



INTERNATIONAL LAW
JOURNAL

**WHITE BLACK
LEGAL LAW
JOURNAL**
**ISSN: 2581-
8503**

Peer - Reviewed & Refereed Journal

The Law Journal strives to provide a platform for discussion of International as well as National Developments in the Field of Law.

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ABOUT US

WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

LIABILITY OF STATE IN INDIA

AUTHORED BY - DR. DIVYA GUPTA¹

ABSTRACT

In this article the author has explained the vicarious liability of state when any wrong has been committed by its servant, but here the concept differ as State is not always vicariously liable for all wrongs done by its servant as there is difference between sovereign and non sovereign function, so in this article the author emphasises vicarious liability on the bases of sovereign and non sovereign functions of the state. Moreover, the author also dealt with the concept of states liability given under Constitution and how other legislation exempt state from its liability.

KEY WORDS: Laissez-faire, Sovereignty, Respondent superior, Government Liability, Common Law

INTRODUCTION

The function of the State during ancient period was solely regarded as the protection and perfect security of its members in every sphere. Such a theory, thus, had to give greater prominence to the absoluteness and limitedness of the sovereign power and at the same time to its perfect independence. The essential characteristics of the State as a ruling society is that it presented itself as independent, dominant, law creating and law maintaining society. However the role of the sovereign underwent a change with the emerging times from paternal to maternal and the sovereign had to distribute the powers amongst other functionaries created by him. This change gradually gave birth to the executive class. The historical necessity of the ancient times when the development of society was in the embryonic stage gave birth to bi-dimensional aspect of sovereignty

1. The king can do no wrong
2. The king cannot be subjected to laws of the land

It was the king who used to control every aspect of the society and laid down the guidelines as to

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how the society would function. So whatever action, the king shall take cannot be wrong action and being the supreme power and the source from which all the laws of the land use to emanate, cannot be subjected to these laws, hence giving the immunity to the king for all actions done by him or any of his subordinates duly appointed and authorized to take action, under the warranted situation by the king.

The rapid industrialisation created further complexities in social life which warranted conferring of more powers on the administration. Thus there has been a notable shift in the legislative policy of all modern States. The notion of a government which is exclusively concerned with military defense, foreign affairs, police and legal justice, has now become a thing of the past. The modern State is a social service State due to realisation that sovereign power does not work in a vacuum, and is directed towards the realization of some concrete fundamental principles which at a particular time are regarded as of vital interest².

The State has to perform various functions to maintain its sovereign powers and the liberty of its people, and these functions inter-alia include

- i. To maintain order and security by means of the police force and criminal law.
- ii. To raise and spend money to maintain the administration through taxation and property, public parks, sanitation and public health , Elementary education, postal services; construction of roads, bridges, canals, harbors and similar instrumentalities of trade and commerce; and maintenance of theaters, lodging houses, universities and museums.
- iii. To maintain the army, navy and air force to protect the State against external attacks and internal disturbances; and to maintain diplomatic and military relations with other states.
- iv. To improve state organization and administration
- v. To protect the life, liberty and property of the citizens with the assistance of laws and courts.
- vi. The care of the poor and the incapable
- vii. The regulation of occupations and businesses in the public interest.
- viii. to regularize the ownership and operation of railroads, telegraph and telephone services, gas, water, electricity and power works, life insurance, defense materials, machine tools, etc.

Thus in the functional State all those who are engaged in the state departments dealing and dispensing social services are not just bureaucrats, but are the people serving the cause of society

² Debiprasad Pal, State Sovereignty at the Cross Roads,ed.1962,pp-57-59.

at the behest of the State³. This concept gave birth to the welfare State which means that the State will constructively work for the welfare of the people and try to take the pains out of the life of the individuals; and it implies that:

1. it's not the sovereign but the people who formulate the State are actually sovereign.
2. The king or the sovereign has to function according to wishes of the people.
3. All the laws of the land and every action of the sovereign must be directed to maximize the happiness of the people and minimize the pains to extinction.
4. If the action of the sovereign goes astray, than the sovereign can be subjected to the laws of the land and is answerable to the society he represents.

Whatever be the reasons for the version of sovereign and the expansion of the powers, *vis-a-vis*, theories of sovereignty, justifying the use of such powers, the hallmark of controversy still remains the same, i.e., whether individuals right will have the over-riding effect or the sovereign power will dominate the scenario.

These changes in the functioning of the State have affected the determination of the liability of the State. The distinction between Sovereign and Non sovereign functions has been eroded to a larger extent and new trends have emerged in affixing the liability on the State.

In India, the maxim “the king can do no wrong” has never been accepted. The Union and the States are legal persons and they can be held liable for breach of duty, contract and in tort. Since State is a legal entity and not a living entity, it has to act through human agency, therefore the State can be held vicariously liable for the wrong committed by its servants as well as the erring officials can be held liable for the abuse of the powers.

The doctrine of vicarious liability is based on the maxims:

- i. *Respondent Superior* (Let the principle be liable); and
- ii. *Qui facit per alium facit per se* (he who does an act through another does it himself).

The concept has been incorporated under the provisions of the Indian Constitution. Under the Constitution, the liability of the Union Government or a State Government may arise ‘out of any contract or otherwise⁴.’ The word ‘otherwise’ suggests that the said liability may arise in respect of tortuous acts also.

³ V.G., Mankar, Essentials of Government, Ed. 1970, p-29

⁴ Article 294(b)

Article 300 of the Constitution provides that:

The Government of India may sue or be sued by the name of the Union 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 . If at the commencement of this Constitution: a) any legal proceedings are pending to which the Dominion of India is a party, the Union of India shall be deemed to be substituted for the Dominion in those proceedings; and b) any legal proceedings are pending to which a Province or an Indian State is a party, the corresponding State shall be deemed to be substituted for the Province or the Indian State in those proceedings.

Peninsular and Oriental Steam Navigation Co. v. Secretary of State for India, was the historical case which had drawn the principle of sovereign and non-sovereign functions of the Government while deciding the extent of liability and immunity of the State. The Supreme Court of Calcutta held that the Secretary of State is liable only for the extent of commercial functions and not liable for anything done in exercise of sovereign powers. The dichotomy theory of “Sovereign and Non-Sovereign functions determined by the Court in Peninsular case helped the judiciary to interpret the functions of the government when the question of liability of State arose. But there is no uniform and static norm to decide the sovereign functions. The following judicial interpretations are given by the Courts in various cases as sovereign functions to exempt the State from liability. When the functions of the State are carried out by its servants under the provisions of the State the State is not responsible to pay compensation for the wrongful acts of its servants.

The First Law Commission 1957⁵ put forth the view as under:

It recognised the liability of the State for the torts committed by its employees during the course of their employment,; for the torts arising under the common law duty of ownership and possession; for breach of duty by its employees; for the wrongful exercise of power by its employees causing damage, but not for the acts authorized by statute, which in themselves, are injurious. The State should be treated equivalent to a private employer and should be entitled to indemnity from the errant employee. The state should be immune from any liability for the acts

⁵ Law Commission of India (First Report), p. 32 as quoted by Bhat, Ishwara op. cit, p. 39.

of State; acts done under judicial power, and acts done in pursuance of external affairs and defense. In *State of Rajasthan v. Smt. Vidyawati*⁶, the apex court deliberated on the liability of the State as;

1. Doctrine of state immunity was never applicable to India in the form as it applied in England. The East India Company could not have claimed any such immunity as was available to sovereign.
2. The principle of sovereign immunity is now a discarded doctrine.

In another important case of *Kasturi Lal Ralia Ram Jain v. The State of Uttar Pradesh*⁷, the court pointed out that the Government of the States as well as the Government of India naturally and legitimately enter into many commercial and other undertakings and activities which have no relation with the traditional concept of governmental activities in which the exercise of sovereign 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 be conveniently 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. That is the basis on which the area of the state immunity against such claim must be limited.

*In Union of India and another v. Savita Sharna*⁸ the court held that the performance of only such acts could be said to be in exercise of the sovereign powers or delegated sovereign powers which could not be performed under the statute by any individual other than the person who allegedly performed the same

The cases of *Rudul Shah v. State of Bihar*⁹, *Bhim Singh v. State of J&K*¹⁰, point out that whenever the power is given to the officials, there always remains a tendency of misuse.

*The observations of R.M. Sahai, J., in N. Nagendra Rao v. State of A.P.*¹¹, are of seminal importance where His Lordship held,

“In the modern sense the distinction between sovereign or non-sovereign power thus does not

⁶ AIR 1962 SC 933.

⁷ AIR 1965 SC 1039.

⁸ AIR 1979 J&K 6.

⁹ AIR 1983 SC 1086.

¹⁰ AIR 1986 SC 494.

¹¹ AIR 1994 SC 2663.

exist. It all depends on the nature of power and manner of its exercise..... For instance, acts 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.... 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 State as a juristic person, propounded in Nineteenth Century has a 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.

Similarly in *Saheli v. Commissioner of Police, Delhi*¹² In this case the death of a 9 year old boy was caused by beating DUE TO an assault by a police officer. In the writ petition filed by the Women's Civil Right Organization, known as SAHELI the Supreme Court awarded Rs. 75,000/- as damages to the petitioner.

*Neelabati Behra v.State of Orissa*¹³ In this case the petitioner'S son aged 22 years was arrested by an Assistant Sub-Inspector of Police in connection with investigation of the offence of theft in the village. He was handcuffed and kept in the police station. On the next day his body was found with multiple injuries by the side of a railway track. The mother of the deceased sent a letter alleging custodial death of her son. She claimed compensation on ground of violation of A. 21. The Court awarded Rs. 1,50,000/- as exemplary damages.

In a landmark decision in common Cause, *A registered Society v. Union of India*¹⁴ In this case the Supreme court of India went another step further and observed that the Court's power to grant damages cannot be limited only when the fundamental right to life and personal liberty under Art.21 is violated. Even in cases where the public functionaries are involved and the matter relates to violation of other fundamental rights or the enforcement of public duties, the remedy would lie at the option of the petitioner under the public law. Notwithstanding the fact that damages are also claimed in such proceedings.

¹² A.I.R. 1990 S.C. 513

¹³ A.I.R. 1993 Sc 1960

¹⁴ A.I.R. 1999 SC 2979

In *State of Andhra Pradesh v. Challa Ramkrishna Reddy*¹⁵, the negligence on the part of government officers resulted in the death of a prisoner in jail. . The deceased's son filed a WRIT PETITION under Art. 32 of the Constitution for compensation. The court held the Doctrine of Sovereign Immunity is no longer valid and state is liable to pay compensation.

With the recent Judgment by the Supreme Court in **Nambi Narayanan v. State of Kerala** delivered on 14th September, 2018, the concept of vicarious Liability of State from the tortious actions of its servants was established. In this case the Court awarded former Indian Space Research Organization (ISRO) scientist S. Nambi Narayanan, a compensation of Rs 50 lakh for wrongful arrest in 1994 on espionage charges and illegal detention for 54 days. After a 24-year long legal battle, a bench of Supreme Court, awarded compensation to the rocket scientist for loss of reputation and mental agony. Narayanan subsequently moved the National Human Rights Commission, seeking a compensation of Rs 1 crore for his trials and tribulations. The NHRC had ordered for an interim compensation of Rs 10 lakh, which was upheld by the Kerala High Court in 2012. Further, the court appointed a committee by Supreme Court judge DK Jain, to investigate into the role of the Kerala police officers, who were involved in falsely implicating the scientist under the Official Secrets Act. The court observed that Narayanan was "needlessly arrested and tortured". With this judgment once again the vicarious liability of the State for tortious actions of its servants was established.

The modern social thinking of progressive societies and the judicial approach is to do away with archaic State protection and place the State or the Government at par with any other Juristic legal entity. Any watertight compartmentalization of the function of the State as "sovereign and non-sovereign" or "governmental and non-governmental" is not sound. It is contrary to modern jurisprudential thinking. The need of the State to have extraordinary powers cannot be doubted. But with the conceptual change of statutory power being statutory duty for sake of society and the people the claim of a 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.

¹⁵ A.I.R. 2000 SC 2083

There are various legislations which exempt the state from liability.

- The Information Technology Act, 2000, Section 34-: No suit prosecution or legal proceeding shall lie against the Central Government, the Controller or any person acting on behalf of him, the presiding officer, adjudicating officers and staff of the Cyber Appellate Tribunal, for anything which is in good faith done or intended to be done in pursuance of this Act or any rule or regulation or order made there under.
- Consumer Protection Act, 1986, Section 28- No suit, prosecution or other legal proceeding shall lie against the members of the District Forum, or the State Commission or the National Commission or any officer or person acting under the direction of the District Forum, the State Commission or the National Commission or executing any order made by it or in respect of anything which is in good faith done or intended to be done by such member, officer or person under this Act or under any rule or order made there under.
- Narcotic Drugs and Psychotropic Substances Act, 1985, Section 69 - No suit, prosecution or other legal proceeding shall lie against the Central Government or the State Government or any officer of the Central Government or of the State Government any person exercising any powers or discharging any functions or performing any duties under this Act, for anything in good faith done or intended to be done under this Act or any rule or order made there under
- Civil procedure Code, Section 80 - provides that no suit can be instituted against the government until the expiration of two months after a notice in writing has been given. Section 82 - when a decree is passed against the Union of India or a State, it shall not be executed unless it remains unsatisfied for a period of three months from the date of such decree.
- Protection of Human Rights Act, 1993: Sec 38- No suit or other legal proceedings shall lie against the Central Government, the State Government or any member thereof or any person acting under the direction either of the Central Government, the State Government, the commission or the State Commission, in respect of anything which is in good faith done or intended to be done in pursuance of this Act or of any rules or any order made there under or in respect of the publication, by or under the authority of the Central Government, the State Government, the Commission or the State Commission, of any report, paper or proceedings.

Thus the powers are conferred on the executive under various statutes which lay down the ways to exercise these powers; but it is generally seen that the executive acts in total disregard to the Constitutional or statutory mandate in exercise of the powers especially the discretionary powers. The powers are exercised to give benefit to the blue eyed persons; on the basis of corrupt practices; malafidely and secretively. Since The Constitution of India, provides legislative supremacy subject to Judicial review. It is left to the judiciary to render social justice in case when injustice is done due to the legislative or executive action.