

Evolution of State Liability in India - A Need of a Progressive Nation

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Abstract: *The concept of State Liability is one of the most useful aspects of law of tort where the victims can claim damages from the State due to the loss incurred by them from the act of the State while performing its functions. Pre-British India was the era where predominance was given to the 'Rule of Law' and the King was not above law. In British India the doctrine of 'King can do no wrong' was adopted. The position of tortious liability of the State in Independent India is quite similar to what was there under the Crown as Indian Constitution is mostly based on the Government of India Act 1935. So, as it prevailed in British India, the State was started to be given immunity from tortious liability in Sovereign functions and were held liable as a corporate body if the wrong was committed while performing non-sovereign functions. Now, as there was no clear definition of sovereign functions and non-sovereign functions, the question was left to be decided by the judiciary which had to first decide the nature and type of function that the alleged servant of the State was discharging when the wrong was committed. These in turn gave rise to conflicting decisions in the past. With the passage of time the welfare activities of the State started increasing and with this it became difficult to differentiate the functions of State as Sovereign or Non-Sovereign. Moreover, for the ends of justice the Indian courts made a constant effort to overcome this fallacy of 'Sovereign Immunity' by giving decisions where extreme efforts are evident at their end to exclude the alleged act from the realm of sovereign function. This paper analyses both the past and contemporary judgements to study the present position of tortious liability of State under the Constitution of India.*

Keywords: State Liability, Sovereign Function, Sovereign Immunity, Non-Sovereign Function

1. Introduction

The concept of State Liability is one of the most useful aspects of law of tort where the victims can claim damages from the State due to the loss incurred by them from the act of the State while performing its functions. In India the doctrine of State Liability gradually evolved with time. Before analysing the present Indian law on State Liability and its contemporary challenges it becomes necessary to study the gradual moulding of State Liability into its present form.

State Liability in Pre-British India

In Pre-British India where there were rule of Kings in various kingdoms, the doctrine of State liability was not available in its present form where the King could be held vicariously liable for the wrongs of his servants. But since during that era predominance was given to the 'Rule of Law' more commonly known as 'Dharma' which meant 'justice', even the King was not above law. If the ends of justice required that the victim deserved compensation for the loss incurred the King was not an exception. According to the 'Vedic scriptures' such as 'Puranas' and 'Smritis', the King's power was derived from 'Dharma' and he had no independent authority. The King was also subject to law and his kingship was solely dependent on his performance of duties. There was no room of arbitrariness in ancient India's legal jurisprudence. Any breach of duty towards citizen also resulted to forfeiture of kingship.

State Liability in British India

In British India the doctrine of 'King can do no wrong' was adopted. Gradually with the evolution of the society, the involvement of the State in various activities increased so as to also the liabilities for wrongs committed by its servants while discharging their duties. The Crown felt the necessity

to provide immunities and certain exemptions to its officers from the claims of the subjects who were mostly the natives Indians. Thus, with the enactment of The Government of India Act, 1935, rights were granted on the Federal and Provincial legislatures to legislate determining the extent of State liability. Subsequently, State liabilities started to be decided depending on the nature of the action and type of power exercised, to be more precise if the wrong was committed while discharging Sovereign function or Non-Sovereign functions became the litmus paper to establish the State liable under tort law. 'Sovereign powers of the State were never defined and in the absence of any clear distinction between sovereign and non-sovereign powers of the State Courts of law were faced some times with difficulties in resolving the disputes. The plank for defence by State in cases pertaining to State liability used to be that the acts of omission or commission complained of were within the realm of sovereign powers of the State and as such State was not liable.' [1] Hence, liability of State for wrongs under law of torts became a subject of conflict in Indian Courts under British Rule.

Tortious Liability of the State under Indian Constitution

The Constitution of Independent India is mostly based on the Government of India Act, 1935. Consequently, the doctrine that 'King can do no wrong' managed to gain a room in the Indian Constitution. As far as Tortious liability of the State is concerned, Article 294 and Article 300 of the Constitution of India contain both explicit and implicit provisions on it. Chapter III, Part III of the Constitution titled 'Property Contracts, Rights, Liabilities Obligations and Suits' contain both the articles. Article 294 (b) of the Constitution of India provides that the Union Government at the Centre or Government of various States may be held liable under any contractual obligation or otherwise.' The word "otherwise" would include 'various liabilities

including tortious liability also.' This Article thus constitutes and transfers the liabilities of Government of India and Government of each governing province in the Union of India and corresponding States. Article 300 of the Constitution of India provides that State can sue or be sued as juristic personality. It reads as under: "The Government of India may sue or be sued by the name of the Union of India and the Government of a State may sue or be sued by the name of the State and may, subject to any provisions which may be made by Act of Parliament or of the Legislature of such State enacted by virtue of powers conferred by this Constitution, sue or be sued in relation to their respective affairs in the like cases as the Dominion of India and the corresponding Provinces or the corresponding Indian States might have sued or been sued if this Constitution had not been enacted."

Thus, it is quite evident that the position of tortious liability of the State in Independent India was quite similar to what was there under the Crown with enactment of the Government of India Act as discussed earlier. So, as it prevailed in British India, the State was started to be given immunity from tortious liability in Sovereign functions and were held liable as a corporate body if the wrong was committed while performing non-sovereign functions. Now, as there was no clear definition of sovereign functions and non-sovereign functions, the question was left to be decided by the judiciary which had to first decide the nature and type of function that the alleged servant of the State was discharging when the wrong was committed. Then if it is found from the facts that it was a non-sovereign function than only the State could be held liable. These in turn gave rise to conflicting decisions in the past. Moreover, for the ends of justice the Indian courts made a constant effort to overcome this fallacy of 'Sovereign Immunity' by giving decisions where extreme efforts are evident at their end to exclude the alleged act from the realm of sovereign function. It was done so that the victim could claim compensation from the State and making the latter liable for its tortious action. Practically the distinction of Sovereign function and Non-sovereign function while holding the tortious liability of the State makes no sense as there is a constant endeavour to provide relief to the victims for the ends of justice. Then definitely the question arises regarding the logic of not abrogating the doctrine of 'King can do no wrong' in the form of Sovereign immunity even after more than 70 years of Independence.

Conflicting Decisions based on determination of Sovereign and Non-Sovereign Functions

When the Constitution of India commenced, the liability of the State in independent India started to be interpreted in various different point of views. Initially in few cases it was decided that the State would be liable just like any private employer for the wrongs committed by its employees during the course of employment provided the act was committed during discharge of private function and not sovereign function. The second controversies aroused while distinguishing the functions of the State into sovereign and non-sovereign functions. The third interpretation was that only immunity should be given to act of State. A study of some of the important decisions on divergent aspects, pronounced by the Supreme Court of India as well as

different High Courts would reveal the uncertain and unsatisfactory legal position.

In *State of Rajasthan Vs. Vidyawati* [2], the judiciary quite evidently expressed its perspective that the English doctrine 'King can do no wrong' should not have any room in Independent India which was a welfare state. With *Kasturi Lal vs. State of UP* [3] case the uncertainty cropped in once again and the judiciary clearly opined that to remove this uncertainty proper legislation is needed to be adopted in India. After *Kasturi Lal* case, there was a rise in the trend of deciding tortious liability of the State with the litmus paper test of Sovereign and Non-sovereign function of State.

From the cases like *Rudal Shah v. State of Bihar* [4], *Bhim Singh v. State of Jammu And Kashmir* [5] and *Challa Ramkonda Reddy Vs. State of AP* [6] one thing becomes quite clear that post-independence the approach of the judiciary was to grant compensation to the victims for those torts like custodial death, false imprisonment etc, where there were infringement of fundamental rights.

In *Challa Ramkonda Reddy Vs. State of AP* it was clearly stated that plea of sovereign immunity was not available, where there was a violation of the fundamental rights of the citizens. This also means that the concept of sovereign immunity existed in other torts where no fundamental rights can be curtailed. This proves the dependency of getting compensation and establishing tortious liability of State sole on the establishment of the fact that the tort involved infringement of Fundamental Right.

From the landmark judgement pronounced in *N. Nagendra Rao Vs. State of AP*, [7] two points emerged. First was that 'In the modern sense, the distinction between sovereign or non-sovereign power thus does not exist' and second was 'Any watertight compartmentalization of the functions of the State as "sovereign and non-sovereign" or "governmental and non-governmental" is not sound. It is contrary to modern jurisprudential thinking' which mean that any State liability established by analysing the function of State as 'Sovereign' or 'Non-Sovereign' was something which was not beyond doubts.

From the above cases it can be inferred that for those torts committed by State servant that infringed fundamental rights the public law remedy of granting ex-gratia compensation by writs was encouraged and permitted. But the doctrine of Sovereign immunity still was uncertain and existed while seeking remedies under private law.

Contemporary Decisions on State Liability

The Judiciary is proactive in providing relief to the victims in cases where the damage is caused due to the negligence of the Government employee. But in doing so as there is absence of any specific statute making the State liable equally like any other individual for the tort committed by its servants, the Indian courts have to time and again justify themselves as in the case of *State of Haryana v. Santra*. [8]

In the judgement by the Apex Court in *Vohra Sadikbhai Rajakbhai & Ors. Vs. State of Gujarat & Ors* [9], where while deciding the tortious liability of the State, the

nature of the function of the State was determined, is an indicator that the concept of demarking function of the State into Sovereign and Non-Sovereign still exists in India. In this case compensation was allowed only after establishing that the impugned act was a non-sovereign function of the State. From the above cases it can be inferred that compensation can be claimed against State for tort committed by its servants only in cases where there is violation of fundamental right or gross damage which is evident ipso facto. Thus, in cases of torts where there is no infringement of fundamental right or where gross damage is not caused the situation is unclear if the State can be held vicariously liable.

Further, it has been clearly stated by the Supreme Court in *Ram Lakhan Singh v. State Government of Uttar Pradesh* [10] that “Compensation for violation of fundamental rights in aforementioned cases is a public law remedy but there is no express provision in the Constitution of India for grant of compensation by the State in such cases. It is a remedy determined and decided on case-to-case basis dependent on the facts of each case, the disposition of the court hearing the case etc. which makes this remedy arbitrary, episodic and indeterminate ...”. This means that even though the approach of the Indian Courts is to grant compensation to the victims for torts committed by the servants of the State by establishing the State liable for infringement of fundamental rights but it also suffers from uncertainties in absence of any express provisions.

Thus, from the above discussion it can be summed up that the concept of State liability under the Constitution of India is yet to be evolved to give a clear concept beyond ambiguities and gaps due to absence of any express provision or statute.

References

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- [2] AIR 1962 SC 933
- [3] AIR 1965 SC 1039
- [4] (1983) 4 SCC 141
- [5] 1985 (2) SCC 1117
- [6] AIR 1989 AP 235
- [7] AIR 1994, SC 2663; (1994) 6 SCC 205
- [8] 2000 (1) CPJ 53 (SC)
- [9] AIR 2016 (SC) 2429
- [10] (2015) 16 SCC 715