



DOCTRINE OF CONSTITUTIONAL TORT: EVOLUTION AND EVALUATION

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The concept of sovereign immunity “the king can do no wrong” is a legal doctrine by which the sovereign or the state cannot, commit a legal wrong, and is immune from civil suit or criminal prosecution. The doctrine of sovereign immunity is based on the Common Law principle which was borrowed from the British Jurisprudence that “King commits no wrong” provides that state claims immunity for its tortious acts therefore he cannot be guilty of personal negligence or misconduct of his servants and denies compensation to the aggrieved party. Another aspect of this doctrine was that it was an attribute of sovereignty that a State cannot be sued in its own courts without its consent.¹

In any democratic society where government assumes the role of a ‘welfare service state’ the question of government liability evokes a serious response. At one end the democratic government requires active participation of state in welfare and service activities whereas at the other end, the concept of government liability may have dampening effect on such participation. In such a context, balance must be drawn by the government. There may be two remedies available with a person who has been wronged or made to suffer a loss. Thus, the aggrieved person may either sue the officer concerned or proceed against the government on whose behalf he was acting.²

This doctrine held in Indian courts since the mid nineteenth century till recently. When a genuine claim for damages is brought to the courts, and it is refuted by doctrine seemingly having no relevance, there is bound to be resentment and demands for review. The Indian courts, in order to not let genuine claims be defeated, kept narrowing the scope of sovereign functions, so that the victims would receive damages.³ The Law Commission of India too, in its very first report, recommended the abolition of this outdated doctrine. But for various reasons, the draft bill for the abolition of this doctrine was never passed, and thus it was left to the courts to decide on the compatibility of this doctrine in accordance with the Constitution of India.⁴

As regards sovereign immunity in India, the maxim, “the king can do no wrong” has never been accepted. Absolute immunity of the government was not recognized in Indian legal system even prior to the commencement of the Constitution. There are number of constitutional provisions relating to the tortious liability of state. As provided under Article 294 (b) - The liability of union government or the state government may arise “out of any contract or otherwise”. The word “otherwise” indicates that such liability may arise in respect of tortious acts as well.

Another is Article 300 of the Constitution of India, 1950, which specifies the liability of the Union or the State with respect to an act of the Government. The extent of said liability is defined in Article 300(1) which declares that the government of India or of a state, may sue or be sued “in relation to their respective affairs in the like cases as the Dominion of India and corresponding provinces or the corresponding Indian states might have sued or been sued”.

The Article 300 of the Constitution originated from Section 176 of the Government of India Act, 1935. Under Section 176 of the Government of India Act, 1935, the liability was coextensive with that of Secretary of State for India under the Government of India Act, 1915, which in turn made it coextensive with that of the East India Company prior to the Government of India Act, 1858. Section 65 of the Government of India Act, 1858 provided that all persons shall and may take such remedies



and proceedings against Secretary of State for India as they would have taken against the East India Company.⁵ The leading case arising under section 65 of the government of India Act, 1858 is *P. & O. Steam Navigation Co. vs. Secretary of State*⁷. In that case the plaintiff's company servant was proceeding on a highway in Calcutta, driving a carriage which was drawn by a pair of horses belonging to the plaintiff. He met with an accident due to negligence caused by the servants of the Government. For the loss suffered by him due to such accident, the plaintiff claimed damages against the Secretary of State for India. Sir Barnes Peacock C. J. (of the Supreme Court) observed that the doctrine the "King can do no wrong", had not application to the East India Company therefore company would have been liable in such cases and the Secretary of State was thereafter also liable.

The Court also stated the distinction between sovereign and non-sovereign functions. If a tort was committed by a public servant in the discharge of sovereign functions, no action would lie against the Government. The liability could arise only in case of "non-sovereign functions" i.e. acts done in the conduct of undertakings which might be carried on by private person-individuals without having such power. As the damage was done to the plaintiff in the exercise of non-sovereign function, i.e. the maintenance of dockyard which could be done by any private party without any delegation of sovereign power and hence the government cannot escape liability and was held liable for the torts committed by its employees. The aforesaid case was followed by the Hon'ble Apex Court directly arose after independence before the Hon'ble Supreme Court in *State of Rajasthan v. Mst. Vidyawati*,⁸ in that case, the claim for damages was made by the dependants of a person who died in an accident caused by the negligence of the driver of a jeep maintained by the Government for official use of the Collector of Udaipur while it was being brought back from the workshop after repairs. The Rajasthan High Court took the view-that the State was liable, for the State is in no better position in so far as it supplies cars and keeps drivers for its Civil Service. In the said case the Hon'ble Supreme Court has held "Act done in the course of employment but not in connection with sovereign powers of the State, State like any other employer is vicariously liable."

Another case in which the principle laid down in Steam Navigation case was followed was *Kasturi Lal Ralia Ram vs. State of UP*⁹. In this case partner of Kasturi Lal Ralia Ram Jain, a firm of jewelers of Amritsar, had gone to Meerut for selling gold and silver, but was taken into custody by the police on the suspicion of possessing stolen property. He was released the next day, but the property which was recovered from his possession could not be returned to him in its entirety inasmuch as the silver was returned but the gold could not be returned as the Head Constable in charge of the Malkhana misappropriated it and fled to Pakistan. The firm filed a suit against the State of U. P. for the return of the ornaments and in the alternative for compensation. It was held by the Apex Court that the claim against the state could not be sustained despite the fact that the negligent act was committed by the employees during the course of their employment because the employment was of a category which could claim the special characteristic of a sovereign power. The court held that the tortious act of the police officers was committed by them in discharge of sovereign powers and the state was therefore not liable for the damages caused to the appellant.

In *Rudal Shah V. State of Bihar*¹⁰, the petitioner was acquitted by the court of Sessions on June 3, 1968 but was released from the jail more than 14 years, thereafter, on October 16, 1982. In the Habeas corpus petition, the petitioner not only sought his release but also claimed ancillary reliefs and the compensation for unlawful detention. The state could not give any justifiable cause of detention except pleading that the detention was for medical treatment of the mental imbalance of the petitioner. The Supreme Court ordered the payment of compensation of Rs. 30,000. The decision of Rudal Shah was important in two respects. Firstly, it held that violation of a constitutional right can give rise to a civil liability enforceable in a civil court and; secondly, it formulates the bases for a theory of liability under



which a violation of the right to personal liberty can give rise to a civil liability. The decision focused extreme concern to protect and preserve the fundamental right of a citizen than sovereign and non-sovereign dichotomy.

In *N. Nagendra Rao & Co. v. State of A.P.*¹¹, the Supreme Court considered the question of vicarious liability of the government for the negligence of its servants, it noted the earlier Supreme Court decisions in *Vidyawati's* and *Kasturi Lal's* cases, recommendations of the Law Commission in its First Report for statutorily recognizing the liability of the state as had been in England through the Crown Proceedings act, 1947 and in U. S.A. through the Federal Torts Claims Act, 1946. It, therefore, held that the doctrine of sovereign immunity has no relevance in the present day. The concept of immunity in respect of sovereign functions has no application where the fundamental right to life as guaranteed by Article 21 of the Constitution of India has been held in the judgment of the High Court of Andhra Pradesh in *Challa Ramkonda Reddy Vs. State of AP*¹², which has been subsequently approved by the Supreme Court in *State of A.P. v. Chella Ramakrishna Reddy*¹³. The latest case of *State of A.P. v. Challa Ramakrishna Reddy* on the point clearly indicates that the distinction between Sovereign and non-Sovereign powers have no relevance in the present times. The Apex Court held that the doctrine of Sovereign immunity is no longer valid.

The Hon'ble Supreme Court has also concluded in the following words: "..... the law has marched ahead like a Pegasus but the Government attitude continues to be conservative and it tries to defend its action or the tortious action of its officers by raising the plea of immunity for sovereign acts or acts of State, which must fail."

The plea of defense based on the old and archaic concept of sovereignty immunity as borrowed from British jurisprudence prevalent during colonial rule is based on old feudalistic notions of justice namely the "King can do no wrong". There seems to be no reason why the State should not compensate the victims of its actions under sovereign powers, because the benefit of such action accrues to all citizens, and it is highly unfair to put the burden on just a few. Lastly, there is an urgent need to reconsider the *Kasturi Lal's* case by a larger bench because the issue whether the defence of sovereign immunity will apply in case of violation of legal rights needs to be decided. In order to establish a truly equalitarian state abiding by rule of law, the ghost of *Kasturi Lal* needs to be finally put to rest. In the light of above, it would be worth to mention the observation of Apex court in *N.Nagendra Rao Company V. State of AP*. The honorable court noted the recommendations of the Law Commission first Report for statutory recognising the liability of the State as had been done in England through the Crown Proceedings Act, 1947 and in the USA through the Federal Torts Claims Act, 1946. It therefore, held that the doctrine of sovereign immunity has no relevance in the present day. In absence of State Liability Legislation, it will be in consonance with social justice demanded by the changed conditions and the concept of welfare state that the courts will follow the recent decision of the Supreme Court rather than *Kasturi Lal*.

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