Meaning And Origin

Sovereign immunity is a justification for wrongs committed by the State or its representatives, seemingly based on grounds of public policy. Thus, even when all the elements of an actionable claim are presented, liability can be avoided by giving this justification.

The doctrine of sovereign immunity is based on the Common Law principle borrowed from the British Jurisprudence that the King commits no wrong and that he cannot be guilty of personal negligence or misconduct, and as such cannot be responsible for the negligence or misconduct of his servants. Another aspect of this doctrine was that it was an attribute of sovereignty that a State cannot be sued in its own courts without its consent.

This doctrine held sway in Indian courts since the mid nineteenth century until recently. When a genuine claim for damages is brought to the courts, and it is refuted by an ancient doctrine seemingly having no relevance, there is bound to be resentment and demands for review. The Indian courts, in order to not let genuine claims be defeated, kept narrowing the scope of sovereign functions, so that the victims would receive damages. The Law Commission of India too, in its very first report, recommended the abolition of this outdated doctrine. But for various reasons, the draft bill for the abolition of this doctrine was never passed, and thus it was left to the courts to decide on the compatibility of this doctrine in accordance with the Constitution of India.

Before we proceed to discuss the extent of sovereign immunity as it has been carved out over the years, it is necessary to take a look at Article 300 of the Constitution of India which spells out the liability of the Union or State in acts of the Government.

Article 300

Initially in India, the distinction between sovereign and non-sovereign functions was maintained in relation to the principle immunity of the Government for the tortuous acts of its servants. In India, there is no legislation which governs the liability of the State. It is Article 300 of the Constitution of India, 1950, which specifies the liability of the Union or the State with respect to an act of the Government.

The **Article 300** of the **Constitution** originated from **Section 176** of the **Government of India Act, 1935**. Under **Section 176** of the Government of India Act, 1935, the liability was coextensive with that of Secretary of State for India under the Government of India Act, 1915, which in turn made it coextensive with that of the East India Company prior to the **Government of India Act, 1858**. **Section 65** of the Government of India Act, 1858, provided that all persons shall and may take such remedies and proceedings against Secretary of State for India as they would

have taken against the East India Company. It will thus be seen that by the chain of enactment beginning with the Act of 1858, the Government of India and Government of each State are in line of succession of the East India Company. In other words, the liability of the Government is the same as that of the East India Company before, 1858.

Article 300 reads as:

1. *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 any may, subject to any provision 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.*
2. *If at the commencement of this Constitution –*
   i) any legal proceedings are pending to which the Dominion of India is party, the Union of India shall be deemed to be substituted for the Dominion in those proceedings; and
   ii) 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.

An overview of Article 300 provides that the first part of the Article relates to the way in which suits and proceedings by or against the Government may be instituted. It enacts that a State may sue and be sued by the name of the Union of India and a State may sue and be sued by the name of the State.

The Second part provides, inter alia, that the Union of India or a State may sue or be sued if relation to its affairs in cases on the same line as that of Dominion of India or a corresponding Indian State as the case may be, might have sued or been sued of the Constitution had not been enacted.

The Third part provides that the Parliament or the legislatures of State are competent to make appropriate provisions in regard to the topic covered by Article 300(1).

Pre-Constitutional Era –

In India, the story of the birth of the doctrine of Sovereign Immunity begins with the decision of ***Peacock C.J. in P. and O. Navigation Company v. Secretary of State for India***, in which the terms "Sovereign" and "Non-sovereign" were used while deciding the liability of the East India Company for the torts committed by its servants.

In this case the provision of the Government of India Act, 1858 for the first time came before the Calcutta Supreme Court for judicial interpretation and C.J. Peacock

determined the vicarious liability of the East India Company by classifying its functions into “sovereign” and “non-sovereign”.

Two divergent views were expressed by the courts after this landmark decision in which the most important decision was given by the Madras High Court in the case of ***Hari Bhan Ji v. Secretary of State***, where the Madras High Court held that the immunity of the East India Company extended only to what were called the ‘acts of state’, strictly so called and that the distinction between sovereign and non-sovereign functions was not a well-founded one.
No attempt however has been made in the cases to draw a clear and coherent distinction between Sovereign and Non-Sovereign functions at all.

Post-Independence –

After the commencement of the Constitution, perhaps the first major case which came up before the Supreme Court for the determination of liability of Government for torts of its employees was the case of ***State of Rajasthan v. Vidyawati***. In this case, court rejected the plea of immunity of the State and held that the State was liable for the tortious act of the driver like any other employer.[12]
Later, in ***Kasturi Lal v. State of U.P***., the Apex Court took a different view and the entire situation was embroiled in a confusion. In this case, the Supreme Court followed therule laid down in P.S.O. Steam Navigation case by distinguishing Sovereign and non-Sovereign functions of the state and held that abuse of police power is a Sovereign act, therefore State is not liable.
In practice, the distinction between the acts done in the exercise of sovereign functions and that done in non-Sovereign functions would not be so easy or is liable to create considerable difficulty for the courts. The court distinguished the decision in Vidyawati’s case as it involved an activity which cannot be said to be referable to, or ultimately based on the delegation of governmental powers of the State. On the other hand, the power involved in Kasturilal’s case to arrest, search and seize are powers characterized as Sovereign powers. Finally the court expressed that the law in this regard is unsatisfactory and the remedy to cure the position lies in the hands of the legislature.

The Courts in later years, by liberal interpretation, limited the immunity of State by holding more and more functions of the State as non-Sovereign.

To ensure the personal liberty of individuals from abuse of public power, a new remedy was created by the Apex court to grant damages through writ petitions under Article 32 and **Article 226** of the Constitution. In the case of ***Rudal Shah v. State of Bihar***, the Supreme Court for the first time awarded damages in the writ petition itself.
In ***Bhim Singh v. State of Rajasthan***, then principle laid down in Rudal Shah was further extended to cover cases of unlawful detention. In a petition under **Article 32**,

the Apex court awarded Rs. 50,000 by way of compensation for wrongful arrest and detention.
The latest case of ***State of A.P. v. Challa Ramakrishna Reddy*** on the point clearly indicates that the distinction between Sovereign and non-Sovereign powers have no relevance in the present times. The Apex Court held that the doctrine of Sovereign immunity is no longer valid.

Recent Developments

The courts in successive cases continued with the policy of narrowing the scope of sovereign immunity, rather than attempt an express overruling of Kasturilal. Though there were murmurs of disapproval at the principle of Kasturilal in a number of cases, the most explicit disapproval came in ***State of Andhra Pradesh v. Challa Ramkrishna Reddy***.
The petitioner and his father were lodged in a jail, wherein one day bombs were hurled at them by their rivals, causing the death of the father and injuries to the petitioner. The victims were having previous knowledge of the impending attack, which they conveyed to the authorities, but no additional security was provided to them. On the contrary, there was gross negligence since there was a great relaxation in the number of police men who were to guard the jail on that fateful day. Thus, on the grounds of negligence a suit was filed by the petitioner against the Government.

While the case had been dismissed in trial court, the case was allowed in the High Court, where the Court even while accepting the principle of Kasturilal, took consideration of **Article 21** of the Constitution and came to the conclusion that since the Right to Life was part of the Fundamental Rights of a person, that person cannot be deprived of his life and liberty except in accordance with the procedure established by law. Further, by virtue of ***Maneka Gandhi v. Union of India***, the procedure too should have been fair and reasonable. Thus, the High Court held that since the negligence which led to the incident was both unlawful and opposed to **Article 21**, and that since the statutory concept of sovereign immunity could not override the constitutional provisions, the claim for violation of fundamental rights could not be violated by statutory immunities. On appeal by the State, the Supreme Court dismissed the appeal and ruled: *"The Maxim that King can do no wrong or that the Crown is not answerable in tort has no place in Indian jurisprudence where the power vests, not in the Crown, but in the people who elect their representatives to run the Government, which has to act in accordance with the provisions of the Constitution and would be answerable to the people for any violation thereof."*
Thus, the ratio of this case was that sovereign immunity, which is a statutory justification, cannot be applied in case of violation of fundamental rights, because statutory provisions cannot override constitutional provisions. The procedural aspect of this was that aggrieved persons can successfully file their petitions in trial courts for tortious acts committed by State, and there is no need to approach High Court or Supreme Court under **Articles 226** or **32**. However, the court in this case even while holding that Kasturi Lal's case had paled into insignificance and was no longer of binding value, did not consider the cases where no fundamental rights but other legal

rights might be violated. The question that arises is whether in violation of such statutory rights, the sovereign immunity can be effectively claimed. This issue can be decided only by a Constitutional bench of seven or more judges, if the need arises to overrule the Kasturi Lal case.
Consequently, there has been an expansion in the area of governmental liability in torts.

Sovereign Functions & Non-Sovereign Functions

Need for Distinction

The Supreme Court has emphasized upon the significance of making such a distinction as in the present time when, in the pursuit of their welfare ideal, the various governments "naturally and legitimately enter into many commercial and other undertakings and activities which have no relation with the traditional concept of governmental activities which have no relation with the traditional concept of governmental activities in which the exercise of sovereign power is involved"

Therefore, it is necessary to limit the area of sovereign powers, so that acts committed in relation to "non-governmental and non-sovereign" activities did not go uncompensated.