, for the tortious purposes, he won't be an employee of the State Government. When the clause reads "where a tort is committed by an employee of the Government while acting in connection with the affairs of the Central Government, he won't be an employee of the State Government."

SHRI K. L. MISRA: Of course, he is not acting for the State.

SHRI MOHAMMAD YUNUS SALEEM: There should be no conflict at all.

SHRI T. M. SHETH: For that particular purpose, he will be deemed to be an employee either of the State or the Central Government.

SHRI K. L. MISRA: I don't think that is the intention of this phrase.

SHRI KRISHAN KANT: Take for example I.C.S. Officers. Though they may belong to States, it is the Central Government or the Ministry of Home Affairs at the Centre who really regulates the service conditions and action is taken by them. In that case what is the position? Suppose in U.P. a tortious act has been committed. Who will be responsible? The State Government cannot take action without the consent of the Ministry of Home Affairs and the U.P.S.C.

SHRI K. L. MISRA: I am only anxious about this. So long as he acts in connection with the affairs of the State, he is responsible for the act. Both the clauses are very clear that for the Government on whose behalf he is acting, at that moment he is responsible for the concerned Government. There is no difficulty.

SHRI MOHAMMAD YUNUS SALEEM: If he is acting in connection with the affairs of the Union, then he won't be employee of the State Government. For that purpose, there should be no conflict at all.

SHRI KRISHAN KANT: It is all completely defined that if a person is acting for the State, the State Government will be responsible. The interest or profit is that of the State Government.

MR. CHAIRMAN: There is no possibility of conflict. What Mr. Misra is pointing out is that there may be a possibility of conflict. Let us first hear him.

SHRI K. L. MISRA: I only wanted to say that the definition does not introduce an element of doubt.

SHRI KRISHAN KANT: Can you suggest any amendment to it?

MR. CHAIRMAN: An act may be committed by somebody. It is doubtful whether it is for the affairs of the Union Government of the State Government or for both. It is very very difficult to say that. There may be some cases.

SHRI K. L. MISRA: The idea must be that it should be interpreted in the same manner as the Constitution of India. I am here pointing out that the Constitution of India as an interpretation to acts is not available. General Clauses Act is available. The Constitution of India interpreting the act is not available. It may be that you might have used certain words from the Constitution. It is not necessarily available for the purpose. The court should be free to interpret the definition of the Government of India Act even though you might have used the same phraseology in the Constitution.

MR. CHAIRMAN: Kindly look to clause 11(b) where there are specified items of acts done by the State against which you cannot file a suit. When an act was done in connection with entries 10, 11, 12, 13, 14, 15 and 16 of List I in the Seventh Schedule to the Constitution, you cannot file a suit.

SHRI K. L. MISRA: I see in clause 11 certain specified acts done by Government in the discharge of its functions in relation to any of the matters enumerated in the List I about each one of which the Government is not responsible. But the affairs of the State are much larger than any authority.

MR. CHAIRMAN: I only wanted to point out these things with a view to your taking notice of it.

SHRI K. L. MISRA: Clause 11 does not deal with interpretation of the Act under the Constitution.

SHRI H. N. MUKERJEE: I see Mr. Misra's point. It is rather important. There is occasionally a juxta-position between the affairs of the State and the affairs of the Union. There might conceivably be occasions. Take for instance what is happening in North Bengal. At the present moment, officers of the Central Government are sent to work there. Maybe they are doing the work which is partly appurtenant to the State Government and partly to the Central Government. Indeed, in regard to that, **ascertaining** of the responsibility would become a difficult proposition for the officers who are sent from here. I don't think that we may merely say that the formulation made here is clear.

MR. CHAIRMAN: I am trying to find out Mr. Misra's point. He says that there may be occasions when there may be conflicts.

SHRI K. L. MISRA: You please take the illustration of the Central Government's taking over of a certain responsibility under the Constitution itself for the State Government. After all it is the Central Government which discharges all the functions temporarily. Suppose there is an employee working in the State for the time-being under the direction of the Central Government. If you refer to the Constitution, I suppose he is doing the work connected with the affairs of the State which are temporarily taken over by the Central Government.

Would that employee be connected with the Central Government or the State Government especially when the affairs are taken over by the Central Government? If you look to the Constitution, there are certain entries in List I in Seventh Schedule to the Constitution. From that can you find out as to what would be the position of that person?

SHRI S. KANDAPPAN: In this connection, Mr. Chairman, I may point out one thing. Even yesterday I put a question to Dr. Ansari on this point. Apart from the position of West Bengal and U.P. which have been taken over by the Centre—at present they

are being administered by the Centre—there are certain Departments, e.g. the Food Corporation of India the normal function of which is closely in collaboration with the State Food Departments for procurement and then they share between themselves what they procure; They commit certain portions to the Centre and certain other portions to the States. In these operations there is close co-ordination. The same is the case with regard to Railway Police—the Railway Protection Force is a different thing. The Railway Police is being administered by the State, where they are looking after the Railway property and are located in the stations; they do certain functions at the command of the Railway authorities. So, Mr. Misra is making a very relevant point.

MR. CHAIRMAN: He wants to know what will be the position when the Centre is doing certain works which will be technically called the affairs of the State.

SHRI K. L. MISRA: Mr. Chatterjee must be aware of instances where both the Central and the State Governments are quoted as defendants and decreed against.

SHRI K. NARAYANA RAO: Though the Constitution expresses here and there the affairs of State and the affairs of the Centre here and there, the dichotomy is not all that clear because even in the legislative areas we have carved out certain areas for the concurrent legislation. It is very difficult to assign concurrent area exclusively to the centre or to the State. Therefore we have to consider whether we can go with these expressions or we can modify them.

SHRI K. L. MISRA: When the phrase "affairs of the State" occurs in the Constitution, you have the aid of other Articles in the Constitution for the purpose of interpreting. You don't have all those Articles here. Here it stands isolated. The Constitution is not available as an interpretation for this or for any other act.

MR. CHAIRMAN: Can you give us some guidance?

SHRI K. L. MISRA: I confess my handicap. I promise within two or three days to give what my suggestions are. Depending on my knowledge of law of torts, yesterday I noted down certain things. I will let you have my suggestions within two, three days. When you talk of 'independent contractor' you have put the words "under the order or control of the Government". Mr. Chatterjee must be aware of the classical instance of taxi-driver and your own chauffeur quoted in these cases. In the case of taxi-driver you have no liability because of his negligence, but in the case of chauffeur you have that liability. But, when you ask the taxi-driver to go to a certain place, he is actually acting under your orders. I feel that the introduction of the word 'order' here is widening the liability of the Government under the law of torts. In the case of independent contractor, the liability arises only when you have some kind of control over his actions. If you say merely 'acting under the orders of Government' it will be widening the liability of Government beyond what it is in the law of torts. Unless you have control over his actions, this cannot be done.

SHRI K. NARAYANA RAO: Here the purport of the definition of independent contractor pertains only to certain areas and certain other areas have been excluded. If a particular person is working under the order of the State or under the control of an authority, he is not an independent contractor.

SHRI K. L. MISRA: You make it clear while fixing the liability; but orders will not be clear.

SHRI KRISHAN KANT: If the Government puts a clause in the agreement or in the contract, the Government is absolved of the liability.

SHRI K. NARAYANA RAO: The purport of the definition is not to say

who works under the order or under the control of somebody else. The idea is not to distinguish it. If a contractor works under the order or under the control of the Government he cannot be considered an independent contractor. It is more or less a negative definition excluding certain areas.

SHRI K. L. MISRA: In other words, who is not acting under the orders of Government is an independent contractor. That is your idea. Where have you put in the Government's responsibility for the acts of independent contractor?

SHRI KRISHAN KANT: 3(b).

MR. CHAIRMAN: Last two lines.

SHRI K. L. MISRA: "Committed by an independent contractor employed by the Government".

SHRI K. NARAYANA RAO: We have to see who are the people to act under the control of Government, whether they have been included and if so in what manner. As it is, only three classes of persons have been earmarked in the Bill. One is the civil servants, second, the agents and the third, independent contractors. The fourth category may not come under the above three classes; none the less they may work under the control of Government.

SHRI KRISHAN KANT: For example?

SHRI K. NARAYANA RAO: I cannot envisage it just now.

SHRI K. L. MISRA: Under this definition, a person acting under the orders of Government is not an independent contractor. Am I right?

SHRI K. NARAYANA RAO: Yes.

SHRI K. L. MISRA: Even in the case of an independent contractor when an order is given by the Government; then he walks out of the definition.

He ceases to be an independent contractor. Are you really intending that the moment the order is passed by Government a person ceases to be an independent contractor?

MR. CHAIRMAN: I am reading from Ratanlal's book.

"An independent contractor is one who undertakes to produce a given result without being in any way controlled as to the method by which he attains that result."

SHRI K. L. MISRA: I myself said that 'control' is the essential element. The moment you say that an order of the Government would make him able to say an independent contractor, this difficulty will arise. The important thing is control and not the order.

SHRI K. NARAYANA RAO: We have to include this class also.

SHRI K. L. MISRA: Then you will have to classify him somewhere.

SHRI K. NARAYANA RAO: There seems to be an anomaly here.

MR. CHAIRMAN: It is absolutely clear so long as the exemption is there.

SHRI YUNUS SALEEM: There is no ambiguity at all.

SHRI K. L. MISRA: No ambiguity at all. You are doing something which is not justified by the general law. You say that the moment there is an order of the Government, he is not an independent contractor. That is why I gave you the example of the taxi-driver. You have no control over the taxi driver. You ask him to go to a particular place but you have no control over his action at all. He will have to carry out your order. He is an independent contractor. But if you say that the person who is given orders is not an independent contractor, then the taxi driver is not

an independent contractor. The moment you say that he is not an independent contractor, you are extending the definition which is not justified by law. I am only saying that it is going a little beyond what is recognized in the law.

Now in clause 3 you have said in (b) that the Government shall be liable in respect of any tort committed by an independent contractor employed by the Government or any of his servants or workmen in doing the act contracted to be done for the Government in any of the following cases, that is to say, where the Government assumes control of the act contracted to be done by the independent contractor. Now I would like to know what exactly 'assuming control' means. May I point out my difficulties? There are various ways in which the Government controls. You may regulate the action of a person by a licence insisting that he should take a licence and be subject to rules, subject to certain things laid down in the licence itself. A licensee doing his independent business under a licence but controlled by the Government and by the conditions of the licence would come within this clause. In a court of law I will not be able to say 'control' means 'administrative control'.

MR. CHAIRMAN: 'assumes control'. In any way he should exercise control.

SHRI K. L. MISRA: There is control. Under the Industrial Development & Regulation Act a person has to take a licence and conform to certain conditions of the licence. Do you in any way suggest that it should be included?

SHRI K. NARAYANA RAO: That should be covered by the definition of 'control'.

SHRI K. L. MISRA: If 'control' is defined, there is no difficulty.

SHRI YUNUS SALEEM: I think the law is well settled on this point.

SHRI K. L. MISRA: No law defines 'control'.

SHRI H. N. MUKERJEE: The Law Commission's report recommends the use of the expression 'where the employer assumes control as to the manner of performing the work'.

SHRI K. L. MISRA: If that is put then there is no difficulty. If you say 'control' only, then you will be in difficulty. The sense of an 'independent contractor' is that though he is asked to do certain things for you, you are not able to control the manner by which he does it. The moment you control the manner you become liable. But if you merely say 'control' it is very difficult. The meaning of the word 'control' is neither settled by case law nor defined in anywhere for the purposes of this Act.

SHRI H. N. MUKERJEE: The Law Commission's expression seems to be more precise.

SHRI K. L. MISRA: That is the idea of an independent contractor. You do not have the control over the manner.

MR. CHAIRMAN: 'Assumes control' is there.

SHRI K. NARAYANA RAO: What other controls you anticipate?

SHRI K. L. MISRA: You control his production; you control the price.

SHRI K. NARAYANA RAO: This cannot be viewed in isolation. We have to read it along with the definition of an 'independent contractor'.

SHRI K. L. MISRA: Whatever it may be let us take the clear definition given in the Law of Torts. Supposing the definition of an independent contractor is a person over whose actions or the manner of doing you have no control, then in fixing the liability you said that even though there is an

independent contractor, the Government would be liable when it assumes control. Supposing you said that you assume control, that would mean control over the actions of the independent contractor.

SHRI K. NARAYANA RAO: First of all the Bill seeks to define what an independent contractor is. Then comes the second stage: in what circumstances the Government would be liable for certain acts of the independent contractor. Then comes the question of the independent contractor doing something under the control of the Government. There is a nexus there.

SHRI K. L. MISRA: That is when the Government assumes control of the act itself.

SHRI K. NARAYANA RAO: That way we are bringing the contractor into the picture. In doing so we have done it not by precise...

SHRI K. L. MISRA: In the last War there were orders issued called Control Orders.

SHRI K. NARAYANA RAO: That is we are mixing up.

SHRI K. L. MISRA: I am not trying to mix up. In a law court it can be mixed up.

MR. CHAIRMAN: There is something in what you are saying. The Law Commission said that it should say that the Government assumes control as to the manner of performance of the work.

SHRI K. NARAYANA RAO: Then it may become too restrictive.

SHRI K. L. MISRA: Why do you want to make it wider? If the idea is to make the liability of the Government wider than it is at present under the law of torts, I have no objection.

MR. CHAIRMAN: I do not think we want to widen their responsibility.

SHRI KRISHAN KANT: As Chairman has asked a pertinent question, the Ministry should tell us as to why they had removed the expression which the Law Commission has made. We would like to know from the Law Ministry.

MR. CHAIRMAN: Please see Appendix VI, page 58.

SHRI K. L. MISRA: I have seen this.

AN HON. MEMBER: Clarity should be there.

MR. CHAIRMAN: Otherwise he will become an independent contractor.

SHRI SALEEM: It is a point for discussion.

SHRI KRISHNA KANT: While drafting the Bill you removed it. We want to know the reasons why you removed it.

SHRI SALEEM: We will take note of its.

SHRI K. L. MISRA: I am only putting questions for discussion. It is for you to think about.

SHRI M. H. SAMUEL: Please see sub-clauses (i) and (ii).

SHRI K. L. MISRA: It is something different. That is, when you assume control of the act and the contractor has been asked to do it then clause (i) applies. (i) and (ii) are quite different.

SHRI SHRI CHAND GOYAL: He is given that right.

SHRI K. L. MISRA: In the beginning, when you were not here. I said that it might create confusion. It is not always justified to take the definition from other Acts.

SHRI SALEEM: You cannot ignore the provisions of the Contract Act.

SHRI K. L. MISRA: That is different. Taking it bodily will be entirely different. You have departed from it now. In the Objectes and Reasons you have yourself stated.

SHRI SALEEM: To some extent.

SHRI K. L. MISRA: That is right. What I am trying to do is to point out the difficulties that will arise in a court of law. I am not finding fault.

SHRI SALEEM: We will consider this point.

SHRI K. L. MISRA: It is only for your consideration. I intended it to be nothing more than that.

The other thing I was pointing out was that the word 'act' in 3(b)(i) and the same word 'act' in 3(b)(ii) have been used in two different senses. In the first clause you have said "...act contracted to be done". In the second it is an act "ratified or authorised".

SHRI SALEEM: Where is the difficulty?

SHRI K. L. MISRA: It is not very desirable to use two sorts of the same word in two different sections. That is all I am pointing out.

MR. CHAIRMAN: Have you got anything to say in regard to (a) (i)—"while acting in the course of his employment". Many Members think that there will be great difficulty.

SHRI K. L. MISRA: In fact, in (ii) you have both the requirements: must be done on behalf of the Government and should be ratified by the Government.

MR. CHAIRMAN: There is no alternative. Both have to be together, and ratified by the Government.

SHRI SHRI CHAND GOYAL: For "on behalf of the Government", where is the necessity of ratifying it, because

ratification involves lot of complications for the aggrieved party?

MR. CHAIRMAN: Unless ratified, no citizen goes to a court. I put this question to Mr. Setalvad. He at first agreed, but then he said he would let us know his views later.

SHRI K. L. MISRA: It is not necessary that it should be express ratification. But there is some difficulty. Take the case of a driver of a motor vehicle belonging to Government. He is going for repairs. Of course, repair is something necessary for the vehicle itself. But after the repair the driver is taking the vehicle to the garage or somewhere. You cannot always say that whatever route it takes is the route that was specified. Supposing he causes an accident. Will he be able to prove that this was an accident caused in the course of an act done on behalf of the Government? It is very difficult to prove it actually. In remote cases, it may be possible. As the law stands at present, in the case of an agent or an employee, acting in the course of employment is already there. It is only in a case where it does not cover it that the second one will come in.

MR. CHAIRMAN: In every case you have got to fulfil both the requirements.

SHRI K. L. MISRA: Under (a) (i) if it is in the course of employment, you do not need ratification. Under (ii) it is needed only when you are beyond the course of employment. When you are acting beyond the course of your employment, you have to give something specific before making the Government liable.

MR. CHAIRMAN: Supposing a citizen proves that, then why do you require it again?

SHRI SHRI CHAND GOYAL: Our difficulty is that we are feeling that the line between the course of employment and beyond the course of employment is rather thin and by the

inclusion of these words the aggrieved person is likely to suffer and is likely not to get his remedy because the Government is likely to take shelter under this that it has not ratified it. After the event has taken place and the Government knows that if it ratifies the whole liability will come on its own shoulder, our apprehension is the Government will not ratify. If we could omit these words, "is ratified by the Government". If the act is done on behalf of the Government then it is good enough. Why should ratification be a condition precedent for granting relief to a person who has suffered injury by a Government employee or agent?

SHRI K. L. MISRA: But you see ratification itself has been so well recognised wherever the Law of Torts is administered that the question of omitting should not arise. If instead of the word 'and' you put the word 'or' that would be better.

SHRI SHRI CHAND GOYAL: If we substitute 'and' by 'or' you are satisfied.

SHRI K. L. MISRA: I will not object to it.

Now in 3(b)(ii) instead of the words "alleged to constitute the tort" I was suggesting "constituting the tort". Alleged only refers to pleading claim of a party whereas 'constituting' is a fact.

Now in 3(b)(iii):

"where the act contracted to be done although lawful is of such a nature that unless reasonable care is taken, it is likely in the ordinary course of events to cause personal injury or damage to property in the doing thereof and such care has not been taken:"

Now I take you mean 'not taken' either by an independent contractor or by the Government. You include both.

SHRI M. YUNUS SALEEM: You may also consider the proviso.

SHRI K. L. MISRA: I am coming to the proviso. At present I was at clause (iii). Proviso works in the other direction.

SHRI SHRI CHAND GOYAL: Either by the Government or independent contractor should be read at the end of this clause 3(b)(iii).

SHRI K. L. MISRA: I will give an example. Take the case of a Taxi Driver. Supposing his brakes are not in order and he is driving the vehicle. Is it the duty of an independent contractor—the passenger who is travelling—to see before he gets in whether his brakes are in order; that there is no jamming of the wheels, that the tyres of the vehicles are good? Will you say he should also take care to see that? The proviso stands on a different footing. My feeling is this clause goes to one extreme and the proviso goes to the other extreme.

MR. CHAIRMAN: The extreme is nullified.

SHRI K. L. MISRA: It is better to have a middle course in both. In one place you are placing responsibility on the Government which is generally not done; in the other you take away all the responsibility.

SHRI PERI SASTRI: They go in the same direction but the Government has provided built-in safeguards for its sake. Here if we have to bring in common law of negligence everybody is expected—that is an assumption—to take a reasonable care to do certain things.

SHRI K. L. MISRA: Take the case of an independent contractor. Who is expected—the employer or an independent contractor?

SHRI PERI SASTRI: That depends on the situation. So far as this proviso goes it includes both these people.

SHRI MISRA: Do you say according to the Government Law an employer is liable in each case for care not taken by the independent contractor?

SHRI PERI SASTRI: I am not speaking in that way.

SHRI MISRA: That is what the clause is. Let us leave aside the proviso for the moment. Here, you are making Government liable for care which might not have been taken by the independent contractor.

SHRI K. NARAYANA RAO: What it means is this. Suppose a situation calls for a certain care under common law and that care has not been taken, no matter whether the responsibility for the care is on the contractor or on Government because much depends on the situation, Government is liable . . .

SHRI MISRA: Are you saying that that is the law of torts?

SHRI K. NARAYANA RAO: So far as this proviso is concerned . . .

SHRI MISRA: Let us leave aside the proviso for the moment. Do you mean to say that under common law Government or an employer is liable for care not taken by the independent contractor?

SHRI K. NARAYANA RAO: I am speaking about a situation which calls for care. There are situations where under common law a certain care is to be taken; if that care is not taken, then there will be a liability.

SHRI MISRA: There is no phrase 'common law' or even 'law' contained here.

SHRI SHRI CHAND GOYAL: There are two other safeguards. The care referred to is not ordinary care but reasonable care. Secondly in the ordinary course of events it should be such as to cause personal injury.

SHRI MISRA: The point is not about the standard of care. Who is to take

this reasonable care, the independent contractor or the Government?

SHRI SHRI CHAND GOYAL: The independent contractor.

SHRI K. L. MISRA: In the clause that is not so. If care is not taken, then it means that care is not taken by Government.

SHRI SHRI CHAND GOYAL: Whoever is responsible will be liable.

SHRI K. L. MISRA: Then you are placing a liability on Government much beyond what is placed on them by ordinary common law and the law of torts.

SHRI K. NARAYANA RAO: The proviso itself excludes.

SHRI K. L. MISRA: The proviso enables a rubber stamp to be put on everything. The proviso is not the answer to this. You should provide for the liability; then you can think of how to remove that liability. But if the liability itself is more than under the law of torts on Government, if you do not have the proviso, then what would happen? The proviso is confined to cases where there is express stipulation. There might be many things which are not done under express stipulation; many things may have been done not even in writing; the engineer may go on giving oral orders to the contractor to do this and that.

SHRI M. P. SHUKLA: If some such phrase 'by the contractor' is added, would it be all right?

SHRI K. L. MISRA: The clause as it stands includes both, the Government as well as the independent contractor. By making the Government responsible are you not putting a liability on Government much beyond what is permissible under the law of torts?

SHRI K. NARAYANA RAO: In the ordinary course of events the act should be such as to cause injury.

Coming to the question of responsibility, if Government has a responsibility, then the liability is already there. Our position is that even if the independent contractor has got to take care of it, if he fails to take that care, still we want to fasten responsibility on Government. So, it includes both. What is the difficulty in that? ..

SHRI K. L. MISRA: Because it is fundamentally wrong. Excuse me for using that expression. Independent contractor means a person on whose manner of doing you have no control. I shall give you an illustration. Suppose a taxi-driver has got brakes which are not functioning in his car, will the passenger become liable for the tort committed by him? Or is it the duty of the passenger to take ordinary care and set to the brakes? I am giving this illustration because it is a classic illustration used in the law of torts.

SHRI M. P. SHUKLA: Suppose we put the phrase 'care is taken by the person performing such act'.

SHRI K. L. MISRA: I am not really suggesting, I am only expressing my doubts because the thing has cropped up in my mind.

MR. CHAIRMAN: It depends on the special hazardous nature of the task. This is what Salmon says. Quoting some English judgment, he says that again in the case of extra-hazardous acts, that is, acts which in the very nature involve in the eye of law a special danger, an obligation is imposed upon the ultimate employer to take special precaution which they cannot delegate by having the work carried out by an independent contractor.

SHRI K. L. MISRA: This is not that. So, there is a difference between this and that. There are extreme cases of hazard, where such liability will arise, but that is not a case where reasonable care is necessary and it has not been taken.

MR. CHAIRMAN: Again, he says by their very nature, constitutes a special danger to others.

SHRI K. L. MISRA: If you put that, there is no difficulty. But you are saying that this will arise in every case which calls for reasonable care and where reasonable care has not been taken.

SHRI K. NARAYANA RAO: In the ordinary course of events. That is what it means.

SHRI K. L. MISRA: Ordinary course of events means nothing. A loose brake in the ordinary course of events will cause injury. Nobody has ever said in the law of torts that a passenger would become responsible if the brake is loose and it results in an accident.

SHRI K. NARAYANA RAO: Why do you bring in the passenger here?

SHRI K. L. MISRA: I am bringing in the passenger, because in respect of the taxi-driver his position is that of an employer. Suppose there is a loose brake then the taxi-driver is liable and not the passenger.

When you are putting in the phrase 'extreme hazard' I would just like to mention a word of caution. Sometimes, in these matters, a very old case is taken and on the basis of that five or six sentences are put in. It is always better to see the law as it is administered now and not be guided by some remote authorities which will not be good authorities.

MR. CHAIRMAN: I agree that it must be 20th century authority I would refer to a case in 1934 which has been referred to in the Quarterly Review by Pollock. There instances have been given which will make the ultimate employer liable. In cases involving extreme hazard they have done it. I shall read out one more sentence from that judgment.

"He has not merely a duty to take care but he has got a duty to provide that care is taken..."

SHRI K. L. MISRA: If you put in that phrase I have no objection. But as it is, it applies to every case.

MR. CHAIRMAN: There is also another case in 1942.

SHRI K. L. MISRA: Please consider this. My own view is that you are putting a much larger or heavier responsibility than is justified. As the clause stands now it applies to every case, because every job requires some reasonable care to be taken. The liability in such a case would be entirely different from that in a case where the job involves extreme hazard. If you make the clause so wide as it is, then naturally the proviso must be also there. Then, the exemption would come the other way also and practically the whole thing will be wiped out. The difficulty is not so much about the sub-clauses. If reasonable care has been fastened upon the contractor, generally speaking, government should not be liable. The difficulty is about the manner of putting certain expressions in the proviso. The moment you put in 'express stipulation', there is a possibility of degenerating into a rubber stamp. Otherwise, the criteria laid down are perfectly all right.

SHRI KRISHNA KANT: But we know it is going to be a rubber stamp.

SHRI K. L. MISRA: It is a tendency. The only care that has to be taken is that it does not become a rubber stamp. Otherwise, the conditions are all right and are well recognised. I will give my suggestion in writing about it, but I want you to think about it.

SHRI KRISHNA KANT: It is going to become a permanent part of every contract.

SHRI SHRI CHAND GOYAL: This is incorporated in every agreement that government will be entering into with contractors.

SHRI K. L. MISRA: What can be done is: print a form of contract with this condition.

SHRI KRISHNA KANT: Also they want that it should have retrospective effect.

SHRI K. L. MISRA: That is a different matter.

MR. CHAIRMAN: There is something in what you say. The Law Commission in p. 59 of their report are also thinking in that line. You may also consider that before you send us your final note.

SHRI K. L. MISRA: Take, for instance, (iv)—'where the Government is under a legal obligation to do the act itself'.

SHRI SRINIBAS MISRA: What is the justification for using the word 'although lawful' after the word 'where the contract to be done'? It presupposes, as it were, that government can enter into a contract for doing an unlawful act.

SHRI K. L. MISRA: Suppose government gives a contract for making a building on a site which is against the municipal laws.

SHRI SRINIBAS MISRA: Then it will not be a contract.

SHRI K. L. MISRA: Not necessarily. Every contract in violation of law is not void. Government gives a contract for building a building at a site without looking at the municipal law, which violates the municipal law. It will not be lawful, but it will not be void.

I was going to point out three instances where you have used the words law or legal obligation. First is in line 25 p. 3. The second is in cl. 4 on p. 3 'attaching by law'; the third is in cl. 6 'under any law'. By these, do you mean statute law or other laws, because you have not defined 'law'.

SHRI PERI-SASTRI: Law as a whole, under any law which is in force.

SHRI K. L. MISRA: 'In force' means administered by the courts. Do you really mean that.

SHRI PERI-SASTRI: Yes.

SHRI K. L. MISRA: Be sure about it because you may find in some clauses that the obligations are slightly wider than envisaged if it means any law.

SHRI KRISHNA KANT: What Difficulties do you apprehend?

SHRI K. L. MISRA: I only wanted that you should be sure about it.

SHRI PERI-SASTRI: In the proviso there reference to 'rule of law'.

SHRI K. L. MISRA: 'Rule of law' might reduce it to statute law.

SHRI NARAYANA RAO: Not necessarily.

SHRI K. L. MISRA: I am not saying that.

SHRI NARAYANA RAO: Rules of law is a wider concept.

SHRI K. L. MISRA: In England and in books of jurisprudence. I do not think we use it in that sense here.

SHRI SHRI CHAND GOYAL: The words 'for the time being in force' indicate that the reference is to statutory law.

SHRI K. L. MISRA: I will make myself clearer. Take for instance the first example where government is under legal obligation to do the act itself. Even a contractual obligation is a legal obligation. I only point out the amplitude of the expression. If that is the intention, I have no objection.

SHRI PERI-SASTRI: The concluding words are 'in the same manner and to the same extent as a private person of full age and capacity. We are importing the general law of torts as applicable to private employers and making it applicable to the same extent.

SHRI K. L. MISRA: I was on (iv), line 25, p. 3, 'Legal obligation' would mean contractual obligation also.

SHRI K. NARAYANA RAO: How can you equate contractual obligation with legal obligation?

SHRI K. L. MISRA: Though not flowing from the law, this is legal obligation.

SHRI K. NARAYANA RAO: An obligation flowing from a contract cannot be equated with a legal obligation.

SHRI K. L. MISRA: The contract becomes enforceable from the Contract Act. I do not think legal obligation would exclude contractual obligation.

SHRI SHRI CHAND GOYAL: It would not; it seems it will be covered.

SHRI K. L. MISRA: I am sorry I treated this Bill just as any other Government Bill, and I went through it last night in the train. I should have given it a little more time. Now, the word "control" in clause 4, is objectionable. I have the same objection to it, which I have mentioned before. Would a person, a Government official, who has been authorised to inspect and to see that certain things are observed by the independent contractor, come within the word "control"? I am putting the question to you.

SHRI K. NARAYANA RAO: It has nothing to do with an independent contractor.

SHRI K. L. MISRA: What I want to say is that the meaning of the word "control" should be made clear, wherever it is used.

SHRI K. NARAYANA RAO: Public purpose.

SHRI K. L. MISRA: Please do not put in "control" in the same sense as public interest or public purpose. Public purpose and control are not the same.

SHRI K. NARAYANA RAO: "Control" has a very specific meaning here.

SHRI K. L. MISRA: There might be difficulty. Kindly think over it. The word "control" might lead to confusion.

MR. CHAIRMAN: It has been copied from the Crown Proceedings Act.

SHRI K. L. MISRA: In England, you have a body of common law, known, understood and administered

by the courts, and every Act is interpreted in accordance with it. We have not got that advantage here, and therefore, merely bodily copying it and taking it from there without that background is not always helpful.

SHRI M. YUNUS SALEEM: You cannot think of legislation on the law of torts without knowing what has happened elsewhere. We have to borrow many ideas from other countries also.

SHRI K. L. MISRA: That is right. I am not against any foreign ideas. I told you that this arises from the Law Commission's report and the Crown Proceedings Act. They have led to this draft.

Then, in clause 5 also you have used the word "control". The sentence reads: "...in the possession of the Government or over which the Government exercises control in the same manner and to the same extent" and so on. The manner relates to liability; it does not relate to control.

SHRI KRISHNA KANT: It is "exercises control". A suggestion was made that it could be "having control."

SHRI K. L. MISRA: Anyway, the word "control" itself is doubtful here.

SHRI SHRI CHAND GOYAL: Kindly send your amendment.

SHRI K. L. MISRA: Yes. I will send my amendment. Then, in clause 6, the word "law" creates the same difficulty. In clause 10 (1)(b), "the Government certifies that his suffering that thing has been or will be treated as attributable to service for the purposes of entitlement to any award under any law or scheme relating to the death or disablement of members of the force of which he is a member."

This presupposes that there must be a law under which, or a scheme under which this certificate can be given. In the British law, it is pension. I think you have put that idea in a slightly different form here.

SHRI SHRI CHAND GOYAL: I do not follow your point.

SHRI K. L. MISRA: Clause 10 reads as follows:

“Any act done by a member of the armed forces of the Union while on duty as such or by a member of a police force while on duty as such shall not subject either him or the Government to liability in tort for causing the death of another person or for causing personal injury to another person, in so far as the death or personal injury is due to anything suffered by that other person while he is a member of the armed forces of the Union, or, as the case may be, a member of the police force if . . .

“the Government certifies that his suffering—that is, the person who is injured—

“that thing has been or will be attributable to service for the purposes of entitlement to any award under any law or scheme relating to the death or disablement of members of the force of which he is a member.”

What I am saying is, there may be cases where a person may be entitled to an award for suffering injury and he will be entitled to some kind of award for suffering an injury under a law or under a scheme; then, will the certificate of Government mean for the purposes of awarding to him or, will it be for the purpose of fixing the liability of Government? I just want to know it. It is not that I am raising any objection. Every scheme or law presupposes that there will be a certification or recognition that the person injured is entitled to an award. The scheme itself would require that. Are you envisaging that a certificate is covered by that scheme, or, a certificate is given for the purpose of clause 10 for giving immunity to the Government?

MR. CHAIRMAN: I thought that was taken from the British law.

SHRI K. L. MISRA: In the British law, it would be considered for the purposes of pension; there, the position is slightly different. There is no objection to substituting this. I want to know whether a certificate has to be given for the purposes of clause 10 or it has to be given for the purposes of the award.

SHRI PERI SASTRI: For the purpose of clause 10.

SHRI K. L. MISRA: I only wanted to know.

Clause 11. So far as “act of State” is concerned, we know it fairly well. There cannot be an act of State against a citizen. Are you putting this immunity only for the purpose of an alien?

SHRI PERI SASTRI: Yes; that is the intention.

MR. CHAIRMAN: The Law Commission has also said the same thing in page 48.

SHRI H. N. MUKERJEE: Could it not be included in the definition clause?

MR. CHAIRMAN: I think that would be better.

SHRI K. L. MISRA: Yes, because it will be administered by all kinds of courts—munsiffs, subordinate judges etc.—who may not know the technical meaning of “act of State”.

SHRI KRISHNA KANT: On page 5 of this brochure of the Lok Sabha Secretariat, it is said that annexure of territory is an act of State and Government cannot be sued for that. What about ceding of territory in Berubari and Kutch?

MR. CHAIRMAN: On the 11th, the Supreme Court is sitting to decide the Kutch case. It will not be proper

for me to say anything about that now.

I think it would be better if it is included in the definition clause.

We are very unhappy over sub-clause (i). Will you please go through it?

SHRI K. L. MISRA: The wording here is for the prevention or suppression of a breach of the peace, or a disturbance of the public tranquility. It could have two significance. The court will go into only whether the act done, or purported to be done was for the prevention or suppression of a breach of the peace. Or, will the court be authorised to go into the question whether the act was really needed?

SHRI K. NARAYANA RAO: I do not think it could. It is left to the government servant, depending on the situation, to take the decision.

SHRI K. L. MISRA: The act can be purely based on subjective satisfaction when the court cannot enquire into it at all. Or, the *bona fides* of the act will be judged by the court of law; provided it is *bona fide* the court will not go into the question whether it was really needed. The third category is where the court may enquire whether there was necessity for such action for the purpose of prevention or suppression of a breach of the peace. Now, a police officer is not functioning in the claim atmosphere of a court room. So, when he is faced with a situation he cannot have the judgment which he could have in a court of law and the court of law will say that it was not needed. Therefore, if the act is done *bona fide*, he should be protected.

SHRI KRISHNA KANT: Even the Law Commission Report never suggested this provision to be put into it. The Ministry just put it. This is a provision which limits the right of a citizen. It is a blanket provision.

SHRI K. L. MISRA: It should not be left to the court of law to decide whether it was really needed. Provided his act is *bona fide*, he should be protected.

SHRI H. N. MUKERJEE: I want Shri Misra to tell us what could be the reasons for the departure from the Law Commission's recommendations where no exemption is suggested, in so far as action by police force or similar governmental agencies are concerned. There is a very detailed list where there is no reference to the police force. What is the conceivable justification for putting it in? I take it that a citizen would try to go to the court alleging tortious act by a policeman or somebody like that only in some very special circumstances and those circumstances would naturally be gone into by the Court. So, why give an *ambibus* exemption to the police force, worded in a fashion which is extremely dangerous, as far as our understanding is concerned?

SHRI K. L. MISRA: You ask me a question which has more of imagination than of reason. In reply to your question "why did they do it?" I can only say that they were probably more in contact with the situation in the country than the Law Commission.

SHRI H. N. MUKERJEE: What would be the justification for it? You are an eminent lawyer as well as an eminent citizen. Because you have come here to assist us, we want to know from you what could be the ostensible justification for extending the area of exemption in regard to a category of government servants who did not find included in the Law Commission's recommendations, a Law Commission which was composed of extremely sedate and respectable citizens?

SHRI K. L. MISRA: Law is dictated by the needs of society. Law depends on what you think is needed or, not needed. They must have felt the need of putting it in.

SHRI SHRI CHAND GOYAL: The act of a member of the armed forces is not likely to come into conflict with the right of a citizen. So, where is the necessity for exempting it?

SHRI K. L. MISRA: Sometimes the army is called to assist in an extraordinary situation.

SHRI SHRI CHAND GOYAL: So far as the police force is concerned, since it is discharging multifarious duties, it is quite likely that some of its acts may come into conflict with the rights of the citizens. But if this provision is included here, it will give a long rope to the government.

SHRI K. L. MISRA: Regarding the armed forces, the term here is "while on active service". It does not mean any act of a member of the armed forces will be completely immune. 'Active service' means while fighting. There is no other active service for an army man.

MR. CHAIRMAN: Kindly give us any suggestion on (1).

SHRI KRISHAN KANT: Whether it should not be deleted.

MR. CHAIRMAN: If it is not to be deleted, what should be done.

SHRI K. L. MISRA: After all, we must all acknowledge that law and order in society is the first essential for everything unless you are out for a revolution. There is no doubt that law and order problem is spreading everywhere. I am not merely speaking of political side. The other day, it was reported in the papers that because a teacher had beaten a boy, the members of the family and the neighbours all came and dragged the teacher out and beat him outside. Things of that kind are happening.

I know of an incident which happened in Bihar—it has not been reported in the papers—where a group

3035 L.S.—7.

of 8 or 10 persons, on a wayside station, went to the ladies compartment and pulled out every young lady from the compartment and they were all maltreated and after two hours they were left free. Things of that kind are happening in the country. Therefore, we have to face the situation and deal with it. We have to take care to see that this does not give power to Government to suppress legitimate things. I do not think you can completely take it out. If I can suggest any modification, I will do so. But to delete it completely will not be the right thing.

SHRI RAM SEWAK YADAV: You have said that the situation is getting out of control and you have given a few instances. Do you think the police and other authorities do not possess sufficient power to curb that?

SHRI K. L. MISRA: They possess the power. It is not the power that is being increased but the immunity when the power has been exercised.

SHRI RAM SEWAK YADAV: Suppose they exceed the powers. What should be done?

SHRI K. L. MISRA: Now, today I read in the papers that there was a very mild incident somewhere and immediately, there was a demand for a judiciary inquiry. Even when *prima facie* a person has broken the law and has been suppressed by the police, there is an automatic demand for a judicial inquiry. I am quite sure that in many cases it is not justified.

SHRI KRISHAN KANT: Don't you think that even in justified cases this clause will be utilised?

SHRI K. L. MISRA: When you make a law, you have to take care that it does not injure the innocent persons and that it punish the guilty. I am not in favour of deleting it.

SHRI SHRI CHAND GOYAL: One school of thought is that after the passing of this Bill, a person like

Mr. Ralia Ram who failed to get relief in your own State will be in a position to get relief under this Act. It is, in fact, at the instance of the Supreme Court that this legislation is being brought forth. If after the passing of this Bill, a citizen again fails to get relief, we will be failing in our duty. So, we want to know your opinion whether a person like him will be able to get relief after the passing of this Act.

SHRI K. L. MISRA: I am of the view that the protection given should not be more than what is given in England.

SHRI SHRI CHAND GOYAL: In England, the theory is that the king can do no wrong. That theory is not applicable here.

SHRI K. L. MISRA: That theory is completely finished after 1947. Now, in England, it is squarely on the basis of statute. It is now a statutory liability. I am only saying that this kind of protection should not be more than what is given in other countries where tort is being administered, say, in USA and in England.

MR. CHAIRMAN: You remember Mr. Ralia Ram's case. Justice Gajendragadkar took the view that the Chief Justice Sinha was wrong and that he went too far. He not only asked Parliament to consider it seriously but he went too far to say that no sovereign rights can be taken. He thought the police officer taking away stolen gold was also a sovereign act. I think, that judgment is gone after this Act comes into force.

SHRI K. L. MISRA: I have only said that some kind of protection is needed but it should not extend beyond what is given in other countries. The exact form I will suggest later on. This should not become a kind of licence to the police to do whatever they like.

SHRI SHRI CHAND GOYAL: When this Act comes into force, would a person like Mr. Ralia Ram get relief?

SHRI K. L. MISRA: Even in ordinary law, what relief a person gets depends very much upon the judge who is trying the case.

SHRI KRISHAN KANT: Supposing that is a lacuna in our law, do you think that has been sealed by this Act?

SHRI K. L. MISRA: I think, I will give you a note on that.

SHRI SHRI CHAND GOYAL: Mr. Seervai has expressed an apprehension that, to a certain extent, this Bill goes beyond the scope of article 300 of the Constitution. He has expressed an opinion that it is likely to be struck down as being *ultra vires* the Constitution because we cannot go beyond the liability which extended to the Secretary of State. What is your view?

SHRI K. L. MISRA: It says:

"...subject to any provisions which may be made by Act of Parliament or of the Legislature...."

If it says that liability will be the same as it was before—in fact, in the case law, it has taken back to the time of the East India Company—and that article 300 is intended to mean that whatever was the position before has to remain without modification, then the law will be *ultra vires* the Constitution. Article 300 gives specific authority for a variation of that position by a competent legislature.

MR. CHAIRMAN: That apprehension is not justified?

SHRI K. L. MISRA: That is not justified. Mr. Seervai has said two things. One is that this might go beyond article 300. To that extent, he is right. But when he says that it is *ultra vires*, he is wrong.

Then, clause (n) is all right provided 'authorised' does not mean 'impliedly authorised'.

With regard to clause (o), I am not raising any objection, but I just want to know this because I have not yet studied the law on the question. As far as malicious prosecution and malicious arrest are concerned, it is obvious that when a public servant is malicious and does anything, the Government should not be liable because it is purely personal malice, but, for defamation, malice is not necessary. So, I just want to know whether defamation has the same protection in other countries.

MR. CHAIRMAN: May I refer you to page 42 of the Law Commission's recommendations, where it is said:

"any claim arising out of defamation, malicious prosecution and malicious arrest....".

This has been repeated from there.

SHRI K. L. MISRA: Yes; it has been taken from there. I wanted to look into it. I myself will look into it about defamation.

SHRI H. N. MUKERJEE: I was trying to draw your attention to clause 11(e) where exemption is given in respect of any act done under a proclamation issued under the Constitution. The proclamation of Emergency, for instance, led to the suspension of certain Fundamental Rights, and on that occasion many things took place against which many eminent lawyers protested and they pointed out that, after the revocation of the Emergency, the cause of action would arise in the case of people who had been deprived of the applicability of the Fundamental Rights. Can you give us your idea on Clause 11(e) here?

SHRI K. L. MISRA: Usually when there is an Emergency, many acts are done which would not be justified in the ordinary times. As the Supreme Court itself has held, after the Emergency has ceased, still the cause of action remains and is revived. There was only suspension. For instance, if a Fundamental Right has been suspended, the moment the

Fundamental Right comes up again, you can sue or you can obtain your remedy in respect of violations done during the period of Emergency. In most countries, in most situations, there is an Act of Indemnity passed afterwards....

SHRI H. N. MUKERJEE: Instead of an Act of Indemnity which would have to go through the entire Parliamentary process, instead of going by the back-door and putting in this kind of thing....

SHRI K. L. MISRA: It is not back-door because this will also be passed by Parliament.

SHRI H. N. MUKERJEE: You read this clause very carefully. After all, this is a matter of principle which goes to the root of legislation.

SHRI K. L. MISRA: What would be the meaning of "under a Proclamation"? Does it mean anything which was done under the protection of the Proclamation or does it mean acts authorised by the Proclamation? Unfortunately, I read this Bill only yesterday and I could not have much time. I want to know what is the meaning of "under a Proclamation".

SHRI H. N. MUKERJEE: The Deputy Law Minister can tell us about this.

SHRI K. L. MISRA: For instance, a person violates my Fundamental Rights during Emergency; he is able to violate them during Emergency because the Fundamental Rights are suspended. Will that act of violating Article 19 be considered to be an act under the Proclamation? If that is your intention, then the language should be widened. So, I would first like to know your intention here.

SHRI K. NARAYANA RAO: The point raised by Mr. Mukerjee is a vital one. Now they have left it open to the public. Of course, it is only an *obiter dictum* which the Court has

expressed; the Court has yet to decide on that point . . .

SHRI K. L. MISRA: I see your point. The question whether the Fundamental Rights suspended under an Emergency will revive again or not is itself a matter on which there has been no direct authority; I agree. But here the question is a little different. The question here is this. Is it the intention, by this clause, to cover whatever has been the consequences of the Proclamation? If that is so, then the question before the court of law will be whether Parliament is competent to condone violations of Fundamental Rights except to the extent permitted by the Constitution. The Constitution permits this only to the extent that the Fundamental Rights will be suspended as long as the Emergency is in force; the Fundamental Rights are there for the rest of the time. If your intention is to condone all indirect acts of violation, then the question before the Court would be whether the Parliament would be competent to condone all those acts. So, I would like to know first whether you intend, by this language, to cover all indirect acts or you intend merely to protect the acts done directly under the Proclamation.

SHRI M. YUNUS SALEEM: I see that there is some vagueness in clause 11(e). You have rightly pointed this out. This will receive our serious consideration.

SHRI K. L. MISRA: The vagueness should be removed. First, the language should be made clear, whether you intend condoning indirect acts. Suppose, the idea is to condone every kind of act which has been made possible by the Proclamation. There is the other question also, whether Parliament would be competent to do it; please consider that also.

SHRI SRINIBAS MISHRA: Please see clause 1 of the Bill. They say: "It extends...except Jammu and Kash-

mir State, Jammu and Kashmir State has got an emporium in Delhi. Its employee commits tort. Will Govt. be liable under the Bill?

SHRI K. L. MISRA: This is only territorial jurisdiction. It is not left to the State but only to the territory.

MR. CHAIRMAN: They will be liable.

SHRI SRINIBAS MISHRA: Central Govt. employee commits tort in the territory of Jammu and Kashmir. Will they be liable?

SHRI K. L. MISRA: You have a clause somewhere in the Bill that no liability is there for act done outside Indian territory. The intention is not to exempt at all. The intention is territorial jurisdiction of the court. The question is can you sue the person outside Jammu and Kashmir? If you can sue there will be no difficulty at all for fixing liability upon him merely because the act is done in Jammu and Kashmir. If there is such territorial jurisdiction therefore you cannot go to any court except the court in Jammu and Kashmir.

SHRI SRINIBAS MISHRA: It is done inside Jammu and Kashmir State.

SHRI K. L. MISRA: You are talking of the servant of the Government of India within the territory of the Jammu & Kashmir State.

SHRI K. NARAYANA RAO: It does not constitute a tort at all.

SHRI K. L. MISRA: You can bring a part of the cause of action in the Indian territory so that an Indian court goes into it the liability will be there.

SHRI K. NARAYANA RAO: There is no cause of action at all. For this purpose it is excluded from Jammu and Kashmir and the act which would otherwise be tort under this bill would also not be tort at all there.

SHRI K. L. MISRA: It does not exempt any citizen or anybody. Only certain preferences, this thing being administered by courts in Kashmir That is all.

SHRI K. NARAYANA RAO: This particular bill would not be there at all. Whatever is tort is not tort there. They merely get out of this, unless we make special provision in this regard.

MR. CHAIRMAN: No Central Govt. employee commits exactly that kind of thing which is done in Ralia Ram's case. He says, it cannot be done. You have the difficulty about it.

SHRI SRINIBAS MISHRA: Will it be discrimination against the people?

SHRI K. L. MISRA: It is such a customary discrimination. You have stated in innumerable acts 'excepting Jammu and Kashmir'. You have said in the constitution itself.

SHRI SRINIBAS MISHRA: The Law Commission recommended certain definition of independent contractor. He is a person who is contracted to do work for the State without being controlled by the State as to the manner of execution of the work. In the Bill there is also another definition. Which one would you prefer?

SHRI K. L. MISRA: I have already said about it.

SHRI SRINIBAS MISHRA: Please also see about ratification in respect of cl. 3(a)(ii). If ratification is not known to the litigant how can he serve notice?

SHRI K. L. MISRA: He has to serve the notice. In reply he will be told, it will be ratified. He can go to a court of law.

SHRI SRINIBAS MISHRA: Please come to cl. 11. Certain exceptions are given. It is said, nothing will render Govt. liable in respect of such and such things...

SHRI K. L. MISRA: This is act which is limited to the Government's liability for employees, for agents who are independent contractors. Really it does not deal with the entire field. It is limited to that. That liability is already defined in clause 3. Now, that liability which is defined in clause 3 shall not be there if the matter comes under clause 11.

SHRI SRINIBAS MISHRA: Will it mean Govt. will be liable under existing law in other matters.

SHRI K. L. MISRA: Yes. Govt. will be liable if the law is there.

SHRI SRINIBAS MISHRA: Regarding clause 11(i) person who is engaged, there is some doubt regarding the construction.

SHRI K. L. MISRA: It is connected with act.

SHRI SRINIBAS MISHRA: Is there no possibility of any doubt?

SHRI K. L. MISRA: It is 'act' done by so and so for prevention or suppression of a breach of the peace. That is condition precedent to action. It is said he must be engaged in that way and if the act is done for the prevention or suppression of a breach of the peace. Both are necessary.

SHRI SRINIBAS MISHRA: You think there is no possibility of confusion.

SHRI K. L. MISRA: I don't think so.

SHRI SRINIBAS MISHRA: In Clause 11(m) it is said 'Any act in respect of which a remedy is provided under the Indian Railways Act'. Government is not liable.

SHRI K. L. MISRA: If the Act is there, certainly. If the Act frees the Govt. from liability there is no difficulty. I should have thought that when this immunity was being described in Cl. 11, they should have put in some clause and when the Govern-

ment is immune under any other act they should have put in that act to make it more comprehensive.

SHRI SRINIBAS MISHRA: Can you imagine instances where this sub-clause will not come in the way of citizens?

SHRI K. L. MISRA: If an Act of the legislature can be altered by Parliament any time and it likes to confer immunity upon the Government, there is no reason why it should not be given. Once it is an Act, you have to respect it.

SHRI SRINIBAS MISHRA: This means 'any remedy provided under any enactment'. Supposing for doing some of these tortious acts, one remedy is provided in an enactment. Will that be sufficient to uphold that action?

SHRI K. L. MISRA: Not morally, but legally it will be.

SHRI K. NARAYANA RAO: Does it not call for reconsideration? Take the Railways Act or the Police Regulations. Sometimes the compensation given is so inadequate.

SHRI K. L. MISRA: Under the British law, when assessing damages for torts, they will take into consideration whether the person has got something under any other enactment so that he does not get any exorbitant amount. That is what they do in England. I would suggest reconsideration of two matters. One is, if possible, make the law in line with the British law in the matter of assessing damages. Secondly, you might consider the advisability of putting a residuary clause here—not that it is absolutely necessary—indicating whether the Government has been exempted from liability under any other Act so that this becomes complete.

SHRI SRINIBAS MISHRA: Look at the word 'remedy' here. It is only civil remedy.

SHRI K. L. MISRA: I am suggesting alteration of that.

SHRI SRINIBAS MISHRA: Thank you. Now see sub-clause (n) on page 8. Supposing while acting under the Port Trusts Act, the employees of the Government commit certain tortious acts. Will they be liable or exempted?

SHRI K. L. MISRA: If they are authorised to do something by that Act, they will not be liable.

SHRI SRINIBAS MISHRA: Will not that be too much against citizens?

SHRI K. L. MISRA: In the United States when there is a case in a court of law, they speak of *People vs. X*. It should really be a question of collective rights of the people; on the one side and citizens on the other. Unfortunately we do not have that feeling here. But ultimately we are moving towards that stage where Government will be the people.

SHRI SRINIBAS MISHRA: Don't you subscribe to the view that when the people in general benefit as a result of some loss suffered by a few, they should pay for that?

SHRI K. L. MISRA: Yes, but to what extent? Take the zamindari abolition. People should undoubtedly pay. But if they are paid on the scale that is laid down under the Land Acquisition Act, that will be real justice. But if that is done, your monetary system will crash. So, there are so many considerations when it is a question of payment made by the people.

SHRI SRINIBAS MISHRA: I feel that (n) is too wide. Even if the whole factory would have broken down, they have no protection.

SHRI K. L. MISRA: But 'authorised' should not mean impliedly.

MR. CHAIRMAN: Thank you very much. We have subjected you to our examination for nearly three hours. Good-bye.

SHRI K. L. MISRA: Thank you.

(The witness then withdrew)

(The Committee then adjourned)

MINUTES OF THE EVIDENCE GIVEN BEFORE THE JOINT COMMITTEE
ON THE GOVERNMENT (LIABILITY IN TORT) BILL, 1967.

Saturday, 26th October, 1968 at 10.00 hrs. .

PRESENT

Shri N. C. Chatterjee—in the Chair (Upto 12.40 hrs.)

Shri Shri Chand Goyal—in the Chair (from 16.00 onwards).

MEMBERS

Lok Sabha

3. Shri Anirudha Dipa
4. Shri R. M. Hajarnavis
5. Shri Brij Bhushan Lal
6. Shri Baij Nath Kureel
7. Shri Srinibas Mishra
8. Shri H. N. Mukerjee
9. Shri Amrit Nahata
10. Shri K. Narayana Rao
11. Shri Mohammad Yunus Saleem
12. Shri A. T. Sarma
13. Shri M. R. Sharma
14. Shri Biswanarayan Shastri
15. Shri T. M. Sheth
16. Shri Mudrika Sinha
17. Shri G. Viswanathan
18. Shri Ram Sewak Yadav

Rajya Sabha

19. Shri Rama Bahadur Sinha
20. Shri Gulam Haider Valimohmed Momin
21. Shri Krishan Kant
22. Shri M. P. Shukla
23. Shri Hira Vallabha Tripathi
24. Shri B. T. Kemparaj
25. Shri Chakrapani Shukla
26. Shri N. K. Shejwalkar
27. Shri Balkrisna Gupta
28. Shri C. Achutha Menon
29. Shri G. P. Somasundaram
30. Shri M. H. Samuel
31. Shri Dahyabhai V. Patel

LEGISLATIVE COUNSELS

1. Shri R. V. S. Peri-Sastri, *Addl. Legislative Counsel, Legislative Deptt., Ministry of Law.*
2. Shri Subba Rao, *Attache, Legislative Deptt., Ministry of Law.*

SECRETARIAT

Shri M. C. Chawla—*Deputy Secretary.*

WITNESSES EXAMINED

- I. Shri Parshottam Trikamdas, *Senior Advocate, Supreme Court of India.*
- II. Shri C. K. Daphtary, *Attorney General of India.*
- III. Shri M. C. Setalvad, *M. P.*

(The witness was called in and he took his seat)

MR. CHAIRMAN: I have to bring to your notice Direction 58 of the Speaker. It says:

"Where witnesses appear before a Committee to give evidence, the Chairman shall make it clear to the witnesses that their evidence shall be treated as public and is liable to be published, unless they specifically desire that all or any part of the evidence tendered by them is to be treated as confidential. It shall, however, be explained to the witnesses that even though they might desire their evidence to be treated as confidential such evidence is liable to be made available to the members of Parliament."

MR. CHAIRMAN: Mr. Trikamdas, you are a counsel of great experience and standing and you have been good enough to go through this Bill. We shall be very much obliged if you could give us your views by making some preliminary observations so that we can ask questions later.

SHRI TRIKAMDAS: I have not got much to say on the Bill as framed, excepting a few observations. I wish the Bill had been made simpler like the Crown Proceedings Act of 1947 in England. There are so many elaborations here and it will entail a lot of work for the lawyers and the courts in interpreting many of the sections incorporated here.

If I might make a few observations on the clauses, I may mention first that in Vidyavati's case, the Supreme Court did consider the liability of the State in torts and held that the State was as much liable as an individual, and the law has been elaborately laid down in that case. It may be that it may be worth-while to leave it at that, with one exception to which I shall come presently.

I believe the Supreme Court in its judgment has at one place used the words 'act done in its sovereign capacity' on which I shall have a great deal to say a little later.

I would invite your attention to clause 3 (ii). In this connection I would also like to draw your attention to something which is to be found in numerous Acts, namely 'act purporting to be done' under the authority of law; although the law does not permit it, the man acts thinking that it is covered by the law. If that case is not covered, then I suggest that some provision has to be made. I believe that case does not seem to be covered.

MR. CHAIRMAN: Some of us are very unhappy over this sub-clause, because the ratification is practically made compulsory in all cases; after the tortious act is committed, it is very difficult to expect Government to do it. Therefore, some of us were thinking whether the phrase should be 'and is ratified' or 'or is ratified'.

SHRI TRIKAMDAS: Or you can say 'or purporting to be done', or 'or purported to be done'. The sub-clause would then read:

While acting beyond the course of his employment if the act constituting the tort was done by the employee or agent or purported to be done in his official capacity on behalf of the Government

I do not know about the phrase 'is ratified'.

SHRI KRISHNA KANT: If we put the phrase 'act purported to be done in his official capacity' then the phrase 'on behalf of the Government' is not required.

SHRI TRIKAMDAS: Yes, that is right. Then 'on behalf of the Government' is not required.

As it stands, it is absolutely essential in every case 'in his official capacity'. It is a condition precedent, that the act must be on the basis of an Act. When the man does the act, he does so as a public officer or as a public servant. So, he does the act in his official capacity.

SHRI KRISHNA KANT: As the chairman has suggested, the question is whether the phrase should be 'and' or 'or' before the words 'is ratified'.

SHRI TRIKAMDAS: It should be 'or' if you want ratification to be there. Otherwise, it would mean two conditions.

SHRI SHRI CHAND GOYAL: After saying '... if the act constituting the tort was done by the employee or agent or purported to be done by him in his official capacity', we may leave it at that.

SHRI TRIKAMDAS: Then ratification is not required.

Then, you have got to examine the act itself and find out whether it was done by him in his official capacity or

was done or purported to be done while acting beyond the course of his employment; the former will be covered by clause 3(a) (i) while the latter would be covered by clause 3(a) (ii).

SHRI SAMUEL: If you put 'and/or'.

SHRI TRIKAMDAS: You may drop it altogether.

SHRI SAMUEL: Why not have 'and/or'?

SHRI TRIKAMDAS: Some lawyers like that kind of drafting.

I have never liked that kind of drafting.

SHRI SAMUEL: I am talking from the point of view of amendment, and therefore it is not a question of one's liking.

SHRI TRIKAMDAS: If you want ratification to be there, then keep the word 'or' instead of 'and'.

MR. CHAIRMAN: Unauthorised tort may be ratified later by the employer, but if he does it he is liable. 'Act purported to be done' would be one qualification; the other alternative would be 'ratification'. These will be two different qualifications and not two cumulative ones.

SHRI K. NARAYANA RAO: The words 'act purported to be done' and 'acting beyond the course of his employment' would be a contradiction in terms. An act cannot purport to be done and at the same time be beyond the course of one's employment. If it is purported to be done, then it must be covered by sub-clause (i), because it is in the course of employment.

SHRI TRIKAMDAS: It is beyond the scope of the employment and yet it is done by the man. Suppose a Collector does something under the Defence of India Rules. He thinks that the Defence of India Rules are such and such and let us say he does

something under those rules. You may find out whether he has acted beyond his capacity as collector or beyond the letter of the law, but the act has been done by him as collector.

SHRI SHRI CHAND GOYAL: Your suggestion will solve many difficulties. We have been thinking over this. If a person is purporting to act in his official capacity, then the aggrieved person will presume that he is doing it in his official capacity and there is no way out for him. This phrase 'purported to be done by him in his official capacity' would solve all our difficulties.

So your suggestion is very good.

SHRI TRIKAMDAS: It would solve a number of difficulties. I was going to give you one other instance. Recently we have heard a lot about unlawful action going in the name of gheraos and such other things. The police is ordered not to give protection to the person who is illegally detained, as the Calcutta High Court has said, as reported in the Calcutta weekly News recently; in September last, I believe. The police sits quiet at that time; it is negligence on the part of the police. That kind of omission to act is also a tortious act. I do not find any reference to omission here. It could be mentioned here or it could be mentioned somewhere else, where a man has got to act but negligently does not act he cannot plead that the Minister told him that he should not act; this theory of a Minister ordering a public servant whose duties are laid down by law or the police which has to act under the Police Acts cannot hold water. Suppose a citizen is beaten up and injured while these people are looking on, then it is an act of omission. But I do not see any provision to cover such cases.

MR. CHAIRMAN: I think an act constituting a tort may mean not merely positive acts but also acts of omission. The term 'act' includes 'omission to act' also. When there is a duty to act but the man does not act, then

that is also a tort and a wrongful action.

SHRI TRIKAMDAS: It is wrongful action or refusal to act. That will have to be carefully provided for somewhere. The defence that the Minister told them not to act is no defence, when the law says that they have got to act in a particular way, such as the Cr. P.C. or the various Police Acts and so on. Where has that been provided for?

MR. CHAIRMAN: You may think over it and send us an alternative draft later, or if you have any suggestions just now you may make them.

SHRI TRIKAMDAS: You may put in the phrase;

While acting or refusing to act or neglecting to act or omitting to act...
Or we can say:

While acting in the course of his employment or neglecting so to act...

SHRI K. NARAYANA RAO: The accepted distinction between non-feasance and misfeasance is already there. Failure to discharge a legal obligation imposed by statute may by itself constitute a tort.

But if there is a duty and in the process of doing that duty it is not done properly then it may constitute tort.

SHRI TRIKAMDAS: You may provide for that. I thought that non-feasance and misfeasance usually came under the Companies Act.

SHRI K. NARAYANA RAO: It might come even in other branches of law. Take for instance the case of a municipal corporation. If they fail to repair a road and that results in damage or injury to somebody, then today the municipality is not liable and they are not bound...

SHRI TRIKAMDAS: We should make it bound by it. Failure to do an act because of which somebody is injured is a tortious liability.

SHRI K. NARAYANA RAO: But that is not accepted. Even under the ordinary law of torts it is not accepted. But you are wanting to widen it.

SHRI TRIKAMDAS: Where the duty is provided by an act, failure to act is a tortious act.

SHRI SHRI CHAND GOYAL: Previously there was no occasion for providing for all this, because there was no legislation to deal with the subject.

SHRI KRISHNA KANT: You have raised a very important point. Now a days we suffer more due to neglect than due to actual acts and there is no constitutional bar not to provide for these cases also.

MR. CHAIRMAN: I am told by the Ministry that act including omission to act, by definition.

SHRI TRIKAMDAS: But now that you are framing a law you may provide for it also.

MR. CHAIRMAN: It may come under the General Clauses Act, but you think that it would be better to provide for it here.

SHRI TRIKAMDAS: Let it remain in the realm of interpretation. But you may provide for it. With a thing like this, the administration will sit up and take notice. I am not talking of the government administration but of the municipalities and others. Of course, here you are providing for Government liability.

SHRI SAMEUL: By putting in the words 'or neglecting to act' would you not be enlarging the scope of tortious acts which would make it completely impracticable? If you will enlarge it so much, then it would be absolutely impossible not only for the courts to award torts but even for

the Government to pay the torts. For, every human being is guilty of some neglect or other consciously or unconsciously. If he does it consciously then it is a guilt; if he does it unconsciously, then you cannot blame that person. If you put in the word 'neglect' then you are assuming that every act done consciously or unconsciously is liable for torts.

SHRI TRIKAMDAS: I am not assuming that. Neglect would mean that there is some law which enjoins upon a man to do an act; and everybody is supposed to know the law; if I break the law of which I have never heard I shall still be liable all the same. An officer regarding whom rules and regulations and laws are there is supposed at least to know them; he cannot plead ignorance of them.

SHRI SAMUEL: Would you not be making every act of negligence a tortious act?

MR. CHAIRMAN: I would invite your attention to a judgment of the House of Lords in Sir Hugh, Stevenson in 32-33 Appeal cases, where they say that negligence would arise in cases where there is a duty to take care but there is a specific omission to take that case; that would constitute specific tort.

SHRI TRIKAMDAS: I was just talking about duty to act; it will be a similar duty to act; that is in respect of a private person.

MR. CHAIRMAN: We must take negligence to mean omission to do an act when it is a duty to do that act; otherwise it cannot be negligence.

SHRI TRIKAMDAS: There should be omission to act; the man who goes to court must satisfy the court that there is some law which enjoins upon him to act in a particular way but if the person has not acted knowing full well that he has to act and it is duty to act. 'Knowing full well' is as-

summed, of course, because once the law is there, it is assumed that he knows it. If he has been negligent even to bother about what his duty is, then the Government will be liable for employing a man of that character.

MR. CHAIRMAN: The English word 'negligence' is used not only for a state of mind but for other things also. But here negligence is conduct not a state of mind; it is conduct which would involve a great risk of causing damage.

SHRI TRIKAMDAS: That is one thing. The other is that knowing that he has to act, he does not act.

MR. CHAIRMAN: Therefore, you are considering it objectively and not subjectively.

SHRI TRIKAMDAS: Not subjectively.

SHRI SAMUEL: One Member referred to the repair of roads. Roads sprawl all over the country. Suppose there is a ditch which has not been repaired, or there is a man-hole which has not been covered . . .

SHRI TRIKAMDAS: It happens so often in Delhi.

SHRI SAMUEL: If it happens in Delhi it is a very serious matter. But supposing it happens in some far off village and some tourist does not happen to see and falls into it and he claims tort, then what have you to say to that?

SHRI TRIKAMDAS: That is very simple so far as the law of court is concerned. It is already provided in the ordinary law of torts. It is known as the theory of the hidden trap. When you have a highroad, you are supposed to tell everybody that the highroad is proper highroad, and so if there is a ditch somewhere then it is known as a hidden trap in the law of torts. You cannot trap somebody whom you invite to go along the highway. He is an invitee; he may be licensed or not; that makes no difference.

SHRI SAMUEL: So, they will be liable for torts?

SHRI TRIKAMDAS: Of course, they are.

SHRI SAMUEL: How many such cases would happen in a day?

SHRI TRIKAMDAS: I think they should happen more and more.

SHRI SAMUEL: How many cases do you think the courts of law can decide?

SHRI TRIKAMDAS: That depends upon how fast the court works and how many judges there are and how well they are paid.

SHRI SAMUEL: How many courts do you think the Government can set up? I am asking this because we should consider how far we can enlarge the scope of this.

SHRI TRIKAMDAS: This is Government liability that you are dealing with. The other one comes under the ordinary law of torts under which a municipality can be sued today. I have got a great mind to sue the Delhi Municipal Corporation when they leave the breaches in the approach road from my house. So far as the national highways are concerned, you will also see such things. I am only speaking of the liability of the Government which we are discussing for the time being.

Then there is another thing which might create difficulties. Clause 3(b) (1) reads as follows:

"committed by an independent contractor employed by the Government or any of his servants or workmen in doing the act contracted to be done for the Government in any of the following cases (and in no others), namely:—

(1) where the Government assumes control of the act contracted to be done by the independent contractor;"

I am not quite sure what it means. Once the Government assumes control of the act, it is the Government act. I do not quite understand what is meant here. Secondly, about the independent contractor, there is one danger. If you employ an independent contractor who is not capable of doing his job,—and many are employed for various reasons into which we need not go—then, to say that the Government has not taken overcontrol and therefore the Government is not liable for that act would be something like providing an alibi for inefficient or corrupt officials in employing such a man. I do not know how it can be avoided. If you employ an independent contractor, you should take care to see that he is a contractor who is capable of doing his work. Recently, I had to do with a case in the Supreme Court in which a bakery—it was my client—had been asked to pull down an existing chimney and to build another. He employed a man who was a mason, and the Supreme Court held that it was his act of negligence which caused the accident by which the whole building collapsed and the chimney fell down.

MR. CHAIRMAN: The client's act?

SHRI TRIKAMDAS: The client's act, who employed a man knowing that he was not capable of doing that job. All that he says is: "We have employed an independent contractor." You do not find out. Somebody's palm has been greased. I am sorry to say that, but such things happen. He has employed a man who is not capable of doing the job, and one does not make any enquiry about it.

MR. CHAIRMAN: In regard to the point about Government assuming control, I put the same question

to Mr. Setalvad yesterday. We drew his attention to the Law Commission's report, recommendation, wherein they have said that the employer assumes control as to the manner of the act. Mr. Setalvad wanted it to be "as the manner of performance", instead of "assume control."

SHRI TRIKAMDAS: I do not know whether it would cover the point which I am trying to make.

MR. CHAIRMAN: When the Government assumes control over the whole of the act, we are in a difficulty to understand it. Mr. Mukerjee put it to Mr. Setalvad the other day: the recommendation of the Law Commission was that the employer assumes control as to the manner of performance of the work. When the work is going on, he has also some control over the manner of the act.

SHRI TRIKAMDAS: When they employ a contractor, they tell him that the plans are there; the material is there; it has to be used. The control is always there. He is an independent contractor no doubt. He does not do it entirely at his discretion. You do not supervise it; I take it that an independent contractor works under some kind of supervision. With due respect to the Law Commission, I really do not think that "as to the manner of performance" makes it a little more clear.

SHRI SRI CHAND GOYAL: The idea seems to be this. Supposing a contract has been given to an independent contractor and the Government is not very much in the picture. In that case, the liability has not been extended unless the Government assumes control, and by the addition of those words "manner of performance", if the Government is not exercising any control over the performance of the act, then the liability will not extend to that extent, but if the Government has assumed

control over the performance of the act, that act would accrue?

SHRI TRIKAMDAS: May I suggest that instead of "manner", we may put in "direction or control". That may be a little more clear. "Direction" is not a very happy word, but I am groping for the right word.

SHRI KRISHAN KANT: Direction can be remote control also.

SHRI TRIKAMDAS: Yes. Therefore, a little supervision may be needed.

SHRI SAMUEL: Why not use the word "responsibility"?

SHRI TRIKAMDAS: Responsibility is control.

MR. CHAIRMAN: Will the Government assume responsibility for the act done?

SHRI TRIKAMDAS: Then it means a Government act. I am just thinking it over.

SHRI SAMUEL: Control and responsibility are two different things.

SHRI TRIKAMDAS: It is difficult; once you assume responsibility, it is your act.

SHRI KRISHAN KANT: "Responsibility" is much more than "direction and control."

SHRI K. NARAYANA RAO: Whatever words we use here, it is ultimately for the courts to decide in each and every case whether the necessary nexus of control has been established or not. We may call it control or direction, but what constitutes control or direction is ultimately left to the courts to decide. So, I do not think there is any difficulty if we leave "control" as it is.

SHRI TRIKAMDAS: It will make a lot of difference.

SERI B. T. KEMPARAJ: My hon. friend, Shri Narayana Rao, is suggesting that it is a matter for the courts to decide. Then, why should we sit here and why should a committee be constituted? If, for the interpretation of the words, it has to go to the court, then, what is the purpose?

MR. CHAIRMAN: We cannot go to the courts for everything.

SHRI NARAYANA RAO: I am sorry I have been misunderstood. Whatever amount of definition or connotation or explanation one might give, there are certain words which carry technical means, like control, direction, reasonable restriction, and so on. Let us know what precisely we are going to do.

SHRI M. YUNUS SALEEM: Control over administration and over the performance of the work is different from the type of control you mentioned, i.e. what sort of material should be used, what sort of design should be there, etc. There is some difference, though it is also in a way control that the Government is interested in seeing that proper material is used for the performance of the work.

SHRI TRIKAMDAS: Suppose instead of cement concrete, a man uses sand. It happened in Bombay. The house collapsed and 300 persons died. Later on the contractor and the architect were prosecuted and my client had to go to jail. That was not a Government building.

If there is no attempt to supervise and Government simply says, "We invited tenders and gave the job to be cheapest tenderer. We made no enquiries", can you give up all your responsibility?

MR. CHAIRMAN: Salmond says, there are certain cases in which an employer is liable for the action of an independent contractor and "the tendency of legal development is in the direction of extending rather than restricting that liability".

SHRI H. N. MUKERJEE: I think the Government draftsman has done something which the minister is trying to justify, which is very different from what the Law Commission has said. There is some very good reason in what the Commission has said. As Mr. Trikamdas has pointed out, if the words "control over the manner of performance of the contract" are there, the aggrieved citizen would have a wider remedy. When Government employs an independent contractor, it calls for tenders. Giving of tenders implies specification of certain matters in regard to which Government would have some kind of control over the manner of performance of the contract. In that case, the responsibility of the Government is there. The Law Commission wanted the responsibility of the Government and its liability in tort to be more specific, while the Government draftsman has changed it, whatever be the reason. We should follow the line laid down by the Law Commission rather than the draftsman.

MR. CHAIRMAN: The Law Commission has categorically mentioned five cases (a) (b), (c), (d) and (e) at pages 58 and 59, in which Government should be made liable.

SHRI TRIKAMDAS: If you kindly look at (d) there, I was thinking of something of that kind. We can say "whether the act is done under the direction, supervision of Government assumes control over the manner in which the act is done."

In Agartala, I saw the whole span of a particular bridge over a river which collapsed killing some workmen. The work was done by an independent contractor. He did not do

it properly. It is still there as a monument to the contractor and whoever employed him. So, this has got to be carefully considered.

SHRI KRISHAN KANT: Your contention is, the person who chooses the independent contractor should be also liable to the extent he chooses a bad or inefficient contractor.

MR. CHAIRMAN: Lord Blackburn has said:

"I take it to be clear law as well as good sense that where a person is himself under a duty to use care, he cannot get rid of that responsibility by getting the performance of the act by somebody else."

Then he has quoted a number of cases.

SHRI K. NARAYANA RAO: If we treat Government on a par with private individual so far as employment of independent contractor is concerned, will it be all right?

SHRI TRIKAMDAS: Yes. If you employ somebody who is not capable of doing the work, it does not get rid of your liability.

SHRI K. NARAYANA RAO: Through a chain of causation, you can connect each act with every other act. The proximity of negligence must be co-related to the act.

SHRI TRIKAMDAS: But you cannot escape your liability by saying that somebody else did it, unless there is something else which broke the chain and some special act of that man intervened.

MR. CHAIRMAN: Salmond says at page 134:

"The very act of delegation may itself be an act of negligence when due care is not taken to see that the agent is not properly qualified for the performance of the task."

SHRI TRIKAMDAS: I want that to be brought into the Bill.

SHRI K. NARAYANA RAO: If Government takes due care in selecting a properly qualified contractor, but if there is an error of judgment, what will happen?

MR. CHAIRMAN: Then Government will not be liable.

SHRI TRIKAMDAS: You may add a proviso to sub-clause (b) saying:

"Provided that sufficient care has been taken to see that the contractor is qualified to do the kind of work which is entrusted to him."

MR. CHAIRMAN: I think we can put in the words of Salmond himself:

"When due care is not taken to see that the agent is properly qualified for the performance of the task committed to him."

SHRI TRIKAMDAS: I have no objection to that.

In sub-clause (1) you may say,

"Where the act is done under the direction, or supervision or the Government assumes control over the manner of the act contracted to be done."

That is what the Law Commission has suggested.

Then, where you have dealt with immovable property, there is a complete omission of ships. Somewhere Government ships will have to be brought in. There is the navy and Government may have other ships; Of course, it cannot come under immovable property, but somewhere it has got to be brought in. In the English Act, that liability is there.

MR. CHAIRMAN: There is a passage in page 169 of Winfield which

says that the delegation of an incompetent contractor is a breach of duty itself.

SHRI M. YUNUS SALEEM: As regards the ships, kindly see clause (m) on page 7.

SHRI TRIKAMDAS: How will that cover it?

SHRI M. YUNUS SALEEM: There are certain enactments, like the shipping Act or the Navy Act, which provide for damages.

SHRI KRISHAN KANT: The Ministry should show that to the Chairman and if he is satisfied with it, we shall be satisfied.

SHRI M. YUNUS SALEEM: Yes. If there is nothing there, we shall include it.

SHRI K. NARAYANA RAO: If we delete the word "immovable" and retain only the word "property" so that it is all comprehensive and includes both moveable and immovable property, will it be all right?

SHRI TRIKAMDAS: I think, that might cover it. But then the marginal note will have to be changed.

MR. CHAIRMAN: We are somewhat perturbed by clauses 10 and 11.

SHRI TRIKAMDAS: I was coming to them, particularly to clause 11(i). I know what in English law an act of State is. That was a nefarious doctrine, if I might say so, laid down by Lord Kingston in the case of *Kamachibal* (Privy Council Case 7, *Moore's Indian Appeals*, page 476). Unfortunately, although the Supreme Court in the case of *Virendra Singh* (1953, 1 *Supreme Court Reports*, page 415) had laid down that there can be no act of State against a citizen, in its wisdom or otherwise it chose to reverse that decision in *Bohra Fida Ali's* case which I argued. A court of seven Judges was set up and the question was raised by Shri Daphtary the then Attorney General, that if

an Indian State had done something and although the citizen of that State had acquired the thing under the law of that State till the Government of India either ratifies it or recognise it that man has not acquired the right over that property even though he may have become a citizen under the Constitution as soon as the merger took place or the Constitution came into force and whatever may be his rights as is known in many of the doctrines of acquired rights. There the Supreme Court has dealt with the act of State and in dealing with it has, unfortunately, gone very much further. This case is reported in 1964, 6 Supreme Court Reports. It begins at page 461 and at page 530 in the dissenting judgement, Mr. Justice Subba Rao, one of the great judges we have had although attempts are being made to run him down, has pointed out how this doctrine came into existence. First of all is Lord Kingston's in which he says that if the King acquires territory over some natives, he confers a benefit by acquiring that territory and he can give them such rights as he thinks proper. It is a purely colonial doctrine which is not recognised anywhere in the world; in fact, the American doctrine is altogether to the contrary. Then, he gives the doctrine as stated by the great jurist, Stevens, which reads:—

"The courts in England have developed the doctrine of the act of State which, in the words of Stevens, means an act injurious to the person or property of some person who is not at the time of the act a subject of Her Majesty, which act is done by the representative on Her Majesty's authority and is either sanctioned or subsequently ratified by Her Majesty."

You will note that no act of this nature can be done against the subject even so far as the English law is concerned.

MR. CHAIRMAN: May I read out to you what the Law Commission has said at page 40 of the booklet you

3035 LS—8.

have given me? They have taken a further precaution. They have defined it.

"An act of State means an act of the sovereign power directed against another sovereign power and the subjects of another sovereign power not owing temporary allegiance."

Practically against the Indian citizen this defence cannot be available. Kindly say whether you agree with this definition or not.

SHRI TRIKAMDAS: Do we need this very vague doctrine which is not recognised anywhere in the world except in the Privy Council judgement?

MR. CHAIRMAN: Chief Justice Gajendragadkar has said that unless there is specific ratification, you cannot possibly make the Government liable.

SHRI TRIKAMDAS: That is the doctrine which has now been accepted.

MR. CHAIRMAN: Therefore we ought to say what an act of State is.

SHRI TRIKAMDAS: I think, we should not bring into Indian law this very vague doctrine.

MR. CHAIRMAN: If we still accept the Attorney General's contention, we must define it.

SHRI TRIKAMDAS: It cannot be available against the citizen; therefore, why bring it in? I do not understand why you have brought in the emergency proclamation. I shall be coming to that presently.

MR. CHAIRMAN: Either we delete it . . .

SHRI TRIKAMDAS: . . . or you try to clarify it.

SHRI K. NARAYANA RAO: Perhaps we can delete it. I am inclined to the deletion of this thing.

As you have correctly pointed out, "act of State" has a very chequered history. In spite of the definition of the Law Commission, activities of the State done even against foreigners may not absolve the Government of India altogether, so far as international law is concerned. There are quite a large number of cases where one Government is found at fault by another Government. Even if we say, an act of State, the remedy may be denied so far as Indian courts are concerned. But as regard the international cases, the State cannot absolve itself. We should delete it altogether.

MR. CHAIRMAN: What about (e) and (i) of clause 11?

SHRI TRIKAMDAS: It is unbelievable in an Act of Parliament that you give such *carte blanche*. Now, under the Proclamation of Emergency, the Defence of India Act came and the Defence of India Rules came. A lot of things were done. You can ask the former Attorney-General and he will tell you how the Municipality pulled down a building acting under the Defence of India Rules. Ordinarily, they had no right to do it.

MR. CHAIRMAN: We argued in the Supreme Court and the Supreme Court accepted our contention that it was temporary suspension of fundamental rights and that they will revive and the Government will be liable to be sued.

SHRI TRIKAMDAS: I am not sure they have said that.

SHRI K. NARAYANA RAO: They have left it open.

MR. CHAIRMAN: They have indicated that.

SHRI H. N. MUKERJEE: It was indicated by Chief Justice Gajendragadkar. I quote:

".....as soon as the Order ceases to be operative, the infringement of the rights made either by the legislative enactment or by executive action can, perhaps, be challenged by a citizen in a court of law, the same may have to be tried on the merits on the basis that the rights alleged to have been infringed were in operation even during the pendency of the Presidential Order."

MR. CHAIRMAN: Can the Government be sued after the proclamation is over.

SHRI TRIKAMDAS: That is what this passage seems to suggest. This is an Act of Indemnity.

SHRI H. N. MUKERJEE: The Indemnity Act in this regard can be passed, in respect of infringement of fundamental rights, if the martial law is in force, not otherwise. That is the provision in the Constitution.

MR. CHAIRMAN: We are passing an Act of Indemnity here.

SHRI H. N. MUKERJEE: It relates to a period when the martial law was not in operation.

MR. CHAIRMAN: After the proclamation is over, can the Government be sued?

SHRI TRIKAMDAS: Personally, I think, if it is an illegal act, it also goes against the fundamental right. I think, the remedy should be there.

SHRI KRISHAN KANT: Do you think it is *ultra vires* the Constitution?

SHRI TRIKAMDAS: That is anybody's guess as to what Parliament will do and if it is made *ultra vires* is also anybody's guess.

SHRI KRISHAN KANT: Mr. Seervai says that the rights of a citizen are curtailed by the present Bill and that it will go against article 3

of the Constitution and will be declared *ultra vires* the Constitution.

SHRI SHRI CHAND GOYAL: Do you think any provisions of the Bill are beyond the scope of article 300 which are likely to be struck down by the court of law?

SHRI TRIKAMDAS: I have not applied my mind to article 300.

MR. CHAIRMAN: Kindly look at (i) of clause 11:

“(i) a member of a police force; or”

The semi colon should go and only 'or' should be there, that is, any act done by a member of a police or a public servant whose duty it is to preserve peace and order in any area or place or who is engaged on guard, sentry patrol, watch and ward, or other similar duty in relation to any area or place for the prevention or suppress of a breach of the peace, or a disturbance of the public tranquility or a riot, or an affray, or for the prevention of any offences against public property.

Supposing this portion also qualifies a member of a police force, what is your view?

SHRI TRIKAMDAS: I think, that should be better.

SHRI KRISHAN KANT: Do you think this clause should be kept at all?

SHRI TRIKAMDAS: Not in this form. This will have to be very carefully considered.

SHRI KRISHAN KANT: This will be the complete immunity to the police.

SHRI TRIKAMDAS: Not only to police but proclamation can be issued for various things.

SHRI H. N. MUKERJEE: The Law Commission has not recommended this exemption.

SHRI TRIKAMDAS: If they act illegally, then the whole lot of perjurious evidence will come in saying, this was happening, that was happening all that as we find in all these inquiries.

SHRI KRISHAN KANT: If this is passed, only you, as an independent lawyer will hold an inquiry as you did in the case of Indraprastha Bhavan incident and Government will not do it.

SHRI TRIKAMDAS: Why should they do it?

MR. CHAIRMAN: This was drafted before that.

SHRI TRIKAMDAS: It has nothing to do with Indraprastha Bhavan incident. Also, I will not be very satisfied with the inquiry because I do not get the other side of the picture.

SHRI KRISHAN KANT: So, no inquiry can be held.

SHRI TRIKAMDAS: No inquiry need be held.

Mr. CHAIRMAN: Will you kindly give your thought to it and give your suggestions later on, specially on this portion of the clause?

SHRI TRIKAMDAS: So far as clause 11 is concerned, I was extremely disturbed by it.

SHRI SHRI CHAND GOYAL: So are we. In the recommendation of the Law Commission, the members of the police force had not been included. Only the members of the armed forces were included. The members of the armed forces seldom come in conflict with a citizen. But to exempt the police force will be dangerous.

SHRI TRIKAMDAS: It is very disturbing, its many parts, for example, the proclamation, an act of State and so on.

MR. CHAIRMAN: Kindly send us your suggestions particularly with regard police force.

SHRI TRIKAMDAS: Yes.

SHRI KRISHAN KANT: Have you anything to say regarding (n) and (e)?

SHRI TRIKAMDAS: That may arise in the case of a surgeon performing an operation or in the case of capital punishment, sentencing a man to death. That is a kind of thing which may be contemplated. I note it.

MR. CHAIRMAN: Take the case where abortion must take place. The surgeon is authorised to do that particular act.....

SHRI TRIKAMDAS: This will not cover that. Here it says:

"...any personal injury or any damage to property caused by an act which by its nature is likely in the ordinary course of events to cause such injury or damage, if the doing of the act is authorised by any enactment....."

That is why I immediately thought of capital punishment or whipping which still exists.

SHRI SHRI CHAND GOYAL: Shri K. L. Misra was of the opinion that implied authority must be excluded out of 'authorised' in clause (n).

SHRI TRIKAMDAS: Yes; it must be on the face of the Act or enactment; the authority must be there. For example, take a Municipal Act—I do not know about Delhi Administration—about encroachment of property or putting up a building; you pull that building if it is not authorised by law.

It is never done in Delhi. That might be authorised by law; there may be no liability if you do that or take possession of something on which some person has encroached. In government land, it arises very often.

MR. CHAIRMAN: Thank you very much....

SHRI TRIKAMDAS: How soon would you like me to send my comments?

MR. CHAIRMAN: In about ten days or a fortnight.

SHRI TRIKAMDAS: Yes; I will do that.

MR. CHAIRMAN: Thank you very much.

(The witness then withdrew.)

II. Shri C. K. Daphtary, Attorney-General of India.

(The witness was called in and he took his seat)

MR. CHAIRMAN: I shall just read out to you one of the directions from the Speaker about the evidence given by the witnesses being treated as public....

SHRI DAPHTARY: I know it already.

It is a good thing that the law of tort is being codified in some way or the other because upto now it has not been done and it is desirable that the rule should be laid down. This is a limited statute in the sense that it only deals with government liability. It is desirable that even the general law of tort should really be codified. But that is a larger issue. As to this, I think it is good that it is done because the Supreme Court's judgment has left the matter in some doubt.

The only question on this Bill could be: is it short of what it ought to be or does it go too far? Either view is possible. Some would say: why should not the liability be absolutely identical with that of the private individual? That, of course, cannot be because there are various functions which the State performs in respect of which when anything is done which would normally be a tort, there should be protection. It has been put in the case law in this way that when something is done by way of governmental function, then there is a protection; when it is a non-governmental function as in the case of commercial adventure or anything of that kind, then there is no protection. But that is a very broad division. There may be cases where even in the case of a governmental function, there needs to be no protection and there may be cases the other way where in the other division there is a necessity for some kind of protection. In fact, the very case of the policeman in Ralia Ram's case is a border-line case where you may very well say: why should not the State make good to the person what its own officer has done away with subject, of course, to settling arguments whether it could be said to be in the course of his duty, etc., etc., the same kind of argument that arises when one thinks of 197 of the Criminal Procedure Code. There are a number of things here which call for some comments, and I am sure questions have been asked and answers have been received by persons of much more experience and wisdom than myself, so that it is superfluous for me to say anything further, and, therefore, I should be let off very lightly.

I would like to add something about the Act of State. As it stands, as the Supreme Court has held, there is no question of any act of State as against a citizen; it cannot apply to any tortious act done to a citizen; tortious act done to a company or corporation, I am not sure about it; I am not sure how that would work

out if you use the word 'citizen' in those cases in the sense in which 'citizen' is used in Chapter III. But I take it that it would cover the non-resident alien; if a tort was done to him, then that would be an act of State. Whether that limited application was what was intended, I cannot tell you; that is a matter entirely for those who framed the Bill; but if that is so, then it is legitimate.

SHRI KRISHAN KANT: Don't you think that it needs to be clarified in the Bill itself?

MR. CHAIRMAN: Is there any necessity for clarifying as the Law Commission has given the definition? They have said on page 40:

"An act of State means an act of the sovereign power directed against another sovereign power or the subjects of another sovereign power not owing temporary allegiance in pursuance of sovereign rights."

SHRI DAPHTARY: Could be done.

SHRI KRISHAN KANT: The previous gentleman who appeared as witness said that you may better deal with Jammu and Kashmir. Here it says, it extends to the whole of India except Jammu and Kashmir. The main point is this. An Indian citizen is in Jammu and Kashmir. Tortious act is done by that Government servant. What is the position? Can he be sued?

SHRI DAPHTARY: He could be sued.

SHRI KRISHAN KANT: Law does not apply to Kashmir. Where will he be? Suppose Jammu and Kashmir citizen is in Delhi...

SHRI DAPHTARY: May I know, which Government has done the tortious act there?

SHRI KRISHAN KANT: ICS and IAS officers are there.

SHRI DAPHTARY: They are functioning as officers of the Government of India.

MR. CHAIRMAN: If in the course of employment he does something which is tortious can you sue? Suppose in the Kashmir emporium here some tortious act is done. Can we sue him here.

SHRI K. NARAYANA RAO: It is doubtful.

SHRI DAPHTARY: It is a doubtful proposition.

SHRI KRISHAN KANT: That is Jammu and Kashmir territorial jurisdiction. Suppose a person does it in India. He may be resident of Jammu and Kashmir. Then he will be liable. He will have to go by the law of the land.

SHRI DAPHTARY: He personally can be sued—So could the Government of India officer who goes and does something wrong in Kashmir—by the person against whom tort is committed.

SHRI SHRI CHAND GOYAL: Jammu and Kashmir is excluded. The act does not apply there.

SHRI DAPHTARY: Even in Jammu and Kashmir courts torts are not unknown. They have got their own law about torts. They have got common law of their own...

SHRI KRISHAN KANT: This act clarifies or limits certain things. It is specifically stated that it shall not extend to Jammu and Kashmir. The person against whom the action must be taken can take shelter behind saying this act does not apply.

SHRI DAPHTARY: He cannot take shelter.

SHRI KRISHAN KANT: In State of Jammu and Kashmir torts is as uncertain as the supreme court felt.

SHRI DAPHTARY: Or as may be laid down in the act.

SHRI KRISHAN KANT: Do you want to suggest any amendment?

MR. CHAIRMAN: The Government of India officer performs something. In the course of his duty, he is doing something, he is liable. They should not claim immunity because they are temporarily located there.

SHRI DAPHTARY: How does one to do it, unless this Act, however you frame it, applies to Kashmir. It can't apply unless it falls within the scope of any of the statutes which are extended to Kashmir by the President.

MR. CHAIRMAN: It must be covered by those items. It has been held by supreme court that even amendments made here let us say, for the constitution itself, could not apply to Kashmir without an order under Art. 370 by the President.

SHRI K. NARAYANA RAO: Art. 300 is not applicable to Jammu and Kashmir. So far as law of torts is concerned it is exclusively regulated by the internal law of Jammu and Kashmir. This particular extension of the Bill is excluded so far as Jammu and Kashmir is concerned. There may be 2 different sets of situations arising now. For example you may say this. There is the Jammu and Kashmir Government emporium here. That might have caused injury to some individual in Delhi. The reverse thing can also happen. The Government of India employee there does some injury in Jammu and Kashmir, for instance. Is this particular law applicable in such situation? That is the thing which we want to know.

SHRI DAPHTARY: No.

SHRI SHRI CHAND GOYAL: Shri K. L. Misra who appeared as witness was of the opinion that the law being one which lays down this on territorial lines, this will extend to

emporium whether Delhi or Calcutta.

SHRI DAPHTARY: You said you apply it to both. You said both cases. I will take Jammu and Kashmir. This law does not apply to Jammu and Kashmir. So this is not applicable for Jammu and Kashmir. Now, let us come here. Here, I presume, what you mean is, that some tortious act is done by an officer of the Jammu and Kashmir Government...

SHRI K. NARAYANA RAO: Yes.

SHRI KRISHAN KANT: Some tortious act is committed by an employee—acting in connection with the affairs of the union. Here I would like to read out to you the definition of Government. The Bill says:

“Government in relation to any liability imposed under this Act, means (i) where a tort is committed by an employee of the Government while acting in connection with the affairs of the Union or by an agent or independent contractor employed by the Central Government, the Central Government; (ii) where a tort is committed by an employee of the Government while acting in connection with the affairs of a State, or by an agent or independent contractor employed by a State Government, the State Government”....

MR. CHAIRMAN: Under Article 300, there is a note. It says:

‘In its application to the State of Jammu and Kashmir, references to the State or States shall be construed as not including references to the State of Jammu and Kashmir’.

SHRI DAPHTARY: Art. 300 says ‘subject to any legislation by Parliament’. The ordinarily understood English law before constitution does apply. Non-availability of such and such article to Jammu and Kashmir does not mean that this Article does not prevail in the territory of Jammu and Kashmir. That is all. Nothing

more. That does not mean that so far as Jammu and Kashmir is concerned the old law, preconstitutional law, is not statutorily or constitutionally made applicable. That is all. They are left to their own devices in regard to any law. Now, we come to this Act. This Act applies to this territory. It defines ‘Government servant’ or ‘Government employee’. If the person who is employed in the Kashmir Emporium comes within the definition of an employee of the Government and if a tortious act is committed in Delhi, should he be protected? The Act applies here...

SHRI K. NARAYANA RAO: My difficulty is that it is not merely a territorial extension. It has a personal aspect too. The State has a juristic personality. ‘State Government’ is also defined. The Bill tries to impose liability on the State Government. What is the meaning of this extension? Does it not exempt Jammu and Kashmir Government from the purview of this Bill? If it does, it does not bind Jammu and Kashmir Government.

SHRI DAPHTARY: To the extent that there are exemptions in this Act.

SHRI K. NARAYANA RAO: I am not talking about that. ‘State Government’ has been defined.

SHRI DAPHTARY: Jammu and Kashmir is a State Government according to that.

SHRI K. NARAYANA RAO: We are now fixing responsibility both on the Central Government and the State Governments. The Bill says that it does not extend to Jammu and Kashmir. Does it not mean that it also excludes liability of Jammu and Kashmir Government?

SHRI DAPHTARY: I follow. There would be normally liability of the State for the act of its employee. A Jammu and Kashmir employee in the emporium here does a tortious act. Under the statute, the State would be

liable, merely looking at the definition of the State Government. The only question would be whether it could be sued. If the tortious act was committed for which he is liable, why not it be sued?

MR. CHAIRMAN: Art. 300 of the Constitution says that the Government of India may sue or be sued by the name of the Union of India and the Government of a State may sue or be sued by the name of the State. Here it is said that this does not apply to Jammu and Kashmir State.

SHRI DAPHTARY: I understand. I think it is not a question of mere territorial extension. You say that it is a question of exemption of a particular State from the liability of this Act.

SHRI KRISHAN KANT: Now it is a double difficulty. A Jammu and Kashmir citizen working here is not liable to be sued.

SHRI SHRI CHAND GOYAL: Citizen is liable, but Government is not liable.

SHRI KRISHAN KANT: Because of the act of an Indian employee, the State Government will not be liable. It means inequity between citizen and citizen.

SHRI DAPHTARY: Let us think about it. It extends to the whole of India except to Jammu and Kashmir. Let us put it in another way. This Act shall not extend to Jammu and Kashmir...

SHRI YUNUS SALEEM: Sorry to interrupt you. You kindly keep in mind Entry 8 of List III—Concurrent List.

SHRI DAPHTARY: So, you cannot legislate in respect of actionable wrong in respect of the State of Jammu and Kashmir. But I would like to think about it. I can understand if it does not extend to Jammu and Kashmir. You cannot extend it to

Jammu and Kashmir because this Entry does not apply to Jammu and Kashmir. I would have thought that the question of extension is only a matter of territoriality, and not a matter of liability which can be imposed for something done within this territory to which the Act applies. If it is to be construed as exemption from liability of the State—I think not.

MR. CHAIRMAN: Therefore, you can sue Jammu and Kashmir.

SHRI DAPHTARY: You can sue the State Government of Jammu and Kashmir here.

SHRI SHRI CHAND GOYAL: If we add the words "except the territory of the State of Jammu and Kashmir", will it not remove all confusion?

SHRI DAPHTARY: That would not be good drafting at any rate.

SHRI HAJARNAWIS: I would only reinforce what Mr. Daphtary has said. Law of torts being a law based on what is said to be common law and it has no statutory basis, there are no two laws of torts—one for Kashmir and another in India. Therefore, the liability has arisen. Then the question of territory does not arise.

SHRI K. NARAYANA RAO: It is not that clear. Take a parallel situation. American Embassy is here—or say, any other mission of any other foreign country. If they commit certain tort, this Bill is not applicable.

SHRI DAPHTARY: Because 'Government' is defined here to be either Union Government or State Government.

SHRI K. NARAYANA RAO: If that is the position, in what way Government of Jammu and Kashmir stands on a different footing? Once we concede that the Act does not apply and along with it this definition does not apply, the Government of Jammu and

Kashmir is excluded. Even if they are within the purview of the Indian territory, they are exempted from liability. Then, what are the implications?

SHRI DAPHTARY: The implication is this—that this is not a law which is the law of Jammu and Kashmir. That is the meaning of that it does not extend to Jammu and Kashmir. It is a law prevailing in the whole of the country, but not prevailing in Jammu and Kashmir. It does not bind that State because it is not one of its laws. But I do not construe non-extension as meaning exemption from liability of the State if it falls squarely within the statute in respect of anything done within the territory to which the Act applies.

SHRI K. NARAYANA RAO: Now we have referred to various Constitutional provisions. The implication is not only to say that Parliament has no power to make a law relating to actionable wrong, but it also means that Parliament is incompetent to say under what circumstances the Government of Jammu and Kashmir will be liable.

SHRI DAPHTARY: I am not sure. Parliament has power within that territory for which it is entitled to legislate, to say who shall be liable and who shall not be liable.

SHRI K. NARAYANA RAO: This is an area which deals with Government liability. In that process Government of Jammu and Kashmir is excluded from the purview of the legislative powers of the Parliament.

SHRI DAPHTARY: The legislative item is not extended to Jammu and Kashmir. Therefore, there is no power to legislate in respect of that legislative item so as to make the law which is made as the law of Jammu and Kashmir. But, acting within the entry, so far as this territory is concerned, the legislation can be as complete as it likes so as to make it a

liability on anyone they think proper subject to the fact that the tort is committed here etc., etc.

SHRI R. M. HAJARNAVIS: I want to ask you one question. The rule of law is a fundamental basis of a State. If we are governed by the rule of law, then there can be no question of any act of a State being applied by the State against a citizen.

MR. CHAIRMAN: This was already decided.

SHRI SRINIBAS MISHRA: Here the Kashmir Government has got an Emporium. If an employee has committed a tort, can he be liable for the tort?

SHRI DAPHTARY: I think that our Legislature here can say 'I am making a law under which A, B, C, D or E will be liable.' And if Jammu and Kashmir Government is one of those who is made liable, to my mind, the liability is attached to the State provided, of course, the act is done here which leads to cases of action and so on and so forth. If their servant who commits the tort is within the area here, by reason of the Act, the liability is attached to the State. In any event the State is carrying on its business here. Why should it not be liable?

SHRI K. NARAYANA RAO: May I submit one more thing? I take your interpretation that the Government of Jammu and Kashmir will be liable. If it is within the territory of India, does it not stand to reason on a reciprocal basis to bind the Government of India also for a tortious act committed in Jammu and Kashmir? I am not saying that it is the liability of the Jammu and Kashmir Government. It is the liability of the Government of India for certain tortious acts committed by the people of Jammu and Kashmir. Why should it be exempted?

SHRI DAPHTARY: Why not? It has not enabled to legislate so as to apply this Act to Jammu and Kashmir.

SHRI K. NARAYANA RAO: Let me put it this way. We shall put it in such a manner that we can exempt this. So far as liabilities are concerned, we may say that the personnel of the Government of India, no matter whether they are there or anywhere, if they have committed a tort, they may be liable.

SHRI DAPHTARY: You will have to provide that they will be tried in respect of a tort committed. The state can lay it down in respect of a tort committed.

SHRI K. NARAYANA RAO: Is it possible?

SHRI H. N. MUKERJEE: I can understand if Jammu and Kashmir have any extra territorial rights, you can say that whatever is done in Delhi, Bombay or in Calcutta by the employee, it is not liable. But, if a tortious act is committed by an official of the Government of India in Maharashtra or Madras or in Jammu and Kashmir, he is liable. But, what is your suggestion if the extension of the working of this act is applied to the State of Jammu and Kashmir according to Constitution?

SHRI DAPHTARY: That is a problem and one has to think about it.

SHRI HIRA VALLABHA TRIPATHI: Let me take an extreme case of any person whether he comes from Kashmir or from England or from Germany. If he commits a tortious act, whether this act applies to him or not so long as he is here and he has committed that act he not liable?

SHRI DAPHTARY: I say that he is personally liable. There is no doubt about it. Similarly, if an officer of the Government of India has committed a tort in Kashmir, he would be liable himself. The only question

we are considering is the question of liability of the Government.

SHRI SRINIBAS MISHRA: Now, the Bill, as it stands, does not extend to Jammu and Kashmir. Suppose a man has committed a tortious act which is beyond the boundary of the Jammu and Kashmir. If he gets into the boundary of Jammu and Kashmir and commits that tortious act like that of Kasturilal's case. Can the Government exempt him from liability? Will he get the exemption from Government only if he crosses the border? Is that the conclusion from this Bill?

SHRI DAPHTARY: That would be so because the Act does not apply the moment he crosses the border—whether it is the inch or one mile, it makes no difference.

SHRI KRISHAN KANT: Will you kindly suggest an amendment so that the whole thing may be made clear? Will the confusion still remain? Will there be no way out?

SHRI DAPHTARY: Short of saying, in the matter of crimes, if a crime is committed by an Indian citizen abroad, it may be tried here.

SHRI SRINIBAS MISHRA: Please refer to 2(d). It is regarding the definition of "independent contractor". The contractors are always under the orders and control of Government because the specifications are provided for by them and orders for execution of work are also given by them. What is your experience? What is meant by "independent contractor"?

SHRI DAPHTARY: It means 'a person who contracts to do an Act for the Government, but who in doing the act is not under the order or control of the Government.' Under the general conditions of work, there is no kind of control.

SHRI KRISHAN KANT: Is it not rather vague?

SHRI DAPHTARY: You cannot define it any further I don't think you can particularise it any further. We do not know what circumstances will arise. You cannot cover all of them by a definition.

SHRI SRINIBAS MISHRA: Now we come to the constitutional provisions. Please see clause 11 on page 7.

MR. CHAIRMAN: We are very much perturbed about the Clause 11 (e) and (f).

SHRI DAPHTARY: First of all it is an act done under a Proclamation. What is purported to be done—not at the immediate stage but at the next stage—is by reason of the Proclamation. That is some order is issued. And under that order, if a tortious act is done, that won't be covered by this.

MR. CHAIRMAN: If you put in the proclamation such thing that will be covered and you can enlarge the scope of the proclamation.

SHRI DAPHTARY: Where the proclamation is an emergency proclamation, it says that certain statutes and certain articles shall not apply, certain remedies in regard to certain articles shall not apply and the legislative function shall be performed by the President or by the Parliament if it so desires. None of them constitute a tortious act. If the idea is if the act is done by virtue of a legislation passed by virtue of the proclamation and by virtue of an executive act done under the proclamation...

SHRI SHRI CHAND GOYAL: The question is during that proclamation anything done of that type.

SHRI KRISHAN KANT: It does not say 'during the proclamation'. It says 'under the proclamation'. Anything and everything done under the proclamation is covered as

Mr. Mukerjee read out from Shri Gajendragadkar's observations.

SHRI DAPHTARY: I know one has a suspicion as to what might have meant by this and you have the suspicion and I think that is what is being put to me.

SHRI SRINIBAS MISHRA: On page 41 the Law Commission has put like this:

"Acts done or omitted to be done under a Proclamation of Emergency when the security of the State is threatened."

Would you prefer this exemption to be kept in the Bill?

SHRI DAPHTARY: As it stands at present (e) has hardly any meaning whereas what the Law Commission thinks is undoubtedly somewhat specific and meaningful. But, if it is intended—I do not know—to be a protection against the possible consequences which the Chairman is conscious of and I am conscious of by reason of certain matters and the subject matter of a decision in the Supreme Court, then I doubt.

MR. CHAIRMAN: Mr. Seervai has said this will be illegal.

SHRI DAPHTARY: It may be, it can be.

SHRI K. NARAYANA RAO: In this context may I invite your attention to the fact that there is a subtle distinction between under the proclamation and in consequence of the proclamation. Art. 358 says 'While a Proclamation of Emergency is in operation, nothing in Article 19 shall restrict the power of the State'. That is in consequence. In contrast I may invite your attention to Art. 359(1) 'Where a Proclamation of Emergency is in operation', the President may declare they will be suspended and this is a direct result. When it is under the proclamation, all other things follow.

SHRI DAPHTARY: I am not sure about it. How far can you carry it? What is done under the Proclamation is something done directly under the Proclamation but none of the things that can be done under Art. 359 and 359 could possibly constitute a tort.

SHRI SHRI CHAND GOYAL: In providing this clause if nothing under the Proclamation falls, then this would be meaningless.

MR. CHAIRMAN: The effect of the Proclamation may also be considered. That means these fundamental rights encroachment, you cannot sue for that.

SHRI DAPHTARY: The Constitution permits under Art. 358 and 359 certain things. Under Art. 358 Article 19 is suspended. It is for the time being wiped off the slate. You can legislate or take executive action which is contrary to Art. 19. Under Art. 359 it is only a question of suspending a remedy but not the right. Now Art. 358 is a constitutional provision. What you put to me, I understand, is this: that executive action may be taken which may be tortious, is that protected?

SHRI K. NARAYANA RAO: So far as Ar. 19 is concerned.

SHRI DAPHTARY: Why should it be any executive action? In other words executively or legislatively the State can ignore Art. 19 and make a law or take executive action which is contrary to Art. 19. In other words action or legislation which is restrictive of the various rights in Art. 19 is permitted. Would that be a tortious act? Is it then tort? You say this is really an authority to commit a tort.

SHRI K. NARAYANA RAO: It is there. My submission is that so far as the present clause is concerned, it is not relevant to Article 358 but it is relevant to Art. 359. I will give a concrete illustration. Let us take Makanlal's case where the people have detained wrongfully meaning thereby not in accordance with the provisions of the Constitution which

are compulsory in regard to action. In Art. 359 when the Proclamation is there, irrespective of the Article—you correctly put it—it is only the remedial aspect that is suspended not the substantial action. After the Emergency is lifted you will check the cause of action. Now it directly flows from this proclamation whereas under art. 359 it does not. To that extent if this Bill wants to restrict the right of the individual to go to a court of law, I do not think this clause stands.

SHRI DAPHTARY: Apart from Art. 19 when only fundamental right is violated, you cannot possibly sue.

AN HON. MEMBER: Clause (e) does not protect the Government.

SHRI DAPHTARY: If this is intended to meet a situation which was envisaged, as I put it—I did not mention the case—then I do not think it is possible.

SHRI K. NARAYANA RAO: Then the possibility of harmonious construction is not possible.

SHRI DAPHTARY: It is not something done under a Proclamation—the wrongful detention.

SHRI K. NARAYANA RAO: It was done under that. Once there is a Proclamation, then the President may by order declare.

SHRI DAPHTARY: The remedy was suspended. That was rightly suspended but the other aspect of it it was that there was a tortious act which is not something which was done under the Proclamation.

SHRI H. N. MUKERJEE: I would like to have some clarification. This is a very serious point. The wording in the Bill is: any act done under a Proclamation issued under the Constitution. It presupposes at possible multiplicity of acts which may be done because what happens in this country is that the fundamental rights can be infringed and abrogated. If you put it on account of the act done

under the Proclamation, that to say, a Proclamation of Emergency brought about an infringement and abrogation of something of the fundamental rights and the Supreme Court has already gone on record having said that this is a temporary suspension of Fundamental Rights, which could conceivably be revived later on. In so far as the Government right to have an Act of Indemnity is concerned, Article 34 permits indemnity laws to be passed in respect of infringement of Fundamental Rights only when martial law is in force and not otherwise. The citizen is looking forward to a period of time when the Fundamental Rights are revived and certain legitimate possibilities of remedying rights earlier abrogated exist. Now, should we take shelter under this provision? Any kind of equivocation in law is going to lead to unnecessary and vexatious litigation. From your long experience would you suggest what ought to be done by a responsible legislature. I want to know your views in order to prevent the proposed provision being utilised to continue deprivation of citizen's fundamental rights which conceivably took place in special emergent circumstances.

SHRI DAPHTARY: I may be wrong, but my personal view is that this does not constitute a shield in respect of a claim made for a wrongful deprivation of property or liberty or whatever it is. I don't think it is specific enough, wide enough to cover it. If you want to say that this shall not be a shield against that particular kind of claim, then I think you will have to put something more into it. Now it is capable of being argued either way. My view may be one and that of another may be different. As you have rightly said, equivocation leads to a great deal of trouble.

MR. CHAIRMAN: You see clause (i) on page 7: "any act done by—
(i) a member of a police force; or
(ii) a public servant whose duty it

is to preserve peace and order in any area....." Then it goes on "for the prevention or suppression of a breach of the peace". The point that is troubling us is it covers both past and future.

SHRI DAPHTARY: As drafted it covers both. Though it is provided separately at the end, it may be made clear.

MR. CHAIRMAN: Apart from that, whether this sort of immunity should be given to the Police is the point.

SHRI KRISHAN KANT: In the law Commission's report they have given several suggestions to be included in this Bill, but not this one. This provision has been introduced by the Ministry stealthily so that the whole thing can go through.

SHRI K. NARAYANA RAO: Since the Law Commission gave the report, sociological conditions have completely changed. If protection is not given, you are inviting chaos.

SHRI KRISHAN KANT: Next you can have a police State.

MR. CHAIRMAN: The question is whether such uncanalised power should be given. A policeman can say: I tried to maintain peace and I killed 50 people.

SHRI DAPHTARY: How will you define this?

MR. CHAIRMAN: If one is asked to preserve the peace it does not mean he can do whatever he like.

SHRI DAPHTARY: It envisages stages. Some may be remote and some near.

MR. CHAIRMAN: 24 hours ahead an order may be given; a general order saying "maro" may be given.

SHRI DAPHTARY: But it is difficult to formulate with precision the actual stage.

SHRI KRISHAN KANT: Do you think that such protection is given anywhere in the world excepting of course dictatorship.

SHRI DAPHTARY: Suppose something is done for the prevention of breach of peace which normally would be tort.

SHRI KRISHAN KANT: But, are the police now hampered by any provision or because of lack of provision from taking action?

SHRI DAPHTARY: They have to submit to judicial enquiry afterwards. That is the only penalty.

SHRI KRISHAN KANT: That is afterwards. But the action is done.

SHRI K. NARAYANA RAO: This is a matter of civil liberty. We have the Inquiry Act etc.

SHRI SHRI CHAND GOYAL: Mr. Setalvad was of the opinion that for preservation of law and order this provision is necessary, whereas Mr. Misra was of the opinion that this gives wider powers.

SHRI DAPHTARY: Both Mr. Setalvad and myself are at least 15 years older than Mr. Misra. We belong possibly to an antiquated generation who believed in law and order, possibly not in tune with the present outlook.

SHRI H. N. MUKERJEE: As a lawyer and jurist, would you suggest to the Committee that we need not take note of what he considers to be certain features of the present political situation and introduce in our legislation very deliberately something which lacks of a nature of a Police State?

SHRI DAPHTARY: Quite frankly I think it may be antiquated for the police to have powers.

SHRI KRISHAN KANT: Here they have the powers.

SHRI DAPHTARY: I am not aware anyone having filed a case for an act of tort.

SHRI KRISHAN KANT: I suppose you are still thinking over it. You may explain it later. You say there has been no case of that type.

SHRI DAPHTARY: I say that subject to correction. I am not aware of anyone having filed a suit for an act of tort committed.

SHRI KRISHAN KANT: No case has been filed because it is a sovereign right. Because it was sovereign nobody had brought it before the court. Now we are making the Government liable to tort. Therefore we want to make a provision like this.

MR. CHAIRMAN: They are sovereign functions. There is no question of filing a suit.

SHRI KRISHAN KANT: Have any such cases come up previously before the Supreme Court or the High Courts? I think this question was never raised at all.

SHRI DAPHTARY: If it has anything to do with the preservation of peace it is clearly a sovereign power.

SHRI NARAYANA RAO: Take Rallia Ram's case. The policemen took away some gold. How do you say that there is no case at all. This case had come up before the Court.

SHRI DAPHTARY: I think what is meant here is this. Suppose the law has laid down this that what is done is in the exercise of the sovereign power, then that is protected but what is done is not done in the exercise of sovereign power, that is not protected. Now you are making the Government liable in respect of a

number of things done which may be ordinarily of a governmental nature. In that case, it is necessary that you should have an exemption.

SHRI KRISHAN KANT: In that case, there would be no relief because of that provision.

SHRI NARAYANA RAO: But the police action against the people has been protected here.

SHRI M. P. SHUKLA: I think Sir, this clause (i) provides protection only to the police force or to a public servant while performing the duties either under law or any other order. I think under such circumstances the exemption will be very reasonable. But, if they go beyond that and if they go beyond the sovereign functions, then they cannot be exempted.

SHRI DAPHTARY: Let us take the person who is carrying out the orders under the preventive detention. It may be done on various grounds—one may be of course on grounds of security of the State and another may be on grounds of public order. But, there are other grounds also. It is possible that the orders carried out on those two grounds might be protected. Others cannot be protected. It is not that every action of that kind necessarily is protected under this particular section.

SHRI SHRI CHAND GOYAL: What is your opinion? Do you think that with the provision in this Bill, a man like Kasturilal Rallia Ram will be able to get relief after passing of this Bill?

SHRI KRISHAN KANT: Please read (n) on page 8 of the Bill 'any personal injury or any damage to property caused by an act which by its nature is likely in the ordinary course of events to cause such injury or damage, if the doing of the act is authorised by any enactment for the time being in force'. If the act is done to keep the law and order, then

they will be completely safe and no enquiry can be done because they are doing that as a matter of duty.

Now you take away all the rights of the citizens.

SHRI DAPHTARY: But if the doing of the act is authorised by any enactment for the time being in force, then it shall not render the Government liable.

SHRI SRINIBAS MISHRA: Let me proceed to clause 11(g) 'any act done in the exercise of the powers vested in the Union for the purpose of training, or maintaining the efficiency of, the armed forces'. Under such circumstances, this power can be utilised unconstitutionally. Suppose they belet the private houses. They may not be liable to pay the compensation. My point is that under this clause the power can be used unconstitutionally also.

SHRI DAPHTARY: It was not intended to be used for any malicious armed corps training at all.

SHRI SRINIBAS MISHRA: It can be used unconstitutionally. For beletting of the private houses they will say that they are protected under this sub-clause and they need not pay compensation at all.

SHRI DAPHTARY: If they take up the house for this purpose, it is all right

MR. CHAIRMAN: For the purpose of training, I want 50 houses. How can you say that we can take? You may take clause (m).

SHRI DAPHTARY: Clause (m) says 'any act in respect of which a remedy is provided under the Indian Railways Act, 1890 or under any other enactment for the time being in force.' For this the only remedy is civil remedy.

SHRI SRINIBAS MISHRA: Remedy against whom? It is not clear at all.

SHRI DAPHTARY: What kind of remedy should there be is not clear. But I can say that any sort of

remedy that is to be provided is a good enough thing.

SHRI SRINIBAS MISHRA: Let us take clause 11. Read the beginning of the phrase. "Nothing contained in this Act shall render the Government 'liable in respect of' these things. That means all laws will be enforced in this country, firstly, the law that is now in force and another law containing the savings provisions. That means any act done under this Act will render government liable.

SHRI DAPHTARY: The old law must go. But supposing there is some other statute under which Government is liable, it may be liable notwithstanding this Act. That is why the other remedy is mentioned later on in this connection.

SHRI SRINIBAS MISHRA: In other words, if Government are liable under some old law, they will still remain liable. This will be in addition?

SHRI DAPHTARY: Yes.

SHRI KRISHAN KANT: In regard to clause 3 (a) (i) a suggestion was made to include 'or neglecting to act in the course of his employment'. Do you think that it would be good if it is clarified in the Bill?

MR. CHAIRMAN: We pointed this out to Mr. Trikamdas that that was the definition given in the General Clauses Act also.

SHRI DAPHTARY: Then it would be 'any act done or omitted to be done'.

SHRI KRISHAN KANT: In regard to clause 3 (a) (ii), ratification will never be done by Government after the tortious act has been committed.

SHRI DAPHTARY: I do not know about that. Suppose a public servant is sued for damages for some action of his, then Government may very well say 'Yes, his action is right, and we shall defend him'. So, why is it

suggested that ratification will not be there?'

SHRI KRISHAN KANT: The general apprehension is that Government will not ratify.

SHRI DAPHTARY: Normally they will not ratify. So, the phrase 'ratification' should go. But is it your suggestion that Government are not honest?

SHRI KRISHAN KANT: Government basically is based on coercion and there is no doubt about it.

SHRI SHRI CHAND GOYAL: In France Government has been defined as an honest person.

MR. CHAIRMAN: In the General Clauses Act, act means acts done or illegal omissions.

SHRI KRISHAN KANT: So, it can be clarified here itself. Shri Trikamdas had suggested that the phrase

'While acting beyond the course of his employment the act constituting the tort was done by the employee or purported to be done by the employee in his official capacity.'

'While acting beyond the course of his employment if the act constituting the tort was done by the employee in or purported to be done by the employee in his official capacity.'

would be enough. Do you agree with this?

SHRI DAPHTARY: Yes. It should be 'purported to be done'.

MR. CHAIRMAN: We had put it to Mr. Trikamdas and he had agreed to this, and we had put it to Mr. Setalvad also and he also felt that the word 'and' should be changed to 'or'.

SHRI K. NARAYANA RAO: Now, we are going to bind Government for vicarious activities of its employees. It is a well-known doctrine that when a person does something in the course of his employment it is liable. But

here we want to bind Government for certain acts done by the government servants outside the course of employment.

SHRI DAPHTARY: In excess of or outside.

SHRI K. NARAYANA RAO: Simply because one purport is to act for Government, because he is a government servant for 24 hours....

SHRI DAPHTARY: Does the word 'purport' not occur in Cr. P.C., section 197? Suppose a policeman steals the money in the police station as happened in Ralia Ram's case; was he acting in the course of his employment when he did it? Or was he acting beyond the course of his employment? Or was he purporting to act in the course of his employment when he did it?

SHRI K. NARAYANA RAO: In Ralia Ram's case, there is no semblance under the law to say that that was purported to have been done, and once the property had been entrusted to the police station any person working there could take away that property. Suppose we entrust something to the railway station it does not mean that a railway servant can get away with it. So, you cannot bring that nexus also. Here, somebody's property has been taken to the police station under the authority of law, and if somebody has stolen it there, still Government are liable. The property vests with Government; the custody may be different; so, there is a nexus there. So, what the man has done is not purported to have been done. A person can find fault with Government not for what the policeman might have done or for the fact that the policeman has property had been vested with Government, it had been in the custody of Government and, therefore, it was their responsibility.

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SHRI DAPHTARY: In section 197, Cr. P.C., the phrase 'while acting or purporting to act' is there.

MR. CHAIRMAN: It is only a question of merely giving a sanction to prosecute.

SHRI DAPHTARY: I am of the view that 'or' should be there.

MR. CHAIRMAN: And 'and' should not be there. Two incidences should not be combined in order to enable a citizen to sue.

SHRI DAPHTARY: Suppose the phrase is 'alleged to have been committed while acting or purporting to act in the discharge of his duties'. The question that might arise is this. Suppose an officer takes a bribe for not doing something or for doing something which he can do. Is it something purporting to be in the course of his duties?

SHRI K. NARAYANA RAO: It is 'purporting to be'.

SHRI DAPHTARY: No, there is a difference of opinion on that also.

SHRI K. NARAYANA RAO: Suppose an officer says that such and such a power is within him and he can do such and such a thing, and a person offers him a bribe. Actually, that power does not vest with him, and yet he purports to do that.

SHRI KRISHAN KANT: If you have any suggestions or amendments, in the light of the discussion, you may send them to us.

SHRI DAPHTARY: I shall do so.

(The witness then withdrew)

(The Committee then adjourned till 16.00 hours)

(The witness was called in and he took his seat)

(The Committee reassembled after lunch at 16.00 hours)

III. SHRI M. C. SETALVAD, M. P.

The witness was called in and he took this seat.

MR. CHAIRMAN: We are very grateful to you for affording us another opportunity to ascertain your views on certain complicated matters concerning the Bill.

SHRI BRIJ BHUSHAN LAL: This Bill has been brought forward as a result of the Supreme Court's judgment in the Ralia Ram case. If this Bill is enacted as it is, can a case like that of Ralia Ram arise again?

SHRI SETALVAD: The distinction between sovereign and non-sovereign acts is now being abolished and the State is being put in the same position as any ordinary person. So, a case like that of Ralia Ram cannot occur under this Bill.

SHRI T. M. SHETH: So far as Government's liability in tort is concerned, there were two divergent trends of decisions. One trend started with Hari Pandey's case and ended in Vidyawathi's case. The other started with the P & O case and ended with the Ralia Ram case. The Report of the Law Commission says that the law was correctly laid down in Hari Pandey's case. Then why should not the whole Bill be based on Hari Pandey's case?

SHRI SETALVAD: The Law Commission considered various matters and made specific suggestions. The basic suggestion of the report is that the immunity of the State should go as compared with the ordinary citizen and the State should be placed in regard to torts committed by its servants or agents in the same position as a private citizen. That is the scheme of the Bill.

SHRI T. M. SHETH: But there are so many exceptions to it as in section 3 (b) (ii) where the question of ratification arises.

SHRI SETALVAD: It is the recommendation of the Law Commission also that there should be ratification.

SHRI T. M. SHETH: But the question which is agitating our mind is that the ratification will never come and, to that extent, the law abridges the rights of the citizen as they existed, say, before Ralia Ram's case.

SHRI SETALVAD: By what you are suggesting you will be placing the government or the State in a worse position than a private employer or a principal. Supposing the employee or servant who has certain defined duty is acting in the course of employment, namely, in the performance of that duty, he may do something wrong but if it is being done when he is performing those duties, the principal will be liable. But supposing he is doing something which is entirely outside those duties, though he wants to do it for his master, the private employer will not be liable for such acts unless he has ratified them. Now, why should you place the government or the State in a worse position than a private citizen?

SHRI T. M. SHETH: I will illustrate this point later on. Now I come to the proviso to clause 3(b) (iii) which says:

"Provided that the Government shall not be liable under this sub-clause if there is an express stipulation in the contract between the Government and the independent contractor that".

This places the government in a better position than a private employer. Can a private employer put in such a condition in the contract, escaping liability in torts? I am afraid not.

SHRI SETALVAD: Normally, a private citizen is liable for the acts of the independent contractor. That is the general rule. I am not able to state whether this proviso would or would not work in the case of a private citizen.

SHRI T. M. SHETH: It is only meant for government. The Bill is called Government (Liability in tort) Bill.

SHRI SETALVAD: Under the ordinary law supposing a private citizen has employed an independent contractor and made a stipulation in the contract like the one which is mentioned in the proviso, you tell me that the private citizen will not be able to make such a stipulation because even if he has made such a stipulation he will be liable; you say that such a provision or stipulation will not be legal. If that is so, that should go. I am not accepting that what you say is correct, because I do not know it at the moment. But assuming you are correct, if the scheme of the Bill is to place the government in the same position as a private citizen and if this carries the government further or puts it in a better position, then that provision should go.

SHRI PERI SASTRI: This is a deviation from the recommendations of the Law Commission.

SHRI SETALVAD: If the general principle is that we should equate the government with a private citizen in the matter of the law of torts—that is what the Law Commission also says—why should his special provision be there? It should go.

SHRI KRISHAN KANT: Since the Bill gives all the benefits and advantages to the government, when we started the general discussion we thought we should call it Government (Non-liability in Tort) Bill.

SHRI T. M. SHETH: Most of the members here are agitated over the excessive consideration given in the Bill to the executive servants, particularly the police. There is a very thin line between what the police is authorised to do and what it is doing. Secondly, the excess sometimes is so very mild that it is not taken notice of. It is only in an incident like the one in Indraprasta Estate that the public mind is agitated over it. Therefore, I submit that our law

should also be on the lines of the French law that the government is liable for the act of the servant when it is connected with service. In India in the present position where we are all concerned over the excesses of the executive, don't you think that you should have taken that French model instead of the English law which the other day you were saying you have taken?

SHRI SETALVAD: In the Commission's Report we have examined many laws, including the French law, and we have chosen the English model. The American law is even stricter, less in favour of the citizen than the English law. We chose the English Law. Going to The French law, I think, would be really very revolutionary because in many ways the French system differs from our own, Anglo-Indian system.

SHRI T. M. SHETH: That is true. You say the remedy for the excesses of the executive should be sought elsewhere. But could we not seek it even in this Bill?

SHRI SETALVAD: It is a question of choice between the two evils. As far as I know, the present situation requires proper maintenance of law and order. Now, are you going to weaken the forces of law and order by making the government liable even for the proper acts of the police?

SHRI T. M. SHETH: No, it depends on how one looks at the question. It appears that when the liability is on the government, it will be very strict with its servants. At present the higher officers are overlooking the excesses of their subordinates. When the government is saddled with the liability, it will very strictly watch the actions of its subordinates.

SHRI SETALVAD: Excuse me, you seem to be making a distinction between the government and the citizen. Supposing the police rightly in quelling a riot or quelling a disturbance, does a certain act. If this clause is omitted, government would be liable

for the injury caused by the police when it was rightly quelling a riot. Now, who will pay for that injury? The citizen will pay for that injury. Why should all of us who pay taxes, why should we pay for legitimate acts done by the police which have caused injury to people?

SHRI T. M. SHETH: Not for legitimate acts but for illegitimate acts.

SHRI SETALVAD: Illegitimate acts are not permitted. When a member of the police force acts for the maintenance of law and order, what is protected is the act which is necessary for such maintenance. If he exceeds those acts, if he goes beyond those acts, then, notwithstanding this provision, he will be liable. But if he is within his range of duty and if he acts, still some injury may be caused to others. Now according to your suggestion, if we omit this clause, then the government and, therefore, the tax-payer will be liable for damages even in that case. Why should it be so?

SHRI T. M. SHETH: No, the court will not award such damage because the act was legitimate. The court will hold that damages for torts is allowed only if the act is outside the legitimate duty. In other cases, the court will not grant remedies, in my submission.

SHRI SETALVAD: Do you suggest then that he would be acting as an agent in the course of his employment? No, it cannot be. If you omit this exception, would not the State be liable for all acts done by the policeman when he is acting as an agent or servant of the principal, because it would be in the course of employment?

SHRI T. M. SHETH: This will apply only in those cases where it is an act which he would not be under the law authorised to do. Under the law it is the duty of the police to preserve peace and maintain law and order. If, to that extent, the policeman does his

duty, I do not think the court will award any damage because anything done in pursuance of that duty cannot be actionable under torts.

SHRI SETALVAD: The words "in the course of his employment" include not only legitimate acts, namely, acts which he should have done, but also those acts which he does which are stronger than what is needed. For example, you employ a clerk to do something, say, you ask him to cash a cheque. Now, in the course of cashing that cheque if he commits forgery, which the principal never authorised him to do, the principal will even then be liable for the consequence of that act because in the course of his employment the clerk has acted fraudulently and not negligently. Similarly, if you leave the Bill without this exception, for a policeman acting in the course of his employment the State would be liable for all acts done by him even though they may exceed what was necessary to be done because the acts would be done in the course of his employment. How would you solve this difficulty?

SHRI G. VISWANATHAN: Most of us feel that this "act of State" in the saving clause can be deleted. I want to know your views whether it should be deleted or whether it should be explained.

SHRI SETALVAD: It is now well settled, I think, that an act of State can never happen between the citizen and the State.

SHRI G. VISHWANATHAN: This morning we heard the Supreme Court Advocate, Shri Trikamdas, say that this doctrine is very vague and is not accepted anywhere in the world except in a few places.

SHRI SETALVAD: It was vague at one time but now, I think, it is very clear and the Law Commission has also accepted it. What the Law Commission has said is really the result

of case law on this subject. If you like you can mention it here but I do not think it necessary to define it here.

SHRI M. P. SHUKLA: We are concerned only with three provisions of this Bill, namely, its extent, the ratification provision and the savings clause. My colleague has already asked you about the "act of State" in the savings clause but about the acts done by the police force we feel that this should be so worded as not to give any cause for anxiety to the citizen and cause for escape to the State from the liability for acts of its agents.

SHRI SETALVAD: As to the provision for ratification, clause 3(a)(ii), it has been debated here. I feel that this places the State in exactly the same position as a private employer. If a private employer employs a servant or an agent and if that agent or servant does any act which is not in the course of his employment, the act has to be ratified in order to make the private employer liable. Are we going to place the Government in a worse position than that?

SHRI M. P. SHUKLA: Not at all. But are these two things necessary, namely, acting on behalf of Government and securing ratification?

SHRI SETALVAD: They are necessary. I have got here the reference. You will find it in Pollock and Mulla at page 65 *et seq.* Ratification can only be made of an act done on behalf of another person. That is the first requirement of ratification in law. The further requirement is that that person should by conduct or words accept that act. So, I think, both these provisions are necessary.

SHRI KRISHAN KANT: Will it satisfy if we say:

"While acting beyond the course of his employment if the act

constituting the tort was done or purported to be done in his official capacity?"

I think, that will include everything.

SHRI SETALVAD: The words "official capacity" need not cover all acts done on behalf of Government. You want it to be wider as it is here.

SHRI M. P. SHUKLA: About the acts of the police force we feel that according to the provision in this Bill they will be let at large and the State will not be held responsible; the excesses might go beyond what may be very legitimate and reasonable.

SHRI SETALVAD: There is the other alternative which we have already discussed, namely, if you expose the police or the State for liability in tort for all acts of the police even though it may be done for the preservation of law and order, you are imposing a liability on the ordinary citizen for which there is no justification.

SHRI M. P. SHUKLA: If there could be some better drafting of this clause which could allay these fears, that may be probably more acceptable. We would request you to give thought to this and suggest even at a later stage such a change.

SHRI SETALVAD: Very well, but that should be for the Draftsman who, I suppose, is here.

SHRI M. P. SHUKLA: Now about the extent of the Bill. It says here that it extends to the whole of India except the State of Jammu and Kashmir. We believe that it indicates only the territorial extent of the Bill and not that if the State of Jammu and Kashmir or the servants of the Government of that State commit some tort in territories other than Jammu and Kashmir, they will be liable.

SHRI SETALVAD: This clearly is

territorial extent. If Jammu and Kashmir employee in India commits an act of tort, then the liability will attach.

SHRI M. P. SHUKLA: If Government of India employee commits a tort in the territory of Jammu and Kashmir, how will he be dealt with?

SHRI SETALVAD: This will not extend to Jammu and Kashmir. It is a tort committed in Jammu and Kashmir where the Act does not apply.

SHRI M. P. SHUKLA: Will it not give an invitation to employees of Government of India to commit acts of tort in Jammu and Kashmir and get away with it?

SHRI SETALVAD: That is rather far-fetched.

SHRI HIRA VALLABHA TRIPATHI: I would like to draw your attention to clause 11(e). Does this clearly indicate what is intended by the law makers?

SHRI SETALVAD: The idea is to protect all legitimate acts authorised by the statute or by law or by a proclamation. Of course, under the Constitution, a proclamation stands on a higher pedestal than an ordinary law. That is why protection is given.

SHRI HIRA VALLABHA TRIPATHI: A proclamation does certify things by which you suspend certain rights or certain remedies. Here, it is like an act done under a proclamation. Does that cover the whole things? Does it indemnify?

SHRI SETALVAD: You want protection and if protection is to be given it should be wider.

SHRI HIRA VALLABHA TRIPATHI: It must be made clear.

SHRI SETALVAD: The phraseology can be altered to clarify it.

SHRI C. ACHUTHA MENON: I would like to draw your attention to clause 11(i) relating to police force. You are of the view that the police acting legitimately under the orders of Government should be protected and Government also should have immunity. In your Report of the Law Commission, while enumerating the exemptions, you have not thought it fit to provide for the exemption of police force. It has now been provided in the Bill and you think it is necessary.

SHRI SETALVAD: Yes.

SHRI C. ACHUTHA MENON: Then, the question arises why did you not think it proper at the time of the Law Commission's Report that you submitted?

SHRI SETALVAD: As I said earlier, the Report is not an exhaustive Report. It only indicates certain lines and certain exceptions.

SHRI C. ACHUTHA MENON: That I understand. Even then, you have provided for exceptions to judicial acts, acts of State and so many other things. Naturally, that is a thing which ought to have occurred to you. Anyhow, you still think that it is a necessary protection so far as the police is concerned.

SHRI SETALVAD: It is confined to acts done for the prevention and suppression of all these things. That qualifying clause is there.

SHRI C. ACHUTHA MENON: While the police are acting in the course of their duties, so many excesses are committed very often and the ordinary citizen has no remedy.

SHRI SETALVAD: Even though they may be acting in the course of their employment if they do not do acts which fall within the

ambit of this qualifying clause, those acts will not be protected.

SHRI C. ACHUTHA MENON: I should rather think that it is a very nice distinction made. I do not know in what way it is going to be interpreted, whether acts done by the police or acting under orders.

SHRI SETALVAD: Let us take a recent illustration. It was alleged that there were police excesses in the Indraprastha Bhavan. If they were really acting without any orders and they ran into the place, that will not be protected by this clause.

SHRI C. ACHUTHA MENON: There might be general orders to go and suppress a riot or some such things. The question is whether there were orders for a particular act or not. Is it proper for the courts to go into all these details and come to a certain conclusion? Then, an ordinary citizen will be in a very sorry position because his remedy will be dependent upon the interpretation of various nice distinctions between general orders and all these things.

SHRI SETALVAD: What is the alternative? As I said a little while ago, are we going to make, all acts of the police, whether legitimate or done properly or not, as torts for which Government may be liable? That is the only alternative then?

SHRI C. ACHUTHA MENON: Is that the only alternative? I do not know. We have an apprehension that, first of all, this clause is not very clear, namely, 'any act done under a Proclamation issued under the Constitution'...

SHRI SETALVAD: I have said a little while ago that it must be clarified or amplified by the addition of some words. It is difficult to say whether an act was under the Procla-

mation unless some more words are added to that clause.

SHRI C. ACHUTHA MENON: Another question is whether it is intended, by this clause, to indemnify the Government from the consequences of all that has been done. For instance, the Supreme Court has held that, in regard to acts for which there was no remedy while the Proclamation of Emergency was in force, those persons who were affected may, after the withdrawal of Emergency, go to the court for remedy.....

SHRI SETALVAD: May or may not get the remedy....

SHRI C. ACHUTHA MENON: What I want to know is this. Is it intended, by this clause, to indemnify the Government from all future consequences and if so, whether this is the proper way of doing it.

SHRI SETALVAD: If you want my opinion, as the clause stands at present, certainly those acts which the Supreme Court were referring to would not be protected by this clause because they would not be acts done under the Proclamation. As I have said already, this clause must be clarified or amplified by the addition of some words.

SHRI BALKRISHNA GUPTA: What I understand is that, in India, as the country is run today, excesses are hundred times more than in any other civilised country in the world, at the hands of the police, at the hands of the executive officers, at the hands of all sorts of agents of government, and not even one per cent of the case comes to the court. So, in the name of law and order, you are restricting the remedies to which a citizen is entitled and thus you are permitting the excesses to continue by having such an Act. Don't you feel so?

SHRI SETALVAD: I do not think so. When an act is done and the

man who is injured claims compensation, the question which always arises is whether the act was done in the preservation of peace. If the act is not done for that purpose, if it goes beyond what should have been done, then the Government would be liable.

SHRI BALKRISHNA GUPTA: More often the Police engineers the law and other question just to hide their own crimes against the citizens. This has been the state of affairs in this country. Under the Essential Commodities Act and other Acts which the Government has enacted in the last 20 years, they are confiscating and stealing the properties of the people and are injuring their lives, and under the name of law and order, you permit them to continue their excesses. If they act in a little more human way, more on the side of the citizen, don't you think that people will be better off and Government will be more civilised and more human?

SHRI SETALVAD: May I put a question with respect? Would you enable the citizens to maltreat the police? Suppose a policeman, even when acting strictly in discharge of his duties, manhandles a man in order to keep him away from certain things happening, then, according to you, that would also be a tort for which the Government would be liable. How can you work this?

SHRI BALKRISHNA GUPTA: People are killed while under custody. I am a political worker; I move about and I know what goes on. And not even one case out of a hundred comes to the court. People are frightened of the Police and the government servants. If you, somehow or other, relax these things a little, then the Police will be frightened and the citizens will enjoy more freedom. This is my request.

SHRI SETALVAD: As I said the day before yesterday, the remedy for this does not lie in importing some-

thing into this Bill; the remedy lies either in some other laws or in having a better Government.

SHRI BALKRISHNA GUPTA: Better Government will come out of better laws.

SHRI KRISHAN KANT: Please refer to clause 3(b) where a proviso has been added giving immunity to Government if a certain provision has been made in the contract. I would then refer you to 'Notes on Clauses'; on page 14, it is said:

"...The proviso to item (iii) of sub clause (b) is, however, new because it is felt that it will not be fair and proper to make the Government liable under this item if there is an express stipulation in the contract between the Government and the independent contractor that reasonable care in the doing of the act shall be taken by the contractor and not by the Government and the independent contractor shall, and the Government shall not, be liable for any personal injury or any damage to property caused in the doing of the act by the failure on the part of the independent contractor to take such care."

In the morning we were discussing about this. The liability of the Government should not stop, rather the immunity should not come, if they pass on the work to the independent contractor because the very method of selection of contractor can be defective and an inefficient or incompetent contractor may be selected and because of that, the whole thing may happen. Therefore, here the Government's liability should continue to that extent. After all, the Government is responsible for the selection of the contractor.

SHRI SETALVAD: Are you suggesting that Government should be liable in some larger measures than an ordinary employer?

SHRI KRISHAN KANT: It was suggested that a proviso may be added here saying, provided sufficient care has been taken to see that the contractor is properly qualified to perform the task entrusted to him. Something like that should be added. In the morning a number of case laws were read out in which it was said that the immunity of the Government does not become complete by virtue of passing on the work to an independent contractor because the process of selection of contractor can be defective which can ultimately affect the citizens. What do you think of this?

SHRI SETALVAD: Both in regard to Government and in regard to private citizens, a duty could be imposed that, while getting work done by an independent contractor, it should be ~~got~~ done by a proper contractor. There should be no objection to that.

SHRI KRISHAN KANT: Yes. That is the point.

Now I come back to clause 11(i). Do you think that, because of not putting this clause of immunity, the Police has so far been handicapped in the performance of their functions?

SHRI SETALVAD: At the moment the police would be protected in the discharge of the duties of the police force. There is what is called, sovereign power or something of that kind for torts even if it is excessive. The question will still arise whether policeman was acting as provided for preservation of law and order or not.

SHRI KRISHAN KANT: When judicial enquiry is held the judge of the high court or the other always decides whether the police acted correctly or not. So that itself is protection for the police is it not?

SHRI SETALVAD: There is no question of liability for tort—that is judicial enquiry whether you punish police officer or do not punish and so on.

SHRI KRISHAN KANT: At present, the present law is to provide for a judicial enquiry to be made. Suppose the Judge-Enquiry Commission comes to a conclusion was within the legitimate jurisdiction in its works, no tort lies.

SHRI SETALVAD: Even if they are not legitimate, in the present law, not tort will lie.

SHRI KRISHAN KANT: The question of preservation of peace and all that is put in here. It can be utilised for anything and everything; that has been our fear.

SHRI SETALVAD: Remedy lies somewhere else; not in this Bill.

SHRI KRISHAN KANT: That remedy is too far-fetched.

SHRI H. N. MUKERJEE: I wish to make a reference to the proclamation issue and ask certain questions. First of all, there is clause 11. It is said that any act done under a proclamation under the constitution is exempted. You have suggested that this might be interpreted that acts done beyond the issue of the proclamation may not be covered. My fear is this: as it is formulated it might very well be interpreted to mean not merely the issuance of the proclamation but the consequential results. Emanating from the proclamation this is a matter where there might be legal controversies, but I would like to make it foolproof and to that extent, I suppose, I can interpret your evidence to mean that this clause should be rendered foolproof.

SHRI SETALVAD: It should be, whatever the intention is, it should be made clear. But as it appears to me, as it stands at present, it will not cover acts done not under proclamation but under notification and other things done later on in subsequent stages resulting to the proclamation.

SHRI H. N. MUKERJEE: I wish to recall what you yourself said in early

1966, about there being constitutional dictatorship in this country on account of certain things happening on that occasion. The Supreme Court gave certain judgement and I would like to read out to you what Justice Ganjendragadkar had said.

"The inevitable consequence of this position is that as soon as the order ceases to be operative the infringement of the rights made either by the legislative enactment or by executive action can perhaps be challenged by a citizen in a court of law, the same may have to be tried on the merits on the basis that the rights alleged to have been infringed were in operation even during the pendency of the Presidential Order,

If, at the expiration of the Presidential Order, Parliament Passes any legislation to protect executive action taken during the pendency of the Presidential Order, and afford indemnity to the executive in that behalf the validity and the effect of such legislative action may have to be carefully scrutinised."

The highest judicial pronouncement is here. It says the citizen might very well have his rights established later on after the revocation of the emergency.

SHRI SETALVAD: He may have the remedy. They consider it possible, and also consider the possibility of protecting legislation—which may be itself challenged.

SHRI H. N. MUKERJEE: When Supreme Court makes a pronouncement like this, naturally, protection of the citizens' rights becomes for us a matter of great anxiety. That is

why in Article 34 of our constitution there is a provision that if indemnity laws have to be passed in respect of infringement of fundamental rights, it can be done only when martial law is in force and not otherwise. That makes me suspect that you may bring in immunity by the backdoor, a kind of surreptitions, condoning of fundamental wrongs. In view of this, and in view of what you yourself described once as 'constitutional dictatorship', I felt I could get some more words from you based on your judicial understanding of the thing. After all, this kind of omnibus provision, any act done under a proclamation, should not be there in the legislation.....

SHRI SETALVAD: The clause should be made more clear as to what is intended to be covered. It should cover what is directed to be done by the proclamation and nothing more. If it is sought to include things far removed from the proclamation it is a matter of great concern. That is what I feel about it.

SHRI H. N. MUKERJEE: Your advice would be to clarify this thing.

SHRI SETALVAD: Undoubtedly.

SHRI H. N. MUKERJEE: Thank you.

MR. CHAIRMAN: We thank you very much and we are grateful to you for affording us this second opportunity to cross-examine you.

SHRI SETALVAD: I have tried to do my best. I hope I have helped hon. Members, Thank you:

(The Witness then withdrew)

(THE COMMITTEE THEN ADJOURNED).