



# TORTIOUS LIABILITY OF THE STATE IN INDIA: A CRITICAL ANALYSIS

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**Abstract--** The State is not only responsible for maintenance of law and order and collection of taxes, but also carries out various activities which were traditionally considered to be actions of a private individual. In such situations, the issue of liability of the State or Union Govt. becomes of much more importance. This paper analyses the concept of “sovereign immunity” and its interaction with a democratic welfare society established under the Rule of Law. Lastly, the paper deals with the emergent need to codify the Tort legislation in India to provide appropriate relief to those whose rights are afflicted by tort law violations.

## INTRODUCTION

The doctrine of *laissez faire* has given place to the doctrine of “Welfare State”. The participation of the State in various welfare and service activities has led to the emergence of government as the major employer. Hence the question arises whether state is vicariously liable for the torts committed by its servants during the course of employment.

## OBJECTIVE OF THIS PAPER

Objective of this paper is to analyse the transition of tortious liability of the State in India from the days of East India Company till date. Article 300 of the Constitution of India deals with the extent of liability of the Government of India and the Government of States, but it is surprising that it has reinstated the position prior to the Constitution of India, when principle of sovereign immunity was in full swing. The principle of sovereign immunity had been discarded in England by the Crown Proceedings Act, 1947 before our constitution came into existence. The judiciary has played a significant role in the absence of any specific legislation in this regard. The judiciary has limited the scope of the doctrine of sovereign immunity by guaranteeing the right to compensation as a fundamental right.

## RESEARCH METHODOLOGY

The paper is based on primary data collected from Books & Articles and secondary data collected from internet, newspapers, magazines and journals.

## PRE-CONSTITUTIONAL POSITION

Before the commencement of the Constitution, liability of the Dominion and Provinces of India was described in Section 176 of the Government of India Act, 1935 referring back to section 32 of Government of India Act 1915

which in turn refers to section 65 of the Act of 1858. The Act of 1858 for the first time laid down the tortious liability of the State in India. At the time when Act of 1858 was passed, the English common law was that no proceedings civil or criminal was maintainable against the sovereign because the “King can do no wrong”. Section 65 of the Act stated : “The Secretary of State in council shall and may sue and be sued as well in India as in England, by the name of the Secretary of State in Council as a Body Corporate, and all person and bodies politic shall and may have and take the same suits, remedies and proceedings, legal and equitable, against the Secretary of State in council of India as they could have done against the East India Company.” Therefore to know the liability of we have to find the position of the East India Company prior to 1858. The East India Company was acting in dual capacity performing commercial functions and exercising sovereign powers.

A leading case in this connection is *P & O Steam Navigation Company v. Secretary of State for India*<sup>11</sup>, where the question before the Supreme Court of Calcutta was to ascertain the liability of East India Company for the tortious acts of its servants committed in the course of their employment. In this case a servant of the plaintiff company was traveling in a horse driven carriage belonging to the company. While the carriage was passing near the Government Dockyard, certain workmen employed by the Government, negligently dropped an iron piece on the road. The horses were frightened and one of them was injured. The plaintiff company filed a suit against the Secretary of State for India for the damage that was suffered due to the negligence of the servants employed by the Government of India and claimed damages. The defendants claimed immunity of the crown and contended that the action was not maintainable. The court tried to look into the liability of the East India Company. A distinction was drawn between the sovereign and non-sovereign functions of the East India Company. It was held that if the act was done in the exercise of sovereign functions, the East India Company would not have been liable, but if the function was a non-sovereign one, i.e. which could have been performed by a private individual without any delegation of power by the Government, the company would have been liable. Maintenance of dockyard was considered to be a non-sovereign function, as such the Government was held liable.

In *Nobin Chander Dey v. Secy. of State, India*<sup>2</sup>, the State was exempted from liability when the function was considered to be a sovereign one. There the plaintiff filed a suit for specific performance of contract contending that the Government had made a contract with him for the issue of licence for the sale of *ganza* and had made breach of the same. Declaring an action of granting a *ganza* licence as sovereign, a method of collecting tax, the court held that the action was not maintainable as the Government was immune from any such action. But in *Secretary of State v. Hari Bhanji*<sup>3</sup>, a suit was instituted for recovery of excise duty collected by the state on salt. The Madras High Court ruled that the immunity of East India Company extended only to “acts of State” and the distinction based on sovereign and non-sovereign functions of East India Company was not well founded.

In *Secretary of State v. Cockcraft*<sup>4</sup>, a suit was filed to recover damages on the ground that the injury was caused to plaintiff due to negligent leaving of a heap of gravel on a military road maintained by the Public Works Department. Holding the function to be sovereign, the court dismissed the suit. Similarly in *Secretary of State v.*

*Srigobinda Choudhuri*<sup>5</sup>, the Secretary of State could not be sued in respect of an act of subordinate, in the exercise of a sovereign power. In *Etti v. Secretary of State*<sup>6</sup>, the Madras High Court ruled that in maintaining a hospital for the benefit of the public at the expense of the public revenues, the Government was discharging a proper governmental function as a sovereign and therefore, the Secretary of State was not liable for the torts of his servants employed in the hospital. The scrutiny of the above stated decisions indicates that despite the view propounded in *Hari Bhanji*, the distinction between sovereign and non-sovereign functions was perpetuated in the later decisions. Had this view found judicial acceptance in India, the position as regards the tortious liability of the Government would have been entirely different today.<sup>7</sup>

## POST-CONSTITUTIONAL POSITION

Article 300 of the Constitution of India prescribes the way in which suits by or against the Government may be instituted. According to this Article, the Government of India may sue and be sued by the name of the Union of India and the Government of a State may sue and be sued by the name of the State in relation to their respective affairs in the like cases as the Dominion of India and the corresponding Indian states might have sued or been sued if the Constitution had not been enacted. So it is clear that the liability of the State relates back to the position prior to the enactment of the Constitution.

*State of Rajasthan v. Mst. Vidyawati*<sup>8</sup> was the first direct case before the Supreme Court of India dealing with the vicarious liability of the State for the tortious act of its employees after the Constitution came into force. In this case, the claim for damages was made by the widow of the deceased, who died in an accident caused by the negligence of the driver of a jeep, while it was being taken from the workshop to the collector's bungalow for the Collector's use. The Rajasthan High Court had held the State liable. Dismissing the appeal of the State of Rajasthan, the Supreme Court held the State liable. The court observed that in India, ever since the time of East India Company, the sovereign had been held liable to be sued in tort or in contract and the common law immunity never operated in India. The Court further observed:

The principle of sovereign immunity is now a discarded doctrine. In the United Kingdom itself, this rule 'based on the old feudalistic notions of justice namely that the king was incapable of doing a wrong', has become outmoded in the context of modern development in statecraft and resulted in the enactment of Crown Proceedings Act, 1947.<sup>9</sup>

These observations gave the impression that the Court was in favour of a broader view of the state's liability for tortious acts of its servants than what the *P & O* case had laid down. But it is also true that the Court did not specifically overrule the test of sovereign function to determine government's liability. What did it do was to give a restrictive significance to the concept of 'sovereign' functions. It did not accept the view that the maintenance of a car for the collector in the discharge of his official duties, was a sovereign function.<sup>10</sup>

*Vidyawati* decision might have been the precursor of a new trend in the area of state liability in India, but unfortunately, only three years later, the efficacy of the views mentioned therein was whittled down by the Supreme Court in *Kasturi Lal v. State of U P*<sup>11</sup>. In this case, the plaintiff was going to Meerut to sell gold, silver and other goods. As he was passing through the city, he was taken into custody by three policemen. His person

was searched and all the gold and silver was taken into custody and he was put in the lock up. On his release his gold was not returned, though silver was immediately returned. The gold had been misappropriated by the Head Constable who fled to Pakistan. Kasturi Lal filed a suit against the Government of U. P. for the return of gold or value. There was a clear finding on record of gross negligence on the part of the police authorities in the matter of safe custody of the gold. The Supreme Court applied the vague distinction of sovereign and non-sovereign functions and held that the state is not liable because the functions of arrest and seizure of the property are sovereign functions. The court however felt disturbed that it was not in position to give any remedy to Kasturi Lal. The Court expressly declared that this was not a satisfactory position of law and suggested that a law be enacted to deal with the tortious liability of the State on the lines of the Crown Proceedings Act, 1947. *Kasturi Lal* has been severely criticized as being ‘clearly wrong’, ‘unfortunate’ and ‘productive of great public mischief’. This decision was termed as outmoded, which must be rejected.<sup>12</sup>

### ***Post Kasturi Lal Scenario***

The distinction between sovereign and non-sovereign functions is vague which leads to absurd conclusions. In *Union of India v. Harbans Singh*<sup>13</sup>, carrying meals by truck of military department by military driver was held to be a sovereign function by the Punjab High Court. The same High Court in *Union of India v. Jasso*<sup>14</sup>, held that the carrying of coal to the Army Head Quarters is a non-sovereign function. In *Satyawati v. Union of India*<sup>15</sup>, the Delhi High Court held that the carrying a hockey team in a military truck to the Air Force Station to play a match is a non-sovereign function. In *Union of India v. Sugrabai*<sup>16</sup>, the Bombay High Court held that the transporting of military equipment from the workshop of the Artillery School is a non-sovereign function. In *State of U. P. v. Hindustan Lever*<sup>17</sup>, the Allahabad High Court held that the government sub-treasury’s banking function is a non-sovereign function. In *Union of India v. Savita Sharma*<sup>18</sup>, the Jammu and Kashmir High Court held that driving of a military truck to Railway Station to bring the jawans to Unit Head Quarters is a non-sovereign function. The same High Court in *Union of India v. Abdul Rehman*<sup>19</sup> held that the driving of a water tanker belonging to BSF by a BSF driver is a non-sovereign function. From the above stated decisions of the High Court it is evident that the judiciary has not laid down any clear test to determine the character of a function as sovereign and non-sovereign.

### ***Recent Trends to hold the State liable***

The recent judicial trend is to hold the State liable for the tortious acts of its servants. The defence of sovereign immunity is not available in case of torts that violate the right to life and personal liberty enshrined in Article 21 of the constitution. In *Rudal Shah v. State of Bihar*<sup>20</sup>, the unlawful detention of the petitioner for fourteen years after the acquittal from the Session Court was held to be violative of Article 21 and the State was directed to pay the compensation of Rs. 30,000. In *Sebastian M. Hongray v. Union of India*<sup>21</sup>, the Supreme Court directed the Union of India to pay exemplary costs to the widows of two person detained by the Jawans of 21<sup>st</sup> Sikh Regiment who could neither be produced by the respondent even after the direction of the Court nor their whereabouts could be established. In *Bhim Singh v. State of J & K*<sup>22</sup>, the petitioner who was an MLA was wrongfully detained by

the police in order to prevent him from attending the session of the legislature. The Supreme Court awarded the compensation of Rs. 50,000/- against the State on account of authoritarian manner in which the police acted with the right to personal liberty of the petitioner.

In *SAHELI, A woman's Resource Centre v. Commissioner of Police*<sup>23</sup>, the death of a 9 year old boy was caused by beating and assault by a police officer. In a writ petition filed by a Women's Civil Right Organisation, SAHELI, the Supreme Court directed the State to pay Rs.75,000/- as compensation to the boy's mother. In *Kumari v. State of T.N.*<sup>24</sup> the Supreme Court awarded Rs. 50,000/- against the State for the death of a child who fell into an uncovered sewage tank. In *Nilbati Behra v. State of Orissa*<sup>25</sup>, the petitioner's son died in police custody on account of torture by the Police. The Supreme Court awarded compensation of Rs.1,50,000/- against the state and expressly held that principle of sovereign immunity does not apply to the public law remedies under Articles 32 and 226 for the enforcement of the fundamental rights.

The Supreme Court reiterated the same principle of law in *N. Nagendra Rao & Co. v. State of AP*<sup>26</sup>. In this case, appellants were carrying on business in fertilizer and food grains. Vigilance cell raided the premises of the appellants and seized huge stocks. Orders were issued to dispose of the stocks pending investigations. However, no action was taken. Later on it was found that there was no irregularity except in accounting, so the stocks were to be returned to the appellants, but by then the stocks had been rendered unusable. Trial court decreed the suit for compensation but the High Court of Andhra Pradesh reversed it on the basis of ratio of *Kasturi Lal*. On appeal, the Supreme Court upheld the trial court decision and held that the doctrine of sovereign immunity stands diluted in the context of modern concept of sovereignty and thus the distinction between sovereign and non-sovereign function no longer survives. The court further observed that the state is immune from liability only in cases of acts of State like defence of the country, administration of justice, maintenance of law and order and repression of crime except when Article 21 is breached. In course of expounding the philosophy behind this principle, the court observed that no civilised system can permit executive to play with the people of its country and claim that it is entitled to act in any manner as sovereign. No legal or political system can place the state above the law. There is shift from the concept of sincerity, efficiency and dignity of state as juristic person to liberty, equality and rule of law. The concept of public interest has also changed with the structural change in society. Thus the Supreme Court concluded that any compartmentalization of functions of state into sovereign and non-sovereign or governmental or non-governmental is not sound as it is contrary to the modern thinking.<sup>27</sup>

In *Kewal Pati v. State of U P*<sup>28</sup>, a convict was killed in jail by a co-accused. The Supreme Court directed the state to pay Rs. one lakh as compensation to the widow and children of the deceased because it was the duty of the jail authorities to ensure his life and safety in jail but they failed to do so resulting in deprivation of his life contrary to law. In *PUCV v. Union of India*<sup>29</sup>, the supreme Court awarded compensation of Rs. one lakh each to the families of the persons who were killed by Imphal police in fake encounter. The Court reiterated the principle of *Nilbati Behra*<sup>30</sup> and *Challa Ramakonda Reddy v. State of A.P.*<sup>31</sup> In the latter case, A.P. High Court held that the right to life is basic, inalienable and indefeasible. The founding Court has held that where a citizen has been deprived of his life or personal liberty otherwise than in accordance with the procedure prescribed by law, it is no answer to say that the said deprivation

was brought about while the officials of the State were acting in discharge of the sovereign functions of the State. The Supreme Court further held: “The fundamental rights are sacrosanct. They have been variously described as fathers incorporated the exception in the Articles themselves wherever they were found advisable or appropriate .No such exception has been incorporated in Article 21 and we are not prepared to read the archaic concept of immunity of sovereign functions, incorporated in Article 300(1) as an exception to Article 21.”<sup>32</sup>

In *Common Cause, A Regd. Society v. Union of India*<sup>33</sup>, the Supreme Court held that the allotment of petrol outlets by the minister of state could not be treated as “act of the State” and so the defence of sovereign immunity was not accepted.

### *Whether Kasturi Lal’s ruling is overruled?*

It is quite clear from the abovementioned catena of cases that the judicial trend is to make the government accountable rather to defend it under the ground of sovereign immunity. Now the question strikes to the mind regarding the relevance and standing of *Kasturi Lal’s* case. Whether *Kasturi Lal* is overruled? The answer of this question is not a straight one as no decision has expressly overruled the *Kasturi Lal’s* case. But at the same time, we have no hesitation to say that the effect of *Kasturi Lal* has been diluted to large extent by the later decisions without referring to this case. This fact is evident from the subsequent cases. In *State of Gujarat v. Memon Mohd*<sup>34</sup>, the custom authorities seized two trucks, a station wagon and goods belonging to the plaintiff on the ground that the plaintiff had not paid import duties on the said trucks and these trucks were used for smuggling goods. The respondents filed an appeal against that order. During the pendency of the appeal, the goods were disposed of under an order passed by the Magistrate. The appeal was allowed. The order of confiscation was set aside. The Supreme Court held that after seizure, the position of the Government was that of a bailee. The orders of the Magistrate obtained on false representation did not affect the right of the owner to demand the return of the property. The Government, therefore, had a duty to return the property, and on its failure to do the same, it had a duty to pay the compensation.

In *Smt. Basava v. State of Mysore*<sup>35</sup>, theft was committed and some ornaments were stolen from the house of the appellant. The police authorities recovered the ornaments in course of investigation and kept them in the police custody under the orders of a magistrate. The ornaments were, however, stolen from the police custody before the disposal of the case. After the final disposal of the criminal proceedings, the appellant made an application to the Magistrate under section 517 Cr. P.C. for the return of the ornaments or their equivalent value, which was rejected on the ground that the recovered ornaments never reached court custody. On appeal, the Supreme Court reversed the decision and held it wrong to suppose that once the property is not available with the court, the court would disclaim all responsibility. The court observed that where the property is stolen or destroyed and there is no prima facie defence of due care, the court can order the payment of the value of the property in order to meet the ends of justice. The court ordered the state to pay cash equivalent to the property of the appellant. When we examine the facts of the instant case in contrast to the facts of *Kasturi Lal’s*, we find that these are quite similar as in both the cases property was stolen from the police custody. But when we examine the decisions, they are

just opposite to each other. In *Kasturi Lal's*, the state was not held to be liable due to the ground of sovereign immunity but in the instant case, state was held to be liable without referring to this ground.

### *The Government (Liability in Tort) Bill, 1967*

The Law Commission of India in its First Report had recommended legislation prescribing state liability, as in England. On the basis of that Report a bill entitled 'The Government (Liability in Tort) Bill, 1967' was introduced in the Lok Sabha in 1967. The bill has not yet become the law. The proposed bill made the state liable in the following cases.<sup>36</sup>

1. Tort committed by an employee while acting in the course of his employment.
2. Tort committed by an employee while acting beyond the course of his employment if the act was done on behalf of the government and is ratified by it.
3. Tort committed by an independent contractor employed by the government provided –
  - I. the government assumes control of the act contracted to be done;
  - II. the government has ratified the tortious act;
  - III. reasonable care is not take under the circumstances where though the act is lawful but is of such a nature that it may cause injury;
  - IV. the government is under a duty to do the act itself;
  - V. the government is under an absolute duty to ensure the safety of persons or property in the doing of the act contracted to be done and there has been a failure to comply with that duty.
4. Where there is breach of common law, duties attached to the ownership, possession, occupation or control of immovable property.
5. Where the government is in possession of any dangerous thing which when escapes causes injury.
6. Where there is breach of duty to the employees which the government owes by reason of being the employer.

However, the Bill had exempted the government from liability in the following cases:<sup>37</sup>

- (1) Acts done by any member of the armed or police force in discharge of his duties or which are natural consequences thereof, and acts done for the purpose of training or maintaining the efficiency of the armed forces as also the acts done for the prevention of breach of peace or damage to the public property.
- (2) Acts of State.
- (3) Any act done by the President or the Governor in discharge of their constitutional functions.
- (4) Judicial acts and acts done in execution of judicial process or claims arising from defamation, malicious prosecution or arrest..
- (5) Acts done under proclamation issued under the various provisions of the Constitution.
- (6) Any claim arising from the operation of any guarantee law.
- (7) Any claim arising in a foreign country.

- (8) Any claim arising from injury done by doing an act authorized by law where such injury is a natural consequence of the act.
- (9) Any claim arising from any act for which immunity is provided under the Telegraph Act 1885, Indian Post Office Act, 1898 and the Indian Railway Act, 1890.

From the provisions of the Bill, it is evident that it emphasized on the Government's immunity rather than its liability. The exceptions had overshadowed the liability of the Government. If we compare the Bill with English legislation, the Crown Proceedings Act, 1947 and American legislation, the Federal Tort Claims Act, 1947, it is quite disappointing. Under the Crown Proceedings Act, 1947 Crown is subject to all those liabilities in tort to which it would be subject if it were a private person of full age and capacity<sup>38</sup>. Few exceptions are present there also, e.g. Crown is not liable for judges<sup>39</sup>, injury caused by members of armed forces<sup>40</sup> etc. The Federal Tort Claims Act, 1946, makes the United States liable, respecting tort claims, in the same manner and to the same extent as a private individual under like circumstance. Though the basics of this Act is quite similar to the basic provisions of the Crown Proceedings Act, 1947, but it is narrower and restrictive in its operation due to three kinds of exceptions provided therein. The exceptions are so wide that in many cases a person would find himself without remedy in case of injury to his person or property<sup>41</sup>

## CONCLUSIONS AND SUGGESTIONS

This paper seeks to illustrate that the distinction between sovereign and non-sovereign functions of the State evolved by the judiciary in the times of East India Company is anachronistic in the modern Welfare State. In the present scenario when many of the functions which were carried on by private persons are now being carried on by<sup>38</sup> the State, while, conversely, many erstwhile governmental functions are now being authorized to be done by private individuals and corporations, this distinction is vague and nebulous. The judiciary is hesitant to overrule much infamous *Kasturi Lal*, but it is in progress to dilute the outmoded principle of sovereign immunity. Regarding the defence of sovereign immunity, when there is violation of fundamental right enshrined in Article 21, the standing of the judiciary is crystal clear and commendable.<sup>42</sup>

The judiciary should discard the vague distinction between the sovereign and non-sovereign function of the state expressly as there is no justification to retain it. It is high time that a comprehensive legislation indicating the liability of the State for the wrongful acts of its servants should be passed. This legislation should not be the carbon copy of the Bill of 1967, which could not become the law, as in that Bill exception had overshadowed the liability of the State. Few exceptions should be incorporated in the legislation as exist in English and American legislations e.g. Acts of State, Acts authorised by statutes, etc., keeping in mind, the interests of the governed in a welfare democratic society.

India, being a welfare state, has numerous interactions between State and its subjects which leads to multiple points of conflicts between the two. This paper analysis the concept of "sovereign immunity" and its interaction with a democratic welfare society established under the Rule of Law. Lastly, the paper deals with the lack of development of the Law of Torts in India as well as the way forward in the form of the emergent need to codify



the Tort legislation in India to provide appropriate legal redressal systems to those whose rights are afflicted by tort law violations.

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#### Notes and References

<sup>1</sup>(1876)5 Bom HCR App 1.

<sup>2</sup>(1876) ILR 1 Cal 11.

<sup>3</sup>(1882) 5 ILR Mad 273.

<sup>4</sup>AIR 1915 Mad 993.

<sup>5</sup>AIR 1932 Cal 834.

<sup>6</sup>AIR 1939 Mad 663.

<sup>7</sup>Jain and Jain, *Principles of Administrative Law* at 765(198).

<sup>8</sup>AIR 1962 SC 933.

<sup>9</sup>*Id.* at 940.

<sup>10</sup>See *supra* note 7 at 769.

<sup>11</sup>AIR 1965 SC 1039.

<sup>12</sup>S.P.Sathe, *Administrative Law in India* at 195 (1970).

<sup>13</sup>AIR 1959 Pun 39.

<sup>14</sup>AIR 1962 Pun 315.

<sup>15</sup>AIR Del 98.

<sup>16</sup>AIR 1969 Bom 13

<sup>17</sup>AIR 1972 All 486.

<sup>18</sup>AIR 1979 J&K 6.

<sup>19</sup>AIR 1981 J&K 22.

<sup>20</sup>AIR 1983 SC 1086.

<sup>21</sup>AIR 1984 SC 1026.

<sup>22</sup>AIR 1986 SC 494.

<sup>23</sup>AIR 1990 SC 313.

<sup>24</sup>AIR 1992 SC 2069.

<sup>26</sup>AIR 1994 SC 2663.

<sup>27</sup>*Id.* at 235.

<sup>28</sup>(1995)3 SCC 600

<sup>29</sup>AIR 1997 SC 1203.

<sup>30</sup>See *supra* note 25.

<sup>31</sup>AIR 1989 AP 235.

<sup>32</sup>See *supra* note 29 at 1205.

<sup>33</sup>AIR 1999 SC 2979.

<sup>34</sup>AIR 1967 SC 1885.

<sup>35</sup>AIR 1977 SC 1749. See also *Lala Bishabar Nath v. Agra Nagar Mahapalika*, AIR 1973 SC 1289

<sup>36</sup>The Government (Liability in Tort) Bill 1967, Sections 3,4,5 and 6.

<sup>37</sup>*Id.*, Sections 10 & 11.

<sup>38</sup>The Crown Proceedings Act, 1947, Section 2(1).

<sup>39</sup>*Id.*, Section 2(5).

<sup>40</sup>*Id.*, Section 10.

<sup>41</sup>I.P. Massey, *Administrative Law* at 312 (1995).

<sup>42</sup>See *supra* notes 29,30 and 31.