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From Tort to Constitution: The Journey of Sovereign Immunity and its Impact on Tort and Constitutional Law

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India, as a country, has faced more than a century of colonialism. The impacts of colonialism are so deep that Indian Law is still dominated by the laws made by the British. The journey of sovereign immunity and its status in India begins with the colonial British rule and the laws which were framed by the British then. British Law had the “doctrine of sovereign immunity”. According to the doctrine of sovereign immunity, The Sovereign, that is, the British State cannot be held liable for the actions of its employees. This immunity provided to the British State made it immune to any kind of liability which could have been imposed on it otherwise. This Research Article explores and conducts a comprehensive study of the evolution of sovereign immunity in India and how sovereign immunity is a feudalistic and foreign notion that was responsible for connecting Tort Law with Constitutional Law in India, before finally reaching a democratic and socialist conclusion.

Keywords: *tort, constitution, sovereign immunity, colonialism, british.*

INTRODUCTION

One of the defences in Tort law is that State cannot be held liable. This defence originates from the idea that – “the king could do no wrong”. This defence was also considered to be important in the context of British Law since the British had a history of the doctrine of the “divine right of

kings". To hold the British State liable for the actions of its employees would be considered to be the very violation of the dignity of the British State. This was the rationale behind the existence of the immunity for the State. In India, the journey starts with the rebellion of 1857. The Indian Rebellion of 1857, prompted the British State to take powers into its own hands by ending the regime of the British East India Company in India. However, the British realized that it would not be possible to prevent future rebellions unless there are some concessions which are made to the Indians.

In response to this, The British Government brought the Act¹ which not only transferred the powers to the Crown from the British East India Company but also gave some concessions (though in a lot less amount) to the Indians. One of the attempts of the British at providing such concession to the Indians is section 65². This section says that the Secretary of State (whose position was equivalent to the current position of the Prime Minister in India) can be sued as a body. Thus began the journey of State Immunity in India and how it has affected the Constitutional Law as well.

FROM CORRECTNESS TO BLUNDER:

The journey of State immunity in India begins with the landmark case of the P&O Steam Navigation Company v The Secretary of the State³. The case was the first one in India wherein the State was held liable for the actions of its employees. In the given case, The servant of the plaintiff's company was being driven in a horse carriage. While the carriage was passing along the Kidderpore Dockyard, which was under the Government, two government employees were riveting a bit of iron funnel casing. When the carriage was passing along the dockyard, the employees were scared by the horse and dropped the iron funnel casing, thus making a loud noise which scared the horse, and hence, the carriage stumbled, causing injury to the horse.⁴

¹ Government of India Act 1858

² Government of India Act 1858, s 65

³ *P&O Steam Navigation Company v The Secretary of the State* (1861) 5 Bom. HCR App I

⁴ *Ibid*

The problem with the Judiciary at this point was, whether the Government can be held liable for the actions of its servant. It is important to remember that the incident occurred in 1861 and the idea or the concept of holding the State like for any actions of its employees is considered to be a foreign concept⁵. However, it was in this case that the Judiciary brought in the concept of determining the liability of the State in case of the actions of its employees, based on the fact whether the functions which were being conducted by the State were sovereign or non-sovereign⁶. The reason why this distinction was being made by the Court was to make sure that the Court does not create a completely idealistic notion.

The Court wanted to make sure that there are some functions for which the Government must have complete immunity, such as maintenance of the defence force. Since these are the functions, in which only States engage, the Court considered it to be too idealistic to hold the State liable for it as this might lead to a situation wherein, even though a particular function (which happens to be sovereign) was performed by the State for crucial purposes, still the suits would have been allowed against the State in this regard. This judgement laid a framework for the courts to distinguish between the sovereign and non-sovereign functions of the State and hence determine liability accordingly. In the given case, the Court did not consider the maintenance of the dockyard as a Sovereign function of the State, which could only be exclusively performed by it, hence, the Court held the Secretary of State liable and the aggrieved party was awarded compensation. To provide a norm or a way for the Courts to determine the distinction between the sovereign and non-sovereign functions, the first law commission report was released in 1956⁷. The report stated that all activities related to trade, business, commerce, and welfare can be designated as non-sovereign functions⁸. It also suggested that four exceptions must be laid down to State liability -

⁵ J H B, 'The Laws of England' (1910) 24(2) Harvard Law Review <<https://doi.org/10.2307/1324858>> accessed 17 January 2023

⁶ *P&O Steam Navigation Company* (n 3)

⁷ Law Commission, *Liability of the State in Tort* (Law Com No 1, 1956)

<<https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022080596.pdf>> accessed 17 January 2023

⁸ *Ibid*

- **Act of State** - It means an act of Sovereign power directed against another sovereign power.
- **Judicial Acts** - It means acts done by the Judicial Officers and Persons executing warrants and orders of Judicial Officers.
- Acts done in the exercise of political functions of State, for eg. Foreign affairs, war, and peace, acts on emergency, etc.
- Acts did about defence forces.

Moreover, the maintenance of a defence force and the maintenance of law and order were explicitly referred to as the Sovereign Functions in the report, for which, the State cannot be held liable.⁹ The biggest positive impact of this came in the form of the Vidhyawati case. In the case of the *State of Rajasthan v Vidhyawati*¹⁰, Lokumal was an officer working under the Government of Rajasthan and hired in the capacity of a driver to drive a Government-owned jeep. In the context of the facts of the given case, Lokumal was driving the jeep for his work and not for Government purposes, for which he was hired. While driving the Jeep, Lokumal knocked down Jagdishlal, who was walking on the footpath, and hence, Jagdishlal's widow filed a case against the Government of Rajasthan alleging it to be vicariously liable for the actions of Lokumal. The Court held the Government of Rajasthan vicariously liable. The Court justified its stance by stating that the immunity provided to the Crown in the United Kingdom was based on old feudalistic notions of Justice, which said that the King can do no wrong and that he could not be sued in his courts.

Even during the presence of the East India Company, the common law immunity which was provided to the Crown never operated in India and the State has been held liable for its actions in the past. Since the Government now has engaged in various kinds of activities and occupations providing various services to the people and employing thousands of employees hence, the government can be held liable for the actions of its servants.

⁹ *Ibid*

¹⁰ *The State of Rajasthan v Mst. Vidhyawati And Anr* (1962) SCR Supl. (2) 989

KASTURI LAL BLUNDER

Even after the Judiciary gave a landmark decision that removed, by precedent, any kind of immunity which is given to the State but the Supreme Court made a blunder in the case of *Kasturilal Ralia Ram Jain v The State Of Uttar Pradesh*¹¹. This blunder contributed to the fact that various precedents of the Judiciary would clash in the future. In the given case, Kasturilal Jain was arrested by the police with jewellery and his jewellery was confiscated and kept in the police station. Later, one of the constables who arrested Kasturilal stole the jewellery and ran away with it to Pakistan. The main issue in front of the Supreme Court was whether to hold the State (in this case, the Government of India) liable for the actions of the police officer who absconded.

The Court made a big blunder in this case, by holding the State “not liable” for the actions of the police officer.¹² The Court held that even though the absconding police officer was negligent, however, the State cannot be held liable for his actions because the officer was discharging his sovereign powers. The power to arrest, search and seize, etc are the powers granted to the police officers by the State itself and hence they are sovereign powers, which is why the Police Officer cannot be held liable for the actions of the defendant.¹³ The Court in its judgement mentioned that whenever the State pleads immunity for the actions of its servants, it is very important to determine the distinction between the sovereign and non-sovereign powers strictly. However, in the very same judgement, the Court has mentioned that during the times when the State is pursuing a “welfare ideal”, the State naturally and legitimately enters into many commercial and other undertakings and activities which have no relation with the traditional concept of Governmental activities in which the exercise of sovereign powers is involved.¹⁴

The Court has contradicted itself in its judgement and hence made a big blunder. At first, the Court said that it is very important to make a distinction between the sovereign and non-sovereign powers of the State. Later, it mentions in the same judgement that the State “naturally

¹¹ *Kasturilal Ralia Ram Jain v The State of Uttar Pradesh* (1965) SCR (1) 375

¹² *Ibid*

¹³ *Ibid*

¹⁴ *Ibid*

and legitimately” enters into the forte of several commercial activities which means that the entry of the State into commercial activities (amongst others) would not be rendered as a “non-sovereign” function, since it is entered into “naturally and legitimately”, which further makes a confusion regarding the distinction between the sovereign and non-sovereign functions. The blunder made by the Supreme Court in the case of *Kasturilal* was significant given the fact that the Supreme Court laid down a precedent that further made confusion regarding whether the State can be held vicariously liable or not.

CORRECTING THE MISTAKE

The *Kasturilal* blunder occurred in 1965 and the Supreme Court over the course of the next 2 years, realized the importance of correcting its mistake and undoing its blunder. It finally got the opportunity for the same in the case of *Rajasthan State Electricity Board v Mohanlal and Ors*¹⁵. This case, unlike the previous ones, was not about tort law but rather Constitutional Law, and the rationale of the Supreme Court, in deciding this case, was influenced by the Tort Law itself. Mohanlal was an employee under the Rajasthan State Electricity Board for 2 years. A new notification was issued by the Government of Rajasthan to offer new grades and service conditions to those employees who were transferred to the Board for employment from other departments. Mohanlal, who was already working on the Board for 2 years, was transferred to the Public Works Department (PWD).

From there, Mohanlal along with 10 other employees of PWD, was transferred to the Board (where Mohanlal worked previously). However, the new grades and service conditions along with promotion were offered only to the other 10 employees whereas Mohanlal was not offered the same. Mohanlal then went to the Rajasthan High Court, contending that he was being discriminated against, by the Board¹⁶. The Rajasthan High Court accepted his arguments and overturned the decision of the Rajasthan State Electricity Board and ordered them to offer the same terms and promotion to Mohanlal¹⁷. Later, the Board filed an appeal with the Supreme

¹⁵ *Rajasthan State Electricity Jaipur v Mohan Lal & Ors* (1967) SCR (3) 377

¹⁶ *Ibid*

¹⁷ *Ibid*

Court, and the major issue faced by the Supreme Court was similar to the issue in the *Kasturilal* case- whether the State can be held liable for the actions of the Rajasthan Electricity Board. The major question before the Supreme Court was whether the Board falls under the ambit or definition of “State” as given in Article 12 of the Indian Constitution so that the State can be held liable for the actions of the Board¹⁸. The Supreme Court gave a landmark decision which was to influence one of the most (if not the most) important cases of Independent India- the *Kesavananda Bharati Case*¹⁹²⁰.

The Supreme Court gave the judgement that the Rajasthan State Electricity Board, falls under the definition of Article 12, as a part of the State and is included in the ambit of “other authorities”, which is wide enough to include any authority established by legislation and operating inside India’ territory or under the supervision of the Indian Government. This ratio decidendi, which was used by the Supreme Court, in the present case, influenced the decision of the Supreme Court in the *Kesavananda Bharti Case* in 1973.²¹

THE STATE OF SELF-AWARENESS

The effect of this correction made by the Supreme Court could be seen in the case of *Rural Shah v The State of Bihar*²². In this case, Rural Shah was imprisoned for a period of 14 years by the authorities and was then acquitted by the Court after it was found that there was a lack of evidence. Rural Shah filed a suit against the State of Bihar to provide him with compensation for his unjustified arrest and detainment for 14 years. The Supreme Court in the given case brought the earlier established constitutional framework within the ambit of a civil suit and ordered compensation to be given to the aggrieved party.

The ratio decidendi of the Supreme Court was that one of the ways through which the violation of Articles 21 and 22 be prevented is to give monetary compensation to the aggrieved party. Administrative sclerosis could be corrected through compensation only as there is no other

¹⁸ *Ibid*

¹⁹ *Ibid*

²⁰ *Kesavananda Bharati Sripadagalvaru and Ors v State of Kerala and Anr Writ Petition (Civil) 135/1970*

²¹ *Ibid*

²² *Rumal Shah v State Crl A 195/1999*

instrument available before the Judiciary to do so. To not award monetary compensation. To the aggrieved party because of the mistake of police authorities(who work under the State), would be to not protect the same Fundamental Rights which the Judiciary works to protect. Hence, the Judiciary awarded Rudal Shah with monetary compensation, thus showcasing how the Supreme Court was playing its best innings and was in a state of self-awareness.

IT ALL COMES FULL CIRCLE

All of these decisions made by the Supreme Court, in a constitutional framework, came full circle in the landmark case of *N. Nagendra Rao v The State of AP* in 1999²³. N. Nagendra Rao carried on a business in fertilisers and food grains. His premises were visited by the Police Inspector of the Vigilance Cell and it was found that his premises contained a huge stock of fertilisers, foodgrains, and non-essential commodities, which were then seized. Later on, when the stock was returned to N. Nagendra Rao, it was found to be spoilt, both- in quality as well as quantity. It was found that no steps were taken by the authorities for the preservation of the stock and Nagendra Rao's license also got cancelled. The Supreme Court, in this case, held the State vicariously liable for the actions of the Vigilance Cell.

According to the Supreme Court, for more than a hundred years, the question of vicarious liability of the State has been swinging from one direction to the other(from the *Vidyawati* case to the *Kasturilal* case). The first law commission report in 1956 already mentioned that in the context of a welfare state, it is very necessary to establish a just relationship between the rights of the people and the responsibilities of the State. In India, the State engages in several activities, ranging from irrigation and electricity to providing education and healthcare. Since India is a welfare state, the doctrine of *laissez fairer*, that is, non-interference of the State in the activities of the economy, (which was here used in the context of the life of the people), cannot be held to be applicable and has been replaced by the doctrine of Welfare State²⁴. Referring to the report again, the Court held that the old distinction between the sovereign and non-sovereign functions cannot be enough to determine the liability of the State and hence, it would be unjustified to

²³ *N. Nagendra Rao & Co v State of A P* (1994) SCC (6) 205

²⁴ Law Commission (n 7)

prevent the State immunity in case of tortious actions committed by its employees based on sovereign and non-sovereign functions.²⁵

CONCLUSION

The journey of the vicarious liability of the State took more than a century to evolve. Until and unless, the judges did not accept the vicarious liability of the State, the reasoning on the Vicarious Liability of the State has undergone many changes and created several confusions. It was found in the beginning that the concept of “sovereign immunity” is a feudalistic notion that has become archaic in nature. The common law concept of immunity to the sovereign never worked in the Indian context. Crown immunity, being a feudalistic concept does not entail justice in the form of a welfare ideal. So, the liability framework under tort will not meet a logical end if this concept is followed.

It is also crucial to understand that the Kasturilal blunder, was in a sense, important for the vicarious liability of the State to develop in the Mohanlal case. The Supreme Court of India was playing one of its best innings during the 1960s and 1970s, passing landmark judgements. The Kasturilal blunder allowed the Supreme Court to retrospect and correct its blunder in the Mohanlal Case, which in turn helped the interpretation of the concept of “State” in the Kesavananda Bharati case. In this way, the interpretation of the concept of ‘State’ and the concept of vicarious liability of the State in India has evolved from tort law to constitutional law and came full circle to the tort law again, during the N. Nagendra Rao case.

²⁵ *Ibid*