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## SOVEREIGN V. NON-SOVEREIGN FUNCTIONS OF THE STATE - A LEGAL ANALYSIS WITH CASE LAWS

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### ABSTRACT

The doctrine of sovereign immunity, deeply rooted in the archaic notion that 'The King can do no wrong,' has profoundly influenced the landscape of state liability in India. This paper critically examines the historical evolution and contemporary relevance of distinguishing between sovereign and non-sovereign functions of the state under Article 300 of the Indian Constitution. Through an in-depth analysis of landmark judicial pronouncements, from the *P. & O. Steam Navigation Company* case in the pre-independence era to pivotal Supreme Court decisions, it explores how Indian courts have progressively narrowed the scope of sovereign immunity. The study highlights the judiciary's proactive role in expanding state accountability, particularly in instances involving tortious acts by state servants and egregious infringements of fundamental rights guaranteed by the Constitution. This research also provides a comparative analysis of India's evolving position with the approaches adopted by the United Kingdom, the United States, and France, underscoring a broader international move towards greater governmental accountability. The paper advocates for comprehensive legislation to address the existing ambiguities and ensure a more equitable and modern framework for state liability in a welfare state.

**Keywords:** Sovereign Immunity, State Liability, Article 300, Tortious Liability of State, Sovereign & Non-sovereign functions.

- **Introduction:**

The journey of state liability begins with a simple but powerful idea that a ruler is incapable of wrongdoing. In pre-1947 Britain, this belief was captured in the maxim *"King can do no wrong"*, which not only shielded the Crown from civil claims but also formed the basis of absolute sovereign immunity. As an extension of this doctrine, the State could not be sued in its own courts without its consent. At best, compensation was offered to injured individuals as a gesture of mercy and not as a matter of legal right. Over time, however, the harshness of this principle became increasingly difficult to justify, especially as the functions of the State expanded beyond traditional governance and entered areas that directly affected daily life. This tension between power and accountability forms the foundation of the doctrine of sovereign immunity. When the Constitution of India was enacted, Article 300 adopted the same colonial approach and allowed the Union and the States to be sued only in the same manner as the old Dominion Governments. Yet, it did not define the boundary between sovereign and non-sovereign functions.

This paper explores how the interaction between administrative law and the law of torts has exposed the shortcomings of this outdated approach and why there is now a pressing need for a clearer and more equitable framework.

- **Historical Development:**

- 1) **Pre- Independence:** The leading case arose under section 65<sup>1</sup> of the Government of India Act, 1858, **P. & O. Steam Navigation Co. v. Secretary of State**,<sup>2</sup> the plaintiff claimed damages after one of its horses was injured on a public highway due to the negligence of government workmen. The workers, employed at the Dockyard, were carrying an iron pole across a public road to load it onto a government steamer and caused the accident while doing so. The court had to determine whether the government could be held liable, and to do so it asked whether the East India Company would have been liable in a similar situation. Since the Company, after the Charter Act of 1833, carried out both commercial and sovereign functions, the court held that the Crown's immunity could not apply to activities of a commercial nature. It therefore concluded that the government could be sued

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<sup>1</sup> all persons and bodies politic could sue the Secretary of State in Council in the same manner they could have sued the East India Company.

<sup>2</sup> P. & O. Steam Navigation Co. v. Secretary of State, 5 Bom HCR App. 1.

for negligence when performing non-sovereign functions. The sovereign powers were defined as: ‘powers which cannot be lawfully exercised except by a sovereign, or private individual delegated by a sovereign to exercise them’. It could also be said that what the court said in *P. & O.* to be a ‘clear’ distinction between ‘sovereign’ and ‘non-sovereign’ functions, it is really not so clear. In **Hari Bhanji**<sup>3</sup>, it was decided, Acts done in the exercise of sovereign powers but which do not profess to be justified by municipal law are what we understand to be the acts of State which municipal courts are not authorised to take cognisance. In **Nobin Dey**<sup>4</sup>, the plaintiff paid money to obtain a licence for operating ganja shops. The licence was never issued, nor was the money returned, and the plaintiff claimed damages. The Court held that the giving of licence and taking excise duty was a matter entirely done in the exercise of sovereign powers, and hence no action would lie.

## 2) Post Independence-

It may be of interest to know that in 1949, just on the eve of the inauguration of the Indian Constitution, the Bombay High Court debunked the doctrine of sovereign immunity in **P.V. Rao v Khushaldas**,<sup>5</sup> and adopted the **Hari Bhanji** view of the government liability. The Court restricted the observations in *P. & O.* only to an ‘act of state’ which is taken by the sovereign power outside the ordinary municipal law. After the Constitution came into effect in 1950, the courts in Republican India continued to follow the pre-Constitution approach and consistently applied the *P. & O.* decision, while disregarding the Bombay High Court’s ruling in *Khushaldas*. As a result, the judiciary kept drawing a distinction between sovereign and non-sovereign functions when determining government liability..

### a) Conflicting Judicial Views : Vidyawati to Kasturi Lal

In **State of Rajasthan v Vidyawati**<sup>6</sup>, A jeep owned and maintained by the State of Rajasthan for the collector’s official use was being driven back from a workshop after repairs when the driver, acting rashly and negligently, caused an accident that resulted in a fatal injury to a pedestrian. The State was sued for damages. The State claimed immunity on the ground that the jeep was being maintained “in exercise of sovereign powers.” The Court held that the act

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<sup>3</sup> Secretary of State v. Hari Bhanji, (1882) ILR 5 Mad 273

<sup>4</sup> Nobin Chunder Dey v. Secretary of State for India, ILR 1 Cal 1 (1875).

<sup>5</sup> AIR 1949 Bom 277

<sup>6</sup> AIR 1962 SC 933

of driving the jeep back from the repair shop to the collector's residence had no connection with the exercise of sovereign powers and therefore could not attract sovereign immunity.

Although *Vidyawati* had the potential to mark the beginning of a new approach towards state liability, but then its efficacy was whittled down by the Supreme Court in subsequent **Kasturi Lal**<sup>7</sup> case, the negligence occurred while police officers were dealing with gold seized under their statutory powers. Although the officers were grossly careless in safeguarding the property, the Court ruled that the government could not be held liable because the act was performed in the exercise of sovereign functions. The decision reaffirmed the distinction between sovereign and non-sovereign functions established in the *P. & O.* case.

#### • Law Commission's Report (1956)

In its first report in 1956, the Law Commission of India stated that the position laid down in *Hari Bhanji* was correct, and also pointed out that the law on state liability inherited from colonial rule was outdated, out of step with modern realities. The Commission observed that although the State now performs extensive functions as part of its welfare role, Parliament has failed to modernise the law, which still follows the old colonial approach. It emphasised that government liability should match the expanded functions of the State and not remain tied to the *laissez-faire* era. The Commission further noted that other democratic countries had adopted a broader view of state liability and that the Indian position compared unfavourably with these foreign developments. It therefore recommended that appropriate legislation be enacted to remove the existing defects in the law. The Government (Liability in Tort) Bill, which was drafted in accordance with the Law Commission's recommendations, was introduced in Parliament in 1965 but was not passed. A revised version was again introduced in 1967 and further changes were proposed by the Joint Select Committee in 1969, yet the Bill still failed to become law. Looking in retrospect, it turned out to be for the better that no bill was enacted at this time otherwise the government liability would have been subjected to numerous exceptions.<sup>8</sup> Pending legislation, the courts have taken on themselves the task of adjusting the archaic law to the realities of modern life.

#### • The Shifting Paradigm (Post-1970s) - Narrowing the Scope of Sovereign Functions

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<sup>7</sup> *Kasturi Lal Ralia Ram Jain v State of Uttar Pradesh*, AIR 1965 SC 1039

<sup>8</sup> *President, UOI v Sadashiv*, AIR 1985 Bom 345

After the 1970s, the courts began to significantly narrow the scope of what could be considered a sovereign function and increasingly treated a wider range of government activities as non-sovereign. This judicial approach softened the rigidity of the old law, particularly since the legislature had not taken any steps to modernise it. In the period following *Kasturi Lal*, the courts applied this reasoning carefully, classifying more government functions as non-sovereign and thereby expanding state liability. As the Madhya Pradesh High Court has observed, traditional sovereign functions are the making of laws, the administration of justice, the maintenance of order, the repression of crime, carrying on of war, the making of treaties of peace and other consequential functions. Whether this list be exhaustive or not, it is at least clear that the socio-economic and welfare activities undertaken by a modern state are not included in the traditional sovereign functions<sup>9</sup>.

In another case,<sup>10</sup> the Supreme Court has observed that sovereign functions essentially are primary inalienable functions which only the state could exercise such as taxation, eminent domain and police power which covers its field. It may cover legislative functions, administration of law, eminent domain, maintenance of law and order, internal and external security, grant of pardon. So the dichotomy between sovereign and non-sovereign function could be found by finding which of the functions of the State could be undertaken by any private person or body; the one which could be undertaken cannot be sovereign function.

With the scope of sovereign functions steadily shrinking and non-sovereign functions expanding due to judicial activism, the government is now more frequently held liable for tortious acts committed by its employees against private individuals. In **Chandrima Das**<sup>11</sup>, the Supreme Court held the Government of India liable to pay compensation to a Bangladesh woman who was gang raped by railway employees in yatri niwas.

#### • **Sovereign Immunity v Article 21**

Article 21 has played a tremendous role in shaping the law of government's tortious liability. The most important innovative step adopted by the Supreme Court is to defend life and personal liberty of persons against state lawlessness by holding that where article 21 is violated, the state has to pay compensation and the concept of 'sovereign function' does not prevail in this area.

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<sup>9</sup> Association Pool v Radhabai, AIR 1976 MP 164.

<sup>10</sup> Agricultural Produce Market Committee v Ashok Haribuni, AIR 2000 SC 3116

<sup>11</sup> Chairman Railway Board v Chandrima Das, AIR 2000 SC 988

Thus, the concept of sovereign function ends when article 21 of the Constitution begins.<sup>12</sup> In **Rudul Shah v. State of Bihar**<sup>13</sup>, the petitioner was kept in jail for 14 years after his acquittal by a criminal court. The Court felt that if it refused to pass an order of compensation in favour of the petitioner, *it will be doing merely lip service to the fundamental right to liberty* which the State Government has so grossly violated & It would denude the right to life and liberty under article 21.

## • Sovereign and Non-Sovereign Functions: A Detailed Analysis

### 1) Transportation

A person was killed in an accident caused by a jeep driven by a government employee while performing his official duties. In *Annamalai*, the court held the government liable and awarded damages to the widow on the basis of vicarious liability, as driving a jeep is a non-sovereign function and any person can drive a jeep<sup>14</sup>.

### 2) Railways

The operation of railways is considered a commercial activity. Setting up Yatri Niwas at railway stations to offer lodging and boarding services to passengers for a fee is treated as an extension of this commercial activity carried out by the Government of India. Such an activity cannot be equated with the exercise of sovereign power<sup>15</sup>.

### 3) Military Vehicles

The relevant test is not simply whether a military vehicle was involved, but rather the purpose for which the vehicle was being used. If the activity cannot be characterised as a sovereign function, the government will be vicariously liable for the torts committed by its employees. Government was held liable to pay compensation when an accident occurred when a military truck was going for bringing vegetables for prisoners of war<sup>16</sup>.

### 4) Government Hospitals

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<sup>12</sup> Chairman Railway Board v Chandrima Das, AIR 2000 SC 988

<sup>13</sup> (1983) 4 SCC 141.

<sup>14</sup> Annamalai v Abithakujambal, AIR 1979 Mad 276.

<sup>15</sup> Chairman Railway Board v Chandrima Das, AIR 2000 SC 988

<sup>16</sup> UOI v Neelam Dayaram, 1979 MPLJ 732.

In *Achutrao*<sup>17</sup> The Supreme Court has clearly held that maintaining government hospitals is a non-sovereign activity. It is not a primary and inalienable function of the State, nor is it an activity that private individuals cannot perform.

### 5) Torts against Property

Military jawans took away the wood belonging to the plaintiff for purposes of campfire. The High Court ruled that this act was not referable to any sovereign power. Hence the plaintiff was held entitled to recover the price of the wood.<sup>18</sup>

### 6) Torts against Person

In this area, article 21 of the Constitution plays a very important role. Relevant cases<sup>19</sup> to this point are already discussed in the point, Sovereign Immunity v. Article 21.

#### • State Liability in Other Jurisdictions

In the United Kingdom, the traditional doctrine of absolute Crown immunity slowly evolved as democratic value and administrative accountability became more central to governance. The decisive shift occurred with the *Crown Proceedings Act of 1947*, which for the first time allowed private individuals to bring civil claims directly against the Crown in both tort and contract. This Act effectively placed the government on the same footing as ordinary citizens for most civil wrongs and signalled a significant move towards openness and accountability of public authorities. It also reflected a growing recognition that a modern welfare state must accept legal responsibility for the actions of its servants. The United States took a similar step with the *Federal Tort Claims Act of 1946*, which authorised suits against the federal government for tortious acts committed by its employees while acting within the scope of their official duties. Although the Act retains certain exceptions, particularly for discretionary functions and matters related to national security, it nonetheless demonstrates a strong commitment to ensuring governmental accountability while preserving essential governmental functions. France offers a distinctive example, where the evolution of state liability has been shaped primarily by administrative courts rather than by legislation. Guided by the principles of *Legalite* and *Responsibilite*, French administrative law requires public authorities to act in

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<sup>17</sup> *Achutrao Haribhau Khodwa v State of Maharashtra*, AIR 1996 SC 2377

<sup>18</sup> *Rooplal v UOI*, AIR 1972 J&cK 23

<sup>19</sup> *Rudul Shah v. State of Bihar* (1983) 4 SCC 141 & *Chandrima Das*, AIR 2000 SC 988

accordance with legal standards and to compensate individuals who suffer harm due to administrative actions. French jurisprudence, therefore, encourages a broader scope of state liability in order to promote fairness and protect citizens from arbitrary or negligent conduct by public bodies.

- **The limitations and ambiguities of Article 300 of the Indian Constitution.**

Article 300(1) of the Constitution of India states that the Government of India and the States may sue or be sued in the same manner as the Dominion of India and the Provinces before the Constitution came into force, subject to any law made by Parliament or the State Legislature. Since no such law has been enacted, present state liability remains tied to the liability of the former colonial government. This traces back through Section 176 of the Government of India Act, 1935 and Section 32 of the 1915 Act to the liability of the East India Company before 1858. Section 65 of the 1858 Act preserved against the government the same suits and proceedings that were available against the Company. Thus, to understand current liability, one must examine the extent to which the East India Company could be sued. However, Article 300 does not clarify which functions are sovereign and which are non-sovereign, forcing courts to rely on varying judicial tests and leading to inconsistent and unpredictable outcomes. In the absence of specific legislation under Article 300, the scope of governmental liability continues to remain uncertain.

### **Conclusion and suggestions**

The doctrine of sovereign immunity in India has undergone a gradual but significant transformation. From the early reliance on colonial precedents distinguishing between sovereign and non-sovereign functions, the judiciary has progressively expanded the scope of state liability and restricted the domain of sovereign immunity. Landmark decisions reflect a clear judicial commitment towards protecting individual rights and ensuring governmental accountability. Nevertheless, the continued dependence on Article 300, which ties state liability to pre-Constitution practices, has left substantial ambiguity and inconsistency in the law. The absence of a comprehensive statute has forced courts to fill the gaps on a case-by-case basis, resulting in uncertainty and lack of uniform standards.

To address these limitations, Parliament should enact a specific legislation codifying the principles of state liability in tort. The law must clearly define sovereign and non-sovereign



functions, lay down objective tests for determining liability and provide provisions for compensation in cases involving violation of fundamental rights. Moreover, the statute should reflect the modern welfare role of the state and align with international trends favouring greater governmental accountability. Codification will not only provide clarity and predictability but also strengthen the rule of law and public trust in state institutions.