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# Evolution of Tortious Liability of State in India

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## ABSTRACT

*It is observed that in recent years the state has become a major litigant in the court of law on the one hand government attitude continues to be conservative and it tries to defend its action or the tortious action of its officers by raising thr plea of immunity for sovereign acts or acts of state on the other hand till today a comprehensive enactment delineating the liability of state in case of its tortious act has not been promulgated. Tortious liability of the state is assessed through judicial interpretation and activism alone. In India, we don't have any separate act to deal with liability of the state in tort. However, Article 300 of the Indian Constitution states that Government of India and of state can be sued for their tortious act but this article doesn't enlist the circumstances under which we can sue the state for the tortious act of its servants. This article refers back to the pre-constitutional laws like Government of India Act of 1935, 1915 and 1858. Thus one must reach the time of East India Company in order to determine the extent of liability of Government of India today. After the commencement of the Constitution, a considerable change was made by the Judiciary by narrowly interpreting the sovereign immunity to protect the right of the citizen of a democratic country as decided in Vidyawati's case. While deciding cases, it was clear that the court faced the difficulty to decide whether the particular act is sovereign or non sovereign. In certain cases the court adopted the traditional method of treating the functions, as the sovereign function cannot be done by private persons. In certain cases, the court applied the theory of benefit and ratification to restrict liability of the state for non sovereign functions also.*

***Keywords:*** *State, Tortious, Sovereign, Judiciary, Decisions.*

## I. INTRODUCTION

The advent of Welfare State philosophy has led to an increased associations between the State and the citizens. The State has become the biggest employer and its activities have become all pervading. While performing these acts, sometimes injury is caused to the person or property of private individuals. Rule of Law requires that the wrongs should not remain unredressed. When State acts through its servants then the contention is whether it can be made liable for the wrongful acts of its servants. In addition, when enormous powers are available to state to

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discharge its multifarious functions, it is legitimate on the part of the society to expect that there should be adequate control mechanism to ensure that the power is not abused and in case of such abuse, the errant official is brought to book.

When a public servant commits tort during the course of employment, is it the State or the errant official that is ultimately liable for the wrong is a question that has haunted many legal systems for a long time and is not finally settled even today.[2] The principle of state immunity and officer's liability emphasises the deterrent aspect of the liability in addition to the argument that public funds should not be used to pay for the wrongs of the officials.[3] On the other hand the principle of State liability and officer immunity emphasises the compensation aspect than the deterrent aspect of liability. The protagonists of this principle argue inter alia, that personal liability would dampen the decisions making process leading to inefficiency and State is in a better position to bear the liability as it can equitably spread it among the public. These principles are partially followed in different systems of the world. The spheres of State liability and officer's liability are to be demarcated.

In modern India there was no legislation relating to the liability of the State for torts committed by its servants. The law of compensation against State action or inaction was in a state of confusion because the principles of tortious liability as they had existed in United Kingdom years ago were blindly applied. In India the story of the birth of the doctrine of sovereign immunity - a symbol of absolutism and feudalism - begins with the decision of Sir Bames Peacock C.J., in Peninsular case, in which the terms "sovereign" and "non-sovereign" were used while deciding the liability of the East India Company for the torts committed by its servants. The court held that the State was liable for torts committed while discharging non-sovereign functions.

This 'great and clear distinction' of Sir Barnes Peacock led to gross and utter confusion as it held potential for multiple interpretations. In the later period the courts confounded the confusion by inventing their own tests like 'commercial and non-commercial', 'benefit to the State', 'ratification by the State' and 'statutory and executive power'. Thus the law that contained the principles of liability of the State for torts committed by it servants was not just in substance, not reasonably certain in its form and unpredictable in its working.

The law of state liability in tort in Independent India is to be found in Article 300 of the Constitution of India. But the framers of this provision were either uncertain about the future

[2] P. Ishwara Bhat, Administrative Liability of the Government and Public Servant, (Deep and Deep Pub.,1983), p.6.
[3] Lucknow Development Authority v, M.K.Gupta, (1994) 1 SCC 243, p.264.

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or deliberately avoided any clearcut rule, when they left the courts to search from the monarchical treasure trove some fanciful immunity, and thereby left the litigants to gamble in each case, more on luck than on any specific legal principle. The pre-constitutional precedents continued to haunt the courts in the post constitutional period due to its refer back approach. Obsessed by the classification between sovereign and non-sovereign functions and misled by the old notion that 'the King can do no wrong', the contribution of Indian courts in this field of rendering justice to the victims was not definite in the past.[4]

As far back as 1956 the Law Commission of India considered the question of State liability in tort and concluded that "the old distinction between sovereign and non-sovereign functions or governmental and non-governmental functions should no longer be invoked to determine the liability of the State".[5]

## II. JUDICIAL DECISIONS

### (A) Pre-constitution judicial decisions

Peninsular case[6] appears to be the first significant case decided under the Government of India Act, 1858. The facts of the case were that the servants of the plaintiff were traveling in a carriage from Garden Reach to Calcutta. Some Government workmen employed in dockyard, carrying a heavy piece of iron for the repair of steamer were walking in the centre of the road. The coachman and the syce called out to them to move away from the centre of the road. But the workmen holding the iron piece at one end moved in one direction, while those holding at the other end moved in the other direction causing the obstruction of the road. The coachman slowed the carriage but it was very near to them and in such a confusion, the workmen dropped the iron piece which created a clang and one of the horses being frightened with it ran forward, dashed against the iron piece and sustained injuries. A suit was filed against the Secretary of State for India in Council for the damages suffered due to the negligence of the government servants.

The judge of the Small Causes Court found the dockyard servants negligent but was doubtful about the conduct of the plaintiffs coachman. The Court observed:

[4] P. Leelakrishnan, "Compensation for Governmental Lawlessness", (1992) 16 *C. IJ.L.R 52*- 75, p.53.
[5] *The Law Commission of India,* First Report: Liability of the State in Tort,(Delhi.Ministry of Law, Government of India, 1957), p.32.
[6] (1861) 5 Bom. HCR App. 1.

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*"Whether the Secretary of State was liable for damages occasioned by the negligence of the servants in the service of the government, assuming them to have been guilty of such negligence as would have rendered an ordinary employer liable"*[7]

The Supreme Court of Calcutta decided that an action lay against the Secretary of State for India in Council for damages sustained by the plaintiffs Sir Barnes Peacock C.J., elaborately discussed the question of the liability of the East India Company and of the Secretary of State and observed:

"We are of opinion that the words 'liabilities incurred' in 3 and 4 Wm. IV, Ch.85; Sec 9 and the same words in 21 and 22 Viet., Ch. 106, Secs. 42 and 65 are not necessarily limited to liabilities arising out of contract; for if so, there is no necessity to use the word ''incurred' at all. We think that the words 'expenses, debts, and liabilities lawfully contracted and incurred' must be construed as 'debts lawfully contracted and expenses or liabilities incurred'."[8]

He went on to add that as a practical matter there were very good reasons why the doctrine should not apply in India. Explaining how the East India Company even though entrusted with the government of the country had to engage in undertakings of the character of private business he observed:

"We are farther of the opinion that the East India Company were not sovereigns, and therefore, could not claim all the exemptions of a sovereign; and that they were not the public servants of Government, and, therefore, did not fall under the principle of the cases with regard to the liabilities of such persons; but they were a company to whom sovereign powers were delegated, and who traded on their own account and for their own benefit and were engaged in transactions partly for the purposes of Government and partly on their own account, which, without any delegation of sovereign rights, might be carried on by private individuals".

The above quoted portions of the judgment bear out the basic principle of state liability of the government at any rate in matters that are not sovereign acts. This was the only way out for wriggling out of the impossible doctrine of the Crown not being subject to any action at all in courts of law for any of the lawful or unlawful acts of its servants.[9] It is submitted the distinction is contrary to the law that prevailed prior to 1858 because the words "that which cannot be done by private individuals" had the effect of immunising from liability, many acts of the government outside the sphere of act of state; whereas, the East India Company was immune

[7]Ibid, p. 3.
[8] Ibid. p.15.
[9] V.G.Ramachandran, *Administrative Law*, 2nd ed. (Lucknow: Eastern Book Company, 1984) p.792.

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from liability only for act of state.191 This test is so broad that it confers wide discretion on the judge to characterise a function, as sovereign or non-sovereign according to his will and pleasure.[10]

A careful reading of the decision in the P & O case will show that Sir Barnes Peacock did not intend to engraft any exception to the general rule that the East India Company would be liable to an action for negligence in respect of an act done or authorised by it. He was only giving reasons for his rejection of the argument that the Secretary of State in Council, as regards his liability to be sued, must be considered as the State.[11] The correctness of this decision has been accepted by the Privy Council in the case of Secretary ofState v. J. Moments.

**(B) State Liability under the Constitution**

Our Constitution makers with the enormous experience of their scholastic brain having the sound knowledge of other Constitutions not only brought various good provisions based on other Constitutions but also reflected at some places original master-mindedness by making certain provisions to meet out the requirement of our masses with the new hope to get rid of various social and political enslaveness.[12] But it is unfortunate to not that the Constitution-makers left the law relating to the vicarious liability of the Government in tort where it was prior to the adoption of the Constitution. No substantial change was made in this area. The debates of the Constituent Assembly centered round the nomenclature of the State's personality.

The draft Article 274 was discussed in the Constituent Assembly on 15th June 1949 and finally emerged as Article 300 of the Constitution of India which states that Government of India and of state can be sued for their tortious act but this article doesn't enlist the circumstances under which we can sue the state for the tortious act of its servants.

**(C) Post-Constitution Judicial Decisions**

In 1962, The Supreme Court of India gave a judgement , which, for the first time came before it, introduced important qualifications related to State immunity in law of torts truely based on the sovereign and non-sovereign functions doctrine.[13] State of Rajasthan v. Vidyawati,[14] was

[10] A. Prasanna, *"Tortious Liability ofGovernment",* (1985) *C.U.LR.* 413 at 419.
[11] F.S.Nariman,"*Governmental Liability in Civil Law*",in L. M. Singhvi ,ed., *law and the Commonwealth,* (Delhi: National Pub. House, 1971) p.376.
[12] S.S.Srivastava, *Rule of Law and Vicarious Liability ofGovernment,* (New Delhi: Eastern Law House, 1995), p.55.
[13] Jagdish Kumar Malik, "Art 300 of the Indian Constitution: Controversy Over Sovereign and Non-Sovereign Acts", (1983) 12 *J.C.P.S.* 198, p.202.
[14] *State of Rajasthan* v. *Smt. Vidyawati,* AIR 1962 SC 933 at 235.

the first case which came up before the Supreme Court related to the vicarious liability of government. In this case a driver of a jeep owned by the State Government of Rajasthan and maintained for the official use of the Collector, caused accident to the husband of Smt. Vidyawati while he was driving back after the repairs from workshop. Smt. Vidyawati's husband died. She sued the state of Rajasthan for negligence of the driver. The judgement of the trial court came up against the driver but was not against the State then the High Court decided it against the State also. The State of Rajasthan appealed to the apex Court. The Supreme Court held that the State is vicariously liable for the rash and negligent act of the driver. The Court did not decide whether the act was a sovereign act or not.

Speaking for the Court, Sinha C.J., observed:

"Viewing the case from the point of view of first principles, there would be no difficulty in holding that the State should be as much liable for tort in respect of the tortious act committed by its servants within the scope of his employment and functioning as such, as any other employer. The immunity of the Crown in the United Kingdom was based on the old feudalistic notion of justice, namely that the King was incapable of doing a wrong and therefore, of authorising or instigating one, and that he could not be sued in his own courts. In India, ever since the time of the East India Company, the sovereign has been held liable to be sued in tort or contract and the common law immunity never operated in India. Now that we have, by our Constitution, established a republican form of Government and one of the objectives is to establish a Socialistic State with its varied industrial and other activities, employing a large army of servants, there is no justification in principle or in public ingest, that the State should not be held liable vicariously for the tortious act of its servant. When the rule of immunity in favour of the Crown, based on common law in the United Kingdom, has disappeared from the land of its birth, there is no legal warrant for holding that it has any validity in this country, particularly, after the Constitution. As the cause of action in this case arose after the coming into effect of the constitution, in our opinion, it would be only recognising the old established rule, going back to more than 100 years at least, if we uphold the vicarious liability of the State. Article 300 of the Constitution itself has saved the right of Parliament or the Legislature of State to enact such law as it may think fit and proper in this behalf. But so long as the legislature has not expressed its intention to the contrary, it must be held that the law is what it has been ever since the days of the East India Company".

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The decision in Vidyawathi's case has been acclaimed to be 'progressive'[15] 'right'[16], 'a ray of hope'[17] and 'a precursor of new trend'[18] in making the Government liable like an ordinary employer. It shows how the same 'great and clear distinction' given by Sir Barnes Peacock could be used do adopt the principle of 'responsible state'.[19] It was hailed to have cleared much dead wood that blocked the way of progress in this branch of law.[20] This decision was thought for a time to have negated the previous difference between sovereign and non-sovereign functions and that in future the government would be liable in all cases except 'act of state' properly so called.[21] A careful reading of the court's opinion suggests that while the Court did make some observations justifying a broader view of the State's responsibility for torts of it servants than what the P & O case laid down, in effect it did not overrule the test of sovereign functions to determine government's liability neither did it refer to it, nor did it specifically say that the functions in the instant case out of which the liability arose was non- sovereign.[22]

However, the law governing governmental tort liability in India received a set back due to the decision of the Supreme Court in Kasturilal v. State of U.P., delivered after three years of Vidyawati decision. In this case a bullion dealer was arrested and put in the lock up at midnight on suspicion of being in possession of contraband gold and the gold was kept in the police custody. As no case could be made out against him he was released. On demanding back his gold, he was told that the gold had been misappropriated by a constable who had fled to Pakistan. He filed a suit against the state of U.P. for the return of the gold or its price. The U.P. Government repudiated liability to pay compensation for misappropriation. Two substantial questions arose between the parties: (1) whether the police officers were negligent in the safe custody of the gold, and (2) whether the State of U.P. was liable to compensate the appellant for the loss caused by the negligence of its public servants. The Allahabad High Court reversed the trial court's decision and held that even though negligence had been established against the police officers, the state would not be liable for the loss of the gold. The appellant obtained a certificate from the High Court and appealed to the Supreme Court. On the issue of negligence,

[15] S.S.Srivastava, *supra* note,11, p.58.
[16] Justice C.K Thakker, *Administrative Law,* (Lucknow: Eastern Book Co.,1992), p 504
[17] Vijaya K. Bhardwaj,"Some Aspects of Governmental Liability for Police Torts in India and California", (1973) 9 *Ban. LJ.* 53 p. 60
[18] M.P. Jain, *Indian Constitutional Law*, 4th ed.,1999 Re.pt., (Nagpur: Wadhwa & Co.) p.818.
[19] P. Ishwara Bhat, *Administrative Liability of the Government and Public Servant,* (New Delhi: Deep and Deep Pub., 1983), p.40.
[20] *"State of Rajasthan* v. *Vidyawati-Acceptance* of Vicarious Liability of Government for the tortious acts of servants- The Responsible State"- Editorial Comment, (1962) 4 *JIU* 279, p.280.
[21] A.T. Markose & V.D. Sebastian, "Liability of State in Civil Law", in L.M. Singhvi ed. *Law and the Commonwealth*, (Delhi: National Pub. House, 1971), p.346
[22] Ghulam Qadir Mir, "Governmental Liability in Tort", I *KULR* 1994, 118 at 121

the Supreme Court, in an unanimous opinion by Gajendragadkar, C.J., concluded that the police officers were grossly negligent in taking care of the gold seized from the appellant. On the second issue, the Court held that the State of Uttar Pradesh was not liable for the negligence of police officers in the exercise of their statutory powers, and, therefore, the claim could not succeed.

Speaking for the Constitution Bench of the Court, Gajendragadakar. C.J., observed:

"If a tortious act is committed by a public servant and it gives rise to a claim for damages, the question to ask is; was the tortious act committed by the public servant in discharge of statutory functions which are referable to, and ultimately based on, the delegation of the sovereign powers of the State to such public servant? If the answer is in the affirmative, the action for damages for loss caused by such tortious act will not lie. On the other hand, if the tortious act has been committed by a public servant in discharge of duties assigned to him not by virtue of the delegation of any sovereign power, an action for damages would lie".[23]

In arriving at this conclusion, the Supreme Court placed exclusive reliance on P & O case. The appellant, relying on Vidyawati's case contended that his claim against the State for the loss caused by the misappropriation by the constable could not be defeated on the plea that the seizure was an action in exercise of sovereign power.

However, the Court distinguished its decision in Vidyawati's case and said that the basis of the act which existed in Vidyawati's case was absent in the case before them. The acts performed by the police officers though negligent, were performed in the course of their employment, under the powers conferred on them.

Being conscious of the difficulties likely to arise because of the above legal position, the learned Chief Justice observed as under:

"It is not difficult to realise the significance and importance of making such a distinction particularly at the present time when, in pursuit of their welfare ideal, the Government of States as well as the Government of India naturally and legitimately enter in to many commercial and other undertakings and activities which have no relation with the traditional concept of Governmental activities in which the exercise of sovereign power is involved. It is necessary to limit the area of these affairs of the State in relation to the exercise of sovereign power, so that if acts are committed by Government employees in relation to other activities which may

[23] AIR 1965 SC 1039 p. 1046.

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be conventionally described as non-governmental or non-sovereign, citizens who have a cause of action for damages should not be precluded from making their claim against the State".[24]

At the same time he felt disturbed that such an immunity should prevail m the independent India under the Constitution and exhorted the legislatures to seriously consider the enactment of statutes regulating States' claims from immunity on the lines of the Crown Proceedings Act, 1947.[25] The Court through Gajendragadkar C.J., concluded thus:[26]

"In dealing with the present appeal, we have ourselves been disturbed by the thought that a citizen whose property was seized by process of law, has to be told when he seeks a remedy in a court of law on the ground that his property has not been returned to him, that he can make no claim against the State. That, we think, is not a very satisfactory position in law. The remedy to cure this position however lies in the hands of legislature".

Kasturi Lai case was seriously criticised by eminent jurists as one of the 'rash decisions' 'struggling to reassess, and rationally redefine, the modern scope of old governmental prerogatives and immunities'[27] which has retarded the progress of fresh stimulus received in *Vidyawati* case.[28] The Supreme Court perpetuated the irrational distinction between sovereign and non-sovereign functions in the modern context when the State embarks on so many varied activity. The state should match its present day role and not to be confined to the laissez-faire era which the P & O case signifies.[29]

The learned Judge fin Kasturilal case ailed to take note that immunity corresponding to the statutory power was available only to the bonafide exercise of power, but not to the abuse or misuse of the same. This case is a clear example of an improper application of an inadmissible test.[30] The test being fallacious, it helps the courts to reach almost any conclusion.[31]

Pursuant to the observations made by Chief Justice Gajendragadkar and the recommendations of the Law Commission of India, the Government introduced a Bill in 1965 to 'define and amend' the law with respect to the liability of Government in tort, but it lapsed due to dissolution of the Lok Sabha. In 1967. an identical Government (Liability in Tort) Bill, 1967(citation) was re-introduced in the Lok Sabha but the Government allowed the Bill to lapse

[24] ibid., p. 1048
[25] ibid., p.1049
[26] id.
[27] A.R. Blackshield, "Tortious Liability of Government: A Jurisprudential Case Note 8 *J.I.L.I.* 643 (1966), p.645.
[28] AliceJacob,"Vicarious Liability of Government in Torts",7 *J.I.L.I.* 247 (1965), p.248
[29] M.P. Jain, *supra* note 17, p.819.
[30] P. Ishwara Bhat, *supra* note 18, p.40.
[31] B.M.Gandhi, *Law of Torts*, (Lucknow: Eastern Book Co. 1987), p. 102

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on the ground that if enacted it would bring rigidity in determining the question of liability of Government in tort.

The courts in later years, as will be seen have made an attempt to rationalise the situation by adjusting the archaic law to the realities of modem life. Even today, the decision of the Supreme Court in Kasturilal continues to hold good. However, its authority has been substantially reduced by a number of later decisions, of the Supreme Court. Without referring or overruling Kasturilal. a deviation from it has been made. The state has been made liable for loss or damage either to person or property, in those cases where the state would not have been liable if Kasturilal had been followed. Further, by liberal interpretation the courts have extended state liability by holding more and more functions of state as non-sovereign.

It is interesting to note that the judiciary is now taking recourse to fundamental rights and other Constitutionally conferred rights to hold the State liable.

**(D) Recent Judgements**

N.Nagendra Rao & Co. v. State of Andhra Pradesh[32] is another significant judgment delivered by the Supreme Court relating to vicarious liability of the State by a two judges Bench R.M.Sahai and B.L. Hansaria J.J., wherein the law relating to sovereign immunity has been surveyed in detail. In this case, the premises of the appellant, who carried on business in fertiliser and food grains under licence issued by the appropriate authorities was visited by Police Inspector Vigilance Cell and huge stocks of fertilisers, food grains and even non-essential goods were seized. Since no steps were taken for the disposal of the fertiliser, the appellant requested both the DRO and the AAO for diverting the fertilizer either to the place mentioned by the appellant or to release in its favour for disposal and deposit of the sale proceeds as otherwise the fertiliser would deteriorate. But nothing was done. Ultimately the proceedings under section 6A were concluded and the stock of food grains was confiscated with the cancellation of the appellant's licence. The appellant had not properly maintained the account of fertiliser. The explanation of the appellant for difference in stock was not satisfactory and in the absence of any material to prove the guilt of the appellant of any serious infringement, such as black marketing, adulteration or selling at a price higher than the controlled price, the collector was left with no option but to direct confiscation of only a part of the stock and release the rest in favour of the appellant. Despite the order of the collector and order passed by the Sessions Judge, the stock was not released and all the efforts of the appellant to get the stock released went in vain. When the appellant went to take delivery after

[32] AIR 1994 SC 2663.

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being issue notice to him to take delivery of the stock, the stock had been spoilt both in quality and quantity. The appellant filed a suit for recovery of the amount after getting no response of his demand or value of the stock released by way of compensation.

The respondent contented the defence that the act comes under sovereign immunity of the State, and they discharged the statutory duty in good faith, and the appellant has was no any right to claim value of the goods. The matter reached to the Supreme Court after appeals.

The Supreme Court analysed the Essential Commodities Act, 1955 and said that the main provision, section 3 is directed towards securing equal distribution of essential commodity and its availability at fair prices. For this purpose, the Government is empowered to reach and seize if there is a reasonable belief of the contravention of the order made under Section 3. Under Section 6A(1) the report of the seizure has to be placed before the collector without unreasonable delay and the collector my order the confiscation of the essential commodity if he is satisfied that there is contravention of the order made under section 3. If the goods seized are not confiscated, a provision is made under section 6C(2). The section obliges the Government to return the goods seized or pay its value if for any reason it cannot return goods. Therefore, the liability to return the goods does not stand discharged by offering them in whatever condition it was and the owner is not bond to accept them. Confiscation of part of the goods cannot affect this right of the owner. In this regard the court held as under:[33]

"Loss in value of goods or its deterioration in quality and quantity would be in violation of the purpose and spirit of the Act. Even though the section uses the world 'may' but keeping in view the objective of the Act and the context in which it has been used it should be read as 'shall', otherwise it would frustrate the objective of the sub-section. Once goods are seized, they are held by the State through the collector and his agents as custodia societus, unless it is found that the detention was illegal in which case it shall be deemed to have been held for the benefit of the person from whom it was seized. In either case its proper maintenance and early disposal is statutory duty. It is more so as the proceedings do not come to an end quickly".

Regarding the seizure of goods in exercise of statuary and sovereign powers, the Supreme Court said that the doctrine of sovereign immunity has no relevance in the present day context when the concept of sovereignty itself had undergone drastic change.[34] Regarding the modern concept of sovereignty which was not illimitable and indivisible the court further said that the concept of sovereign immunity and the distinction between sovereign and non-sovereign

[33] *Supra* note 32, p.2671.
[34] *Ibid.*, p.2677.

function were neither relevant either before or after coming into force of the Constitution. The old archaic concept of sovereignty does not survive as now it rests with the people.

To decide whether a function is a sovereign function the court suggested the following test:

"One of the test to determine if the legislature or executive function is sovereign in nature is whether the State is answerable for such actions in courts of law. For instance, act such as defence of the country, raising armed forces and maintaining it, making peace or war, foreign affairs, power to acquire and retain territory, are functions which are indicative of external sovereignty and are political in nature. Therefore, they are not amenable to jurisdiction of ordinary civil court. No suit under Civil Procedure Code would lie in respect of it. The state is immune from being sued, as the jurisdiction of the courts in such matter in impliedly barred".[35]

The Court proceeded further, as under:

"But there the immunity ends. No civilised system can permit an executive to play with the people of its country and claim that it is entitled to act in any manner as it is sovereign. The concept of public interest has changed with structural change in the society. No legal or political system today can place the State above law as it is unjust and unfair for a citizen to be deprived of his property illegally by negligent act of officers of the State without any remedy. From sincerity, efficiency and dignity of the State as a juristic person, propounded in Nineteenth Century as sound sociological basis for State immunity the circle has gone round and the emphasis now is more on liberty, equality and the rule of law. The modem social thinking of progressive societies and judicial approach is to do away with archaic State protection and place the State or the Government at par with any other juristic entity. Any watertight compartmentalisation of the functions of the State as 'sovereign and non-sovereign' or 'governmental and non-governmental' is not sound. It is contrary to modem jurisprudential thinking. The need of the state to have extraordinary powers cannot be doubted. But with conceptual change of statutory power being statutory duty for sake of society and the people the claim of common man or ordinary citizen cannot be thrown out merely because it was done by an officer of the State even though it was against law and negligently. Needs of the State, duty of its officials and right of the citizens are required to be reconciled so that the rule of law in a welfare State is not shaken" .[36]

[35] *Supra* note 32, pp. 2682-3.
[36] Ibid., p. 2683.

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This decision of the Apex court is a major step towards rationalisation of the uncertain law. The court has done the right thing by confining the sovereign immunity to only primary and inalienable functions of the State by explaining Kasturilal.

It can be understood that the Bench faced difficulty in Nagendra Rao's case. It was a Bench of two judges, where as Kasturilal's case was decided by a constitution bench of five judges. However, the following examination of cases reveals an honest effort on the part of the courts to narrow down the area of State immunity and widening the area of state liability.

**(E) View of the National Commission to Review the Working of the Constitution**

The National Commission[37] constituted to review the working of the Constitution, hereinafter called the Commission, issued a consultation paper titled "Liability of the State in Tort" for generating debate and eliciting public reactions and opinions. The Commission emphasises the need for a second look at the law relating to liability of the State in tort in following terms:

*"…the law that contains the principles that will govern the liability of the State, for torts committed by its agencies, should be just in its substance, reasonably certain in its form and fairly predictable in its working. This Commission, as a result of its studies, found that the law on the subject- matter of this Report fails to satisfy these criteria. It traces its source to an archaic provision, which is almost two centuries old. It is found to be suffering from conflicting views, owing to the loose and imprecise criteria that have come to be adopted. It deserves a close second look in the present century, in the larger interest of society" .*[38]

The Commission refers to the important decisions of the period before the Constitution and also examines some significant rulings of the post Constitution period to illustrate the principal conflicting approaches.[39] It has analysed the Supreme Court's decision in Nagendra Rao v. State of A.P. in greater detail[40] The cases involving fundamental rights, which represent a parallel to the evolution of law applicable to actions in tort are considered separately.[41]

However, in the Report submitted by the Commission on 31.3.2002 no recommendation was made suggesting a change in this field of law The observation of the commission in this regard is as under:[42]

[37] Report of the Commission to Review the Working of the Constitution, Vol.I, para 1.3.1
[38] "Liability of the State in Tort: A Consultation Paper", issued by the National Commission to Review the Working of the Constitution, (New Delhi: Vigyana Bhavan Annexe), http;// ncrwc.nic.in para 1.2.
[39] Ibid., Chs. 3 & 4.
[40] Ibid., Ch.5.
[41] Ibid., Ch.7.
[42] Report of the Commission to Review the Working of the Constitution, Vol.I, para 6.18

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"The Commission had issued a consultation paper on 'Liability of State in Tort' for eliciting public opinion. After considering the responses and fully discussing the matter, the commission decided that no recommendation in regard to the suggestions made in the consultation paper was necessary".

## III. CONCLUSION

From the foregoing discussion it becomes obvious that in India the State is not liable in tort for acts done by the servants in the exercise of sovereign functions However, it is liable for the torts committed by its servants in the discharge of non sovereign functions. The distinction between sovereign and non-sovereign functions which was initiated in the P & O case is irrational, outmoded and antiquated. Unfortunately this distinction of the pre-Constitution period was perpetuated into the post-Constitution period by the Supreme Court through its Kasturi Lai's ruling. But the judiciary has not laid any clear test to determine the character of a sovereign function. Prior to the adoption of the Constitution, when India was a Police State, the judicial attitude was to give a very wide interpretation to the term "sovereign function'. After attaining independence and adoption of a Constitution providing for a responsible state committed to welfarism, a shift in the attitude of judiciary towards state liability can be clearly perceived The aforesaid discussion of cases leads us to the conclusion that the courts have restricted the area of 'sovereign functions' so as to make the state liable more and more for the loss suffered by the people at the hands of the Government servants. The courts have done this through a restrictive interpretation. Even though Kasturi Lai is not overruled, much of its authority is eroded by now. This is a positive step towards realising the view that in a Welfare State it is necessary to establish a just relation between the rights of the individual and the responsibilities of the State. Under a republican Constitution, the sovereign immunity is to be confined to the bare essential functions, making the State liable in all other cases.

### (A) SUGGESTIONS

1. The study asserts that in modern context when the State is undertaking multifarious activities employing an army of personnel, it is necessary to protect the legitimate interests of the victims of torts committed by its servants by providing definite means of redressal. In this important area, legal principles should not be encoded in abstract doctrines; instead, they should be easily accessible and conveniently readable. Therefore, it is proposed that an Act on the lines of Government (Liability in Tort) Bill, 1967 be enacted forthwith.
2. Pending the enactment of legislation, the courts must continue the liberal interpretation adopted in the trend setting decisions and abolish the distinction between 'sovereign' and

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'non-sovereign' functions. In order to place the law in its proper perspective, the sovereign immunity defence must be confined to the sphere of 'act of state' only. In all other situations, where the state is amenable to the jurisdiction of municipal courts, the sovereign immunity defence should not be available.

3. The doctrine of 'appropriate cases' evolved by the courts to identify a Constitutional tort was explained in M.C.Mehta by the Supreme Court It is found that this articulation is subjective. In view of the doubts expressed about the appropriateness of applicability of strict liability principle in this area, it is suggested that the courts must adopt an objective criteria to identify constitutional torts. The relevant question to be asked is whether the conduct complained of did violate a clearly established fundamental right, which a reasonable person would have known.

4. The Courts in addition should adopt clear criteria to compute the quantum of compensation to be awarded to the victims of state lawlessness. In the area of constitutional torts the criteria used to hold the State liable appears to lack objectivity which is a sine qua non of a certain legal principle. The solution to the problem of state liability lies in expressly overruling the age old precedents and confining the sovereign immunity only to the area of 'act of state'. Further the liability of the state should be only transient and the errant officer should be compelled to indemnify the state. In the area of constitutional torts remedy, the state should be held liable for violation of fundamental rights without the requirement of 'shock the conscience' element.

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