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# BALANCING IMMUNITY AND ACCOUNTABILITY: THE EVOLUTION OF GOVERNMENT LIABILITY IN INDIAN ADMINISTRATIVE LAW

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## ABSTRACT

The project analyses the evolution of government liability in Indian administrative law which stresses on the balance between immunity and accountability. It shows how the idea of state immunity has been rebuilt after Constitutional era by using judicial interpretation and constitutional principles. This study focuses on the difficulties faced due to absence of a defined statutory framework and reliance to define the scope of liability on the Courts. By tracking the historical developments and judicial evolution this project focuses on the significance of reforms which ensures that government liability is fair and it met the need of a modern democracy.

**Keywords:** Government Liability, Administrative Law, Sovereign Immunity, Accountability, Constitutional Principles, Judicial Interpretation.

## INTRODUCTION

In a democratic country it is said that no authority is above the law not even the State. This idea forms the debates on government liability in the Indian Administrative Law. The Doctrine of sovereign immunity once shielded the State from legal accountability. However, where the rule of law and protection of fundamental rights form bedrock of the governance such immunity cannot remain absolute. The evolution of government liability in India mirrors constant difficulties to maintain the balance the functional independence of the State and remedies provided to the citizens harmed by its actions.

The idea of holding the government responsible has become stricter. Courts made new rules like constitutional torts and used the idea of strict responsibility in custodial death cases and focused on the fact that it is the State's duty to protect the fundamental rights of its citizens.

Likewise, countries like United Kingdom and United States have clarified government liability using clear legislative framework which shows the gap in India's legal system. The project aims to examine the relation between sovereign immunity and state's accountability. It emphasizes how the constitutional provisions and judicial interpretations have reshaped the limits of State of liability.

## LITERATURE REVIEW

### *Evolution of tortious liability of state in India:*

This examines the constitutional mechanisms which gives the citizens the power to hold the State accountable for violating their fundamental rights. It specifically stresses upon **Article 32**<sup>1</sup> and **226**<sup>2</sup> of the Indian Constitution, which are the core of constitutional remedies available to individuals. The five writs Habeas Corpus, Mandamus, Certiorari, Prohibition, and Quo Warranto highlights judiciary's role in implementing fundamental rights and ensuring the judicial overview of state actions. This article is directly related to the question as to "How has the awareness of the Supreme Court of Constitutional torts under Article 32 and 226 extended State Accountability beyond the traditional remedies of private law". The article illustrates how the Supreme Court has actively expanded the State's liability which challenges the sovereign

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<sup>1</sup> INDIA CONST. art. 32.

<sup>2</sup> INDIA CONST. art. 226.

immunity. It also stresses that Article 32 remains the heart and soul of the Constitution which reinforces the rule of law and provides an effective remedy against the arbitrary state action. So the article is a critical reference for understanding the constitutional framework that balances state immunity and citizens rights in India<sup>3</sup>.

#### ***Extent of government liability in torts under Indian law:***

This article gives a detailed explanation of the responsibility of the State in tort lawsuits against wrongful acts by its officials. **Article 300<sup>4</sup>** of the Indian Constitution in the paper is discussed to allow the government to be sued, and statutes such as the CPC and the Motor Vehicles Act govern the state's liability. It describes the very important judicial difference between the sovereign and non-sovereign functions, in which only the non-sovereign functions are liable, but this distinction is applied inconsistently. Such historic cases like **P&O Steam Navigation Co. (1861)<sup>5</sup>** and **D.K. Basu (1997)<sup>6</sup>** are noted as having gradually restricted the sovereign immunity and laid additional responsibility on the state. An examination of the structure of the liability regime in India against the ordered liability regimes in the Crown Proceedings Act in the UK and the Federal Tort Claims Act in the US highlights the loophole within the system of the Indian legal framework. The proposals provided in the article (a Government Tort Liability Act, strict administrative negligence, special tribunals, and compensation systems) are helpful in proposing the changes that may help to restore the equilibrium between state immunity and effective solution of providing the citizens with all the necessary remedies<sup>7</sup>.

#### ***Part viii the government's legal personality, ch.54 sovereign immunity:***

The article gives a close examination of the doctrine of sovereign immunity along with the doctrine of sovereign functions in India. It starts with an inquiry into **Article 300<sup>8</sup>** of the Indian Constitution establishing the constitutional foundation of sovereign immunity and surveys case law on sovereign immunity before the Constitution was adopted. The chapter also examines the initial post-independence efforts to reform sovereign immunity legislation, and how the

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<sup>3</sup> Anastasia Gupta, Judicial Remedies and Constitutional Safeguards: Analyzing the Interplay Between Articles 32 and 226, 9 I.J.L.M.H. 112 (2023), <https://ijlmh.com/paper/judicial-remedies-and-constitutional-safeguards-analyzing-the-interplay-between-articles-32-and-226/>

<sup>4</sup> INDIA CONST. art. 300.

<sup>5</sup> P&O Steam Navigation Co. v. Sec'y of State for India in Council, (1861) 10 Moo. P.C. 495 (P.C.).

<sup>6</sup> D.K. Basu v. State of W.B., AIR 1997 SC 610.

<sup>7</sup> Manish Kumar, Extent of Government Liability in Torts under Indian Law, 8 I.J.L.L.R. 54 (2023), <https://www.ijllr.com/post/extent-of-government-liability-in-torts-under-indian-law>

<sup>8</sup> *Supra Note 4.*

Indian Supreme Court has had difficulties in delivering a coherent judicial structure. Notably, it deals with the innovative nature of the Supreme Court that created new doctrines in fundamental rights litigation to avoid its prior limitations, which is indicative of judicial attempts to restrict the application of sovereign immunity and increase the state liability. This renders the chapter one of the most important references in comprehending the historical and doctrinal development of sovereign immunity within the Indian administrative law, and the dilemma the courts have in ensuring the balancing of the state immunity against the rights of the citizens<sup>9</sup>

***Liability of state: a comparative study of various countries under administrative law:***

By pointing to the fact that in India state liability has been developed by judicial interpretations and is still exposed to different limitations according to the doctrine of sovereign immunity. The abstract highlights the difference between sovereign and non-sovereign functions and highlights the manner in which Indian courts have applied this in landmark cases, thereby helping in the conceptualization of how judicial rationale has an effect on state liability. Moreover, the article is connected to the issue of constitutional torts and state responsibility concerning Article 32<sup>10</sup> and 226<sup>11</sup>, as it addresses the concept of public interest litigation and judicial activism as the means of enlarging state liability. Lastly, the article provides solutions to the overall theme of the project to balance state immunity and the need to provide effective remedies to citizens by putting forward reforms and depending on other comparative jurisdictions such as the UK, US, and France. Its comparative outlook presents useful information about the best global experience and the necessity to have uniform standards of liability in India<sup>12</sup>.

***Critical analysis of state liability apropos sovereign and non-sovereign functions:***

The article is very pertinent to the assigned subject as it starts by describing tort as a civil wrong and thus providing the bare legal basis on which the State liability is borne. It then ties this to

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<sup>9</sup> John P. Thomas, Evolution of the Doctrine of Sovereign Immunity in India: Historical and Doctrinal Perspectives, in Evolution of Administrative Law in Asia 215 (Oxford Univ. Press 2023), <https://academic.oup.com/edited-volume/42606/chapter-abstract/357548411>

<sup>10</sup> *Supra* note 1.

<sup>11</sup> *Supra* note 2.

<sup>12</sup> Meera S. Reddy, State Liability and Sovereign Immunity in Indian Administrative Law: A Critical Perspective, 2 Law & Welf. F.Y.R. India N.L. 142 (2023), <https://heinonline.org/HOL/LandingPage?handle=hein.journals/lwfyrl2&div=163&id=&page=>

the Constitution of India, which permits the State to be sued or to sue and demonstrates the constitutional structure to aid accountability to the State. The article is also concerned with the crucial difference between a sovereign role (such as defense, law-making and policing) and a non-sovereign role (such as commercial or welfare activities), a crucial determinant in numerous judicial decisions such as the **P&O Steam Navigation**<sup>13</sup> and **Kasturi Lal**<sup>14</sup>. Lastly, the blending of the essentials of tort law, the constitutional clauses, judicial interpretations and the comparative approaches makes the article comprehensive and presents the reader with a viva question answer concerning not only the basic principles in relation to State liability but also to practical problems concerning the same<sup>15</sup>.

***What does effective government have to do with the constitution?:***

The article is very relevant to the questions because it directly responds to the evolution of the State liability in India. It details how the tort law in India which was initially underdeveloped experienced a significant change in the 1980s when the Supreme Court started exercising constitutional remedies under Articles 32 and 226 to pass compensation in case of fundamental rights like in Rudul Sah and Nilabati Behera. This change shows the development of the State liability not only by the traditional tort law but also by the constitutionalization of the remedies.. In this way it assists in explaining the way of the crusty division between sovereign and non-sovereign functions erosion in practice. Further, the article introduces foreign comparative information using references to the application of constitutional norms by other jurisdictions to horizontal application to privately settled disputes in other jurisdictions, i.e. South Africa and the United States, which reveals how the ideals of the public law can be applied to the remedies in the private law systems. The blurring of sovereign-non-sovereign distinction, and the relative treatment of the State liability in other countries<sup>16</sup>.

***Tortious liability of the state:***

The article is highly applicable to the assigned topic and questions since it establishes the

<sup>13</sup> *Supra* note 5.

<sup>14</sup> *Kasturilal Ralia Ram v. State of U.P.*, AIR 1965 SC 1039.

<sup>15</sup> Ananya Gupta, Critical Analysis of State Liability Apropos Sovereign and Non-Sovereign Functions, Int'l J. L. Mgt. & Hum. Rts. (2023), <https://ijlmh.com/wp-content/uploads/Critical-Analysis-of-State-Liability-apropos-Sovereign-and-Non-Sovereign-Functions.pdf>

<sup>16</sup> Arun Balganesh, The Constitutionalization of Indian Private Law, 5255 Columbia Law Scholarship (2023), [https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?params=/context/faculty\\_scholarship/article/5255&path\\_info=Balganesh\\_The\\_Constitutionalization\\_of\\_Indian\\_Private\\_Law.pdf](https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?params=/context/faculty_scholarship/article/5255&path_info=Balganesh_The_Constitutionalization_of_Indian_Private_Law.pdf)

fundamental premise of tortious liability of the State which is core of the research about the State accountability in tort law. It starts by identifying tort and tortious liability based on the classic definition that Salmond gave and discusses the role of the concept in ensuring that the State is legally liable in wrongful acts or omissions that cause harm to the citizens. British rule had created a distinction between sovereign and non-sovereign capacity and under British rule the doctrine of sovereign immunity immunized the State against liability. This immunity was, however, limited bit by bit in the Indian courts after independence, and the Constitution of India placed new emphases by attaching State liability to the safeguarding of fundamental rights. A very significant aspect of the article is that it mentions **M.C. Mehta v. The case of Union of India**<sup>17</sup> (1986) in which Justice Bhagwati stated that new principles of liability based on the current industrial and social conditions had to be developed. So it is significant that the article is extremely relevant because it gives a holistic sense of the definition, history, constitutional underpinnings, judicial development, and landmark cases of tortious liability in India<sup>18</sup>.

#### ***Evolution of tortious liability of state in India:***

The article does, however, note that the area of such liability is also associated with the historical background of the liability of the East India Company before the Government of India Act, 1858. This reflects the persistence of the doctrine of sovereign immunity, as an inference of the feudal maxim, the King can never do wrong. The article also relates to the questions because of the consideration of judicial pronounced landmark judgments like **Kasturilal v. State of UP**<sup>19</sup> of which the Supreme Court limited government liability in tort to non-sovereign functions, much depends upon the argument advocated by Justice Peacock in **P&O Steam Navigation Co**<sup>20</sup>. It compares that to subsequent steps like **Nagendra Rao**<sup>21</sup>, where the Court noted that the principle of a welfare state has eroded the distinction between sovereign and non-sovereign functions. This analogy shows how India lacks codified law, yet it has been repeatedly urged by judicial decision-making in Kasturilal as well as in several other cases, to adopt codified legislation governing the liability of government. Therefore, the article is timely in the direct connection with the origins of State liability in tort, the process of its

<sup>17</sup> M.C. Mehta v. Union of India, AIR 1987 SC 1086.

<sup>18</sup> Pooja R. Sharma, Tortious Liability of the State, Free Law (2023), <https://www.freelaw.in/legalarticles/Tortious-liability-of-the-state>

<sup>19</sup> *Supra* note 14.

<sup>20</sup> *Supra* note 5.

<sup>21</sup> Nagendra Rao v. State of Andhra Pradesh, AIR 1994 SC 262.

judicial development, along with the current issues of the necessity to address the gap in legislation<sup>22</sup>.

### ***Judicial development and challenges of state liability in India: between sovereign immunity and citizens' rights:***

The article indicates that during the past few years, the State has turned into the biggest litigant in Indian courts, but its strategy is conservative because it still tends to pursue the plea of sovereign immunity to safeguard the wrongful actions of its representatives. It emphasizes the fact that there is no broad piece of legislation on state liability in tort in India and therefore, the courts, through interpretation and judicial activism have had to work out this area. Courts, however, after independence attempted to restrict the ambit of sovereign immunity, as in **State of Rajasthan v. Vidyawati**<sup>23</sup>, Where the judiciary came to realize that it was important to uphold the rights of the citizens within a democratic system. In other cases, they apply the theory of benefit and ratification which limited the liability even in some of the non-sovereign functions. Such discrepancy demonstrates the absence of a clear principle, which results in the court uncertainty. It points to judicial development of state liability in India, the loophole created by the lack of legislation and the tension that persists in administrative law balancing interests of the state and the rights of citizens<sup>24</sup>.

### ***Critical analysis of vicarious liability:***

This abstract is very pertinent to the subject matter of this paper, which is; Balancing Immunity and Accountability: The Evolution of Government Liability in Indian Administrative Law, since it addresses the essence of vicarious liability of the State under the tort law. It starts with the entangled issue of deciding to which extent the Government (administration) must be held accountable of ills committed by its servants- a problem that is compounded in a developing economy such as India where the present state activities are ever growing. This is connected to the sovereign immunity versus accountability. The article, by following the line of the developments prior to and after the Constitution, demonstrates how the Indian courts have

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<sup>22</sup> Raghav Kapoor, Historical Influence of the East India Company on State Liability in India, 5 J. Solid State Tech. 78 (2023), <https://solidstatetechology.us/index.php/JSST/article/view/6497>

<sup>23</sup> State of Rajasthan v. Vidyawati, AIR 1962 SC 933

<sup>24</sup> Ritika Sen & Manish Kumar, Judicial Development of State Liability in India: The Challenge of Sovereign vs. Non-Sovereign Functions, 7 Christ Univ. L.J. 190 (2023), <https://journals.christuniversity.in/index.php/culj/article/view/1907>

changed into a more constraining approach to a more citizen-friendly one. This renders it immediately pertinent to the debates concerning the balance of state protection and the rights of the citizens in the law. Accordingly, it is quite pertinent to the subject and issues because it covers the origins of sovereign immunity, judicial broadening of remedies, the sovereign vs. non-sovereign functions, and the doctrine of the public accountability-all of which are central to the discussion of government liability in Indian administrative law<sup>25</sup>.

## RESEARCH QUESTIONS

1. How has the doctrine of sovereign immunity evolved in Indian administrative law between the colonial era and the post-Constitutional era and what are the doctrinal justifications offered by courts in supporting or dissenting to its retention?
2. What is the scope of government liability in torts committed by the servants of the government and how do the Indian courts resolve the conflict between sovereign and non-sovereign functions?
3. How has the awareness of the Supreme Court of constitutional torts under Articles 32 and 226 extended State Accountability beyond the traditional remedies of the private law?
4. How far does the existing jurisprudence balance the interests of the State, acting as a functional immunity, and the need to provide an effective remedy to citizens whose basic rights have been infringed?

## RESEARCH OBJECTIVES

### **Objective 1: The development of the Doctrine of Sovereign Immunity.**

The first objective is to follow the historical evolution of sovereign immunity in India, its colonial origins, and how it is treated under the Constitution. It involves an examination of the doctrine of *rex non potest peccare* into Indian law by Privy Council precedents, and how Article 300 of the Constitution preserved this structure. Special emphasis will be made on the initial post-independent decisions of the Supreme Court including **State of Rajasthan v.**

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<sup>25</sup> Neha K. Sharma, *Vicarious Liability of the State under Tort Law: An Indian Perspective*, 6 J.L. & Tort Comp. Pub. L. 90 (2023), <https://lawjournals.celnet.in/index.php/jltcp/article/view/910>

**Vidyawati**<sup>26</sup>, an indicator of movement to accountability, and **Kasturilal Ralia Ram Jain v. State of U.P.**<sup>27</sup> that reasserted sovereign immunity in some of the functions. The aim is to assess the doctrinal justifications that the courts used in order to limit or maintain immunity at various stages of jurisprudence.

### **Objective 2: Limitation of liability in Torts of Public Servants.**

The second objective is to explore the extent of governmental liability to tortious actions of governmental officials and to examine how Indian courts have addressed the sovereign versus non-sovereign (or proprietary) function distinction. This necessitates an examination of how such cases have been interpreted by the courts with vicarious liability especially where the State is sued as a master on behalf of the tortious behavior of its servants. Through the examination of how courts have used the functional test in various situations, say in cases of police powers, car accidents, or negligence in hospitals, this objective seeks to examine whether the sovereign/non-sovereign categorisation can provide a coherent and predictable way of weighing the requirements of administration and the interests of the individual.

### **Objective 3: Development of Constitutional Torts and Development of Accountability.**

The third objective is to explore the development of the doctrine of constitutional torts by the Supreme Court in Articles 32 and 226, which provides for a public law remedy other than the traditional private damages. Major decisions like **Nilabati Behera v. State of Orissa (1993)**<sup>28</sup>, **Rudul Sah v. State of Bihar (1983)**<sup>29</sup>, and **D.K. Basu v. The State of West Bengal (1997)**<sup>30</sup> will be examined with the purpose of emphasizing the compensation in cases of custody violence and breaches of **Article 21**<sup>31</sup>. This objective is guided by an interest in appraising the transformative character of rights-based liability on State accountability, particularly in situations of systemic abuses, and how developments have over time diminished the shield of sovereign immunity where basic rights are involved.

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<sup>26</sup> *Supra* note 23.

<sup>27</sup> *Supra* note 14.

<sup>28</sup> *Nilabati Behera v. State of Orissa*, AIR 1993 SC 1960(India).

<sup>29</sup> *Rudul Sah v. State of Bihar*, AIR 1983 SC 1086(India).

<sup>30</sup> *Supra* note 6.

<sup>31</sup> INDIA CONST. art. 21.

## Objective 4: Balancing Immunity and Remedies in Current Jurisprudence

The fourth objective is to critically consider the issue of whether modern jurisprudence is able to balance both the protection of functional immunity of the State and the provision of the necessary remedies to the citizens whose rights are violated. It entails considering whether the remedies that are in place at the moment, such as compensatory damages, writ remedies, and accountability directions are used in a consistent fashion and whether they offer adequate redress and also to assess the presence of gaps in the area of the clarity of doctrine, the sufficiency of compensation or the implementation of judicial awards. Finally, this objective is aimed at finding out whether the legal framework presently in place provides a decent balance between administrative effectiveness, on the one hand, and the personal right to justice and accountability on the other.

## ANALYSIS

### 1. How has the doctrine of sovereign immunity evolved in Indian administrative law between the colonial era and the post-Constitutional era and what are the doctrinal justifications offered by courts in supporting or dissenting to its retention?

The traditional common-law rule expressed in the form of the maxim “rex non potest peccare”, or, that is, the Crown is incapable of wrong, was imported into Indian law in colonial times. The doctrine provided that the sovereign was not liable to a lawsuit in a civil case, except with its express permission. Following the time the East India Company controlled vast regions within India, the courts made a distinction between the actions of the company as a merchant and the actions of the company as a sovereign state. Commercial or proprietary activity was subject to liability, but not that which was deemed to be uniquely sovereign. This difference reemerged during the age of Crown rule and influenced the initial lines of State liability in India.

The legal system became changed upon the arrival of the Constitution but it was not entirely transformed. **Article 300(1)<sup>32</sup>** says that the Union and States may sue or be sued in their respective names. The language appears to be providing entry point of actions against the government, but it has to be interpreted in the historical practice. Article 300 made no end of sovereign immunity, but simply eliminated procedural obstacles to suing the State but omitted

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<sup>32</sup> INDIA CONST. art. 300(1).

the substantive issue of liability to judicial interpretation. that is to say, even though the State was now impleadable, the degree to which it would be liable in the wrongful acts of its servants still rested on the development of the doctrine by the judiciary.

This judicial development took a significant turn in the *State of Rajasthan v. Vidyawati*<sup>33</sup> (1962). The case came as a result of carelessness by a government driver, who rashly drove a jeep causing a deadly road accident. The Supreme Court did not believe that the State was to be absolutely immune against such negligence. It believed, instead, that where the government participates in acts akin to those of persons acting privately, as by operating transport services or administering hospitals, it ought to be liable in tort like any other employer, on account of the torts of its servants. Hence the Court stated a functional test: the liability is not based on the identity of the actor (the State or a personal individual) but rather on the character of the performance being carried out. In the event that the function in question is of a proprietary or operational nature, the normal rules of vicarious liability are applicable; in the event that it is an essential sovereign activity, immunity may remain a possibility.

The ruling in Vidyawati was therefore more of a doctrinal turn. It constrained the colonial doctrine of blanket immunity and accepted the concept that the State in a democracy could not invoke itself to service of depriving its citizens of justice. The ruling marked a step in the right direction as India was headed towards a model whereby negligence of the State in its operations could no longer pass without remedy, and the law was thus aligned to the ideals of equality before the law and access to justice as spelled by the Indians constitution.

Soon after the optimism caused by Vidyawati, the Supreme Court in **Kasturilal Ralia Ram Jain v. State of U.P.**<sup>34</sup> was more prudent. It was a case of misappropriation of gold which police officials had taken, and the Court decided that the proceedings against the State was inadmissible since the act was performed in the performance of sovereign powers. The Court maintained a zone of immunity against normal tort liability by considering functions like arrest, seizure of property and other coercive powers of the police to be inherently sovereign. The theological rationale provided to this stand was two-fold. To begin with, in such a case where the exercise of a sovereign power or any government policy is so closely linked to the act it would be improper to apply the principles of the law of tort and hold the State as a common

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<sup>33</sup> *Supra* note 23.

<sup>34</sup> *Supra* note 14.

tortfeasor. Second, holding the State liable indefinitely to all acts of its officers, both in the accomplishment of its sovereign duties and in acts in pursuit of such sovereign duties, will tend to cripple public government and cripple the discharge of important governmental responsibilities.

In the broader view of Indian law, Kasturilal can be seen as, not a reversion to the absolute immunity but the judicial acknowledgement of a narrower sovereign act exception in a developing system of State liability. Combined with Article 300, establishing the procedural capacity to sue the State, and with Vidyawati, the expansion of the liability to negligent operations during non-sovereign functions, the decision reflects a slow de-colonization of colonial absolutism. The consequence is a useful test, which seeks to differentiate between those acts that are in nature operational and those that are policy-directed or sovereign in nature.

But it is not a strict or rigid test and its application is usually subject to finer factual differences that can make or break a case. In a broader manner the courts have attempted to rationalize their course, on the one hand, it was necessary to provide accountability of the State and protect fundamental rights, and on the other, it was no less urgent to maintain the administrative efficiency and avoid the paralysis of the governance. This strain characterizes the contemporary Indian sovereign immunity law, which is a shift in absolute privilege to contextual and functional doctrine of liability.

## **2. What is the scope of government liability in torts committed by the servants of the government and how do the Indian courts resolve the conflict between sovereign and non-sovereign functions?**

Two main questions are usually addressed by the Indian courts when wrong has been committed by a public servant, first, did the servant commit the wrong in the course of employment; and second, was the wrong committed by the servant in a sovereign, or in a non-sovereign or proprietary capacity. In case the servant was carrying out duties as a part of employment and the duty was operational or service based as opposed to being strictly sovereign, the State will tend to be vicariously liable. This is the principle of *respondeat superior*-- the doctrine which attaches to private employers. The decision of the Supreme Court in **State of Rajasthan v. Vidyawati**<sup>35</sup> is the typical example.

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<sup>35</sup> *Supra* note 23.

But in cases where the alleged misconduct is closely intertwined with the sovereign functions such as the bona fide enactment of law or top-level policy choices, or some line of police conduct that is permitted by statute, the courts have occasionally immunized the State. This method is witnessed by the example of **Kasturilal Ralia Ram Jain v. State of Uttar Pradesh**<sup>36</sup>, indicates the sentiment that an act of subjecting the State to liability in such realms would be an unwarranted restriction of governance. The functional test therefore draws the distinction between administrative acts or operational acts which are liable and sovereign or political acts which are not. But the distinction between the two is usually vague. As an example, the action of the police taking possession of property in the first place could be described as sovereign but the careless handling of the said property in the future could be construed as operational negligence, which leads to liability. This grey area brings out the sensitivity to fact of the enquiry. Despite the fact that Kasturilal is the authority in limiting the liability, it has been applied inconsistently especially when compared to subsequent judicial rulings with a more remedial overture.

Very closely associated are statutory power, indemnity and personal liability of officers. The general trend has been to consider statutory authority as a defence that has had to be demonstrated as opposed to immunity. When a statute authorises or by necessary implication authorises a harmful act, no liability can be found, but neglect or the misuse of statutory power will still be subject to responsibility. In reality, the real-world deterrence impact of liability rules is often weakened as States regularly cover their officers or compensate awards, despite the fact that the officer is technically liable. This jurisprudence thus captures a conflict: there are formal theories of liability but the distribution of accountability and indemnity is such that State responsibility is more likely to be the issue than personal liability.

This framework creates several problems in the system. The greatest one is indeterminacy: courts that interpret the functional test tend to give different results on an incredibly similar fact leaving the law unclear. A second issue is moral hazard, because the promise of State indemnity dilutes incentives to take care by the officials. Hurdles that are procedural in nature include limitation regulations, pre-suit notice regulations of **Section 80**<sup>37</sup> of the Civil Procedure Code, and the expense of long litigation further tips the scales in favor of the State. Lastly,

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<sup>36</sup> *Supra* note 14.

<sup>37</sup> Civil Procedure Code, § 80, No. 5, Acts of Parliament, 1908(India).

compensation awards are arbitrary and not uniform and there is no guidance on quantum and this results in inequality of treatment amongst victims.

Normatively, any evaluation of such a regime should consider the arguments of efficiency of maintaining limited immunity against the other imperative, which is to accord citizens effective remedies. State says that immunity guards against paralysis of litigation of fundamental government activities, continuity in governance and avoidance of deluge with claims. Conversely, refusal to grant redress to citizens will compromise the constitutional pledge of equality before the law and access to justice. In a welfare based constitutional order, responsibility to State wrongs cannot be reduced to a narrow scope. Courts have been alternating between these poles, leaving the doctrine unresolved and in need of reform.

### **3. How has the awareness of the Supreme Court of constitutional torts under Articles 32 and 226 extended State Accountability beyond the traditional remedies of the private law?**

The rise of the concept of constitutional tort in India indicates a major judicial breakthrough, which is based on the writ power of the Supreme Court and High Courts of **Articles 32<sup>38</sup>** and **226<sup>39</sup>** of the Constitution. These provisions enable the higher courts in enforcing fundamental rights and over time the courts have construed this to mean awarding compensation as a remedy in the form of a public-remedy, when fundamental rights were infringed upon. The shift was radical in nature: claimants were no longer restricted to actions under the private-law tort regime, which tends to be slow and cumbersome, but now they could find redress in constitutional actions. This growth acknowledged that the violation of rights is often systemic in nature that transcends individual injustices, and as such demands a response in terms of public law. The courts have therefore not only awarded monetary damages but have also awarded injunctions, made guidelines and structured directions to avert future occurrence. The jurisprudential justification is in the concept that fundamental rights enforcement should be effective; without effective remedies, rights would be a mere illusion. The expansion of remedial powers by the Court is not out of place with that vision, because **Article 32<sup>40</sup>** has been said by Dr. B.R. Ambedkar to form the very heart and soul of the Constitution.

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<sup>38</sup> *Supra* note 1.

<sup>39</sup> *Supra* note 2.

<sup>40</sup> *Supra* note 1.

One of the earliest and most significant cases of such jurisprudence is **Rudul Sah v. State of Bihar**<sup>41</sup>. The petitioner had spent more than fourteen years in jail even after his acquittal. The Court granted monetary damages, and dismissed the idea that Article 21 of the guarantee of life and personal liberty could not be enforced upon by simply release on bail. It was a decisive change: compensation was identified as a proper and required relief due to the violation of the basic right. The principle was reiterated in the case of **Nilabati Behera v. State of Orissa**<sup>42</sup>, wherein a young man died in the custody of the police. The Court clarified that the defence of sovereign immunity could not be invoked inasmuch as it was necessary to evade a liability in cases involving fundamental rights. The mother of the victim was granted compensation which was an indication that in instances where rights are infringed, then the State has to be held directly responsible.

The same reasoning was continued in **Bhim Singh v. State of J&K**<sup>43</sup> involving the illegal arrest of an MLA where the Court considered the compensation as an inseparable remedy. Further structure of the doctrine was given in the case of **D.K. Basu v. State of West Bengal**<sup>44</sup> in which the Court did not only award relief, but also stipulated comprehensive rules to guard against custodial torture and to safeguard the rights of people in custody, in effect linking compensation to preventive measures. The cumulative effect of these cases is that there is a general readiness of the Court to devise redress to situations which go beyond the limits of the private tort law when State action leads to the breach of the basic rights.

Important doctrinal differences define this new body of law as compared to those of the torts of private law. To begin with, the origin of remedy must be found in the Constitution itself: constitutional torts are based on the violation of a fundamental right rather than the infringement of a duty with regard to the personal law. Second, relief is very different in nature. In contrast to the statutory provisions of the law, which are that individual injury be compensated, constitutional tort damages are to recover constitutional values and may entail restitution, declaratory decrees, or structural decrees, such as by way of mandatory provisions. Third, there is a more relaxed standard of liability. There is a common trend that courts have placed liability without the requirement of rigorous demonstration of causation or fault and the issue is whether the violation of rights took place and a viable solution was needed. Practically,

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<sup>41</sup> *Supra* note 29.

<sup>42</sup> *Supra* note 28.

<sup>43</sup> *Bhim Singh v. State of J&K*, AIR 1985 SC 634 (India).

<sup>44</sup> *Supra* note 6.

this has extended the reach of justice, especially in those zones where regular tort litigation would otherwise be unavailable or insufficient, i.e., in cases of custodial violence, unlawful detention, or administrative failure.

Although the doctrine of constitutional tort has its achievements, there are still restrictions to it. Compensation awards are still highly discretionary and lack uniform statutory, resulting in case-to-case variation. The enforcement is not even despite being awarded compensation in some cases, delays in receiving the money and non-accountability systems may make the remedy ineffective.

In addition, compensation, though symbolically significant, may not always help to resolve the structural reasons behind rights abuse. This has cast doubt in the suitability of constitutional torts as a remedy over the long term. However, these criticisms have to be measured against the constitutional requirement of providing effective remedy to violations of rights. In cases where State power is practiced in an illegal manner, the judiciary not only has the right, but arguably the obligation to come up with remedies that bring reality to fundamental rights. Constitutional torts are therefore simultaneously a radical claim to judicial imagination and a much-needed transformation of the remedial terrain to render constitutional rights practical.

#### **4. How far does the existing jurisprudence balance the interests of the State, acting as a functional immunity, and the need to provide an effective remedy to citizens whose basic rights have been infringed?**

Jurisprudence of the State liability in India is a fine balancing act of doctrines. On the one hand, the courts have realised the necessity of maintaining the capacity of the State to exercise its power of governance, particularly in the policy-making, discretion, and sovereign power. Immunity has thus remained preserved in few areas, defence, foreign policy, and legislative roles, where opening the State to the daily litigation can immobilize governance. Conversely, the judiciary has increasingly weakened immunity with respect to negligence in its operation or infringement of fundamental rights including that of **Article 21**<sup>45</sup>. This has changed with time, as evidenced in the differences in case law: rulings like **State of Rajasthan v. Vidyawati**<sup>46</sup> and subsequent line of constitutional tort cases focus on accountability and

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<sup>45</sup> *Supra* note 31.

<sup>46</sup> *Supra* note 23.

compensation, and **Kasturilal Ralia Ram Jain v. The State of U.P.**<sup>47</sup> and subsequent decisions leave a narrow band of residual immunity of truly sovereign functions. The balance is not fixed but contextual and the only aspect that is taken into consideration by the courts is the nature of the act being done, whether it is a policy issue or issue of operational implementation and the existence of fundamental-rights violations and whether the citizens can get any meaningful redress.

Nonetheless, despite the rights-protective course of judicial development, there are critical adequacy issues. One of these challenges is discrepancy in doctrines. The sovereign versus non-sovereign functional test administered by different benches of the Supreme Court and the High Courts is applied differently and has therefore been a source of confusion to the litigant and the administrators. The other issue is the disjoined structure of remedial. Monetary Compensations are distributed unequally and without generalizable principles and judges base their decision on ad hoc variables like the dependency of the victim family, the extent of the violation or the question of the public interest.

Equally concerning are the enforcement gaps: even where verdicts granting compensation or ordering accountability are delivered, the State may take long, partial or reluctant to comply. There is a delay in payments and institutional reforms or prosecutions of wayward officials are also infrequent. Lastly, there is a gap in the structural policy. India lacks a well-developed statutory system - in terms of a codified State Liability Act, an administrative claims tribunal or a centralised compensation fund - to direct claims effectively. Consequently, remedies still rely to a large extent on judicial discretion which, despite its innovativeness, can never replace systemic reform.

## SUGGESTIONS

### Reforming the Doctrine of Sovereign Immunity

India must adopt a holistic State Liability Act which explicitly captures sovereign immunity and State liability principles in place of the existing patchy judicial functional tests. The law should clearly renounce the colonial rule *rex non potest peccare*, should specify the distinction between sovereign and non-sovereign functions in terms. In this way, it would remove uncertainties in judicial interpretation, offer clear and predictable standards of State liability,

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<sup>47</sup> *Supra* note 14.

and streamline the law with constitutional principles of equality before the law and effective redress to underlying rights breaches.

### **Explaining Government Liability in Torts.**

There is need to introduce a special Statutory State Tort Liability Regime to outline under what circumstances shall the State be vicariously liable to torts committed by its servants. The legislation should reposition the burden on the State to demonstrate that the act was a sovereign act instead of it obtaining immunity by default. It ought to come up with clear definitions of operational and sovereign acts, come up with similar procedural mechanisms of filing claims, come up with standardised benchmarks of compensation, and do away with procedural barriers like Section 80 of the CPC, among others, to enhance accessibility and predictability of remedies to victims.

### **Constitutional Torts by Institutionalization.**

Article 32 and Article 226 of the constitution India needs a Constitutional Remedies Tribunal (CRT) with specific powers to address breach of fundamental rights by the State. The CRT would be able to award monetary damages, structural remedies, declaratory judgments, and binding directives and be subject to obvious statutory principles. Such an institutional structure would turn constitutional torts into systematic, enforceable rights-based compensatory and preventive measures, which would bring justice closer to the people and more predictable.

### **Setting up a Centralized Compensation Mechanism.**

The compensation to the victims of constitutional rights violation should be uniform, timely and efficient by having a Centralized State Compensation Fund (CSCF). The Fund would be administered by an independent body and based upon objective standards on how compensation is determined and shall provide rigid time frames in the payment. This would fill the enforcement gap created by the lapse of time or non-adherence by the State, limit arbitrariness in judicial awards, and make the constitutional promise of a functional remedy, without taking away functional immunity to necessary sovereign conduct.

## **CONCLUSION**

Sovereign immunity under Indian administrative law has changed gradually since the colonial state all the way to the post-Constitutional times. The sovereign immunity was originally founded on the colonial principle, *rex non potest peccare*, which ensured the State was not sued without its explicit permission. The adoption of the Constitution, and especially in Article 300(1), has eliminated the procedural barricade to a claim against the State, but at the same time, the State liability issues remained a matter of judicial interpretation.

A historic case was made in the **State of Rajasthan v. Vidyawati**<sup>48</sup> (1962). The functional test was first introduced by the Supreme Court, which held the State liable in torts committed in non-sovereign operations, which were not part of the State as a sovereign, like, but not limited to, the provision of transport or hospital services. But in **Kasturilal Ralia Ram Jain v. State of U.P.**<sup>49</sup>, the Court upheld the immunity against all acts that are directly or closely related to the activities of the sovereign, including police arrest and policy making, due to the danger of interference with the management. At the same time the constitutional torts of **Articles 32**<sup>50</sup> and **226**<sup>51</sup> extended State liability, as in **Rudul Sah**<sup>52</sup>, **Nilabati Behera**<sup>53</sup>, **Bhim Singh**<sup>54</sup> and **D.K. Basu**<sup>55</sup>.

Such instances provided that any fundamental rights violations by the State must be enhanced with an effective remedy beyond the private law torts, which can be monetary penalties and structural orders. Nevertheless, the system is still not unified, there is no consistency in compensations, enforcing the system is slow and the functional test is not regularly implemented. Finally, India does not have any elaborate legal structure to regulate State liability. To be truly responsible, systematic changes are necessary: a written law of liability, independent authorities of control, a centralized compensation fund to make sure that compensation to the victims is frequent, even and timely, and it does not hinder vital operations in the state.

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<sup>48</sup> *Supra* note 23.

<sup>49</sup> *Supra* note 14.

<sup>50</sup> *Supra* note 1.

<sup>51</sup> *Supra* note 2.

<sup>52</sup> *Supra* note 29.

<sup>53</sup> *Supra* note 28.

<sup>54</sup> *Supra* note 43.

<sup>55</sup> *Supra* note 6.

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