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SOVEREIGN IMMUNITIES AND SOVEREIGN FUNCTIONS AS EXCEPTIONS TO DICEY'S RULE OF LAW: THE JOURNEY IN INDIA

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ABSTRACT

India has witnessed an evolution in its approach towards the application of sovereign immunity in the country. The British Rule may have brought with it these common law principles, but they certainly did not find their existence with that of the British. One of such principles is the principle of Sovereign immunity. Throughout the paper, the author has primarily focused on two questions: being a country governed solely by common law for over 200 years, how has the concept of no-sovereign-immunity been established in India and second, whether if today, the sovereign status of the Government of India is superior to the constitutionally acknowledged Rule of Law when practically applied.

With varying judgments, legislative opinions, and the absence of a codified, settled law on the grant of sovereign immunity to the Government of India, this paper aims to put forth the practical and literal sustainability of both the doctrines of Sovereign Immunity and Dicey's Rule of Law, coherently in India. The intrinsic aim of the paper is to analyze the trend of all landmark judgments (pre-independence and post-independence) and ascertain the stand of the Indian Judiciary regarding the practical application of the Doctrine of Sovereign Immunities and Dicey's Rule of Law, simultaneously.

Keywords: The Sovereign, Sovereign-functions, Sovereign-immunity, Rule of Law, Public-welfare

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AN INTRODUCTION TO DICEY'S RULE OF LAW AND SOVEREIGN IMMUNITY

Marking an evolution from the state of a social contract, most nations severally agreed to be represented by a body that would act as their universal representative for dealing with the other nations. A body that would be accountable for taking decisions for the nation on behalf of all its citizens. The person in authority may keep changing, but the position enjoys exclusivity and remains the same. When such a position was created, most states had a king as their supreme ruler and thus, the term 'sovereign' was coined to name the authority. The practice of calling such authority 'sovereign' developed into a worldwide practice and continued even when the 'rule of King' was absolved, and elected governments were established.[1] The sovereign was initially bestowed with certain exclusive and essential functions, which were later termed 'sovereign functions' for manifesting the state's monopoly over such functions.[2] Though the term is more widely interpreted in the present context, the term had a very strict and narrow meaning at its inception.

While theorizing that the State is for the subjects and ascribing certain specific functions to the sovereign, most of the nations bestow upon the sovereign a superior right as immunity against being prosecuted for any wrongs committed by them, essentially while being under their official duty. The practice has been codified as 'sovereign immunity', available against sovereign functions.[3] But an essential question lying here is that while selecting a superior body to represent them to avoid any conflict of interests, did the subject mean to accord status of superiority to the authority in terms of its actions? Did the subjects intend to absolutely absolve such authorities of every liability arising thereto during the discharge of their sovereign functions, thereby according to them an upper hand as against the general public? The answer certainly seems to be not in assertion concerning the 'elected government' form of sovereign these days. But during the rule of the kings, the subjects certainly had no option to choose.[4]

The doctrine of sovereign immunity is based upon the common law maxim "*rex non-potest peccare*", which implied that the King could do no wrong.[5] This doctrine accrues immunity to the king from being liable for any tortious act that he commits. The doctrine is said to have been founded on two reasons: the first being that if sovereign was to be sued in its courts and that too, without its consent, it would be equivalent to attributing it on the same level as that of the public. This reasoning essentially lies from the period of king's rule, where a higher stature was inherent with the authority of the sovereign. Another reason being the

[1] M.P. JAIN AND S.N. JAIN, PRINCIPLES OF ADMINISTRATIVE LAW 15 (Lexis Nexis 2017).
[2] id.
[3] George W. Pugh, *Historical Approach to the Doctrine of Sovereign Immunity*, 13 LOUISIANA LAW REVIEW 3 (1953).
[4] M.P. JAIN, INDIAN LEGAL AND CONSTITUTIONAL HISTORY 10 (Lexis Nexis 1981).
[5] id.

effect on the treasury of the Crown, if the sovereign was to be held liable. It was essential for the people to ensure that their Crown suffers no loss. Hence, considering this reason, tortious liability for the sovereign was not demanded. But Sate and Law do not exist in the same way anymore as they used to be. The understanding of their concept has experienced a drastic change by the means of modern jurisprudence. The state is no longer the absolute authority. It has become a mere notion, under which the concept of sovereignty is another notion. The 'Absolute State Power' theory is no longer in use for most of the states as they have evolved into democratic nations wherein State does not get absolute power.[6]

'The Law of Constitution' in 1885 by Mr. A.V. Dicey propounds a clear understanding of the theoretical development against such absolute immunity along with discussing his perspective on the Rule of Law.[7] Quoting Dicey, he said: "It means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority by the government. The law rules Englishmen, and by the law alone; a man may with us be punished for a breach of the law, but he can be punished for nothing else."[8] This clearly indicates the presence of equality before the law in the 'Rule of Law' and that no particular class is exempted from being equally subjected before the courts of Law. Rule of Law thus allows no special privilege to the officials in the form of exemption from the duty of being obedient towards the law that governs the citizens. Nations depict an incorrectly and general notion regarding the basis of administrative law when they believe that the affairs of the government and its related parties are out of the jurisdiction of the general courts of law as they are to be dealt especially by other official bodies. This idea itself is inconsistent with the customs of the Law of England and is therefore intrinsically inconsistent with the Law of England and its derivative subjects.

His idea was precisely limited to the law of England. However, his rule was not something that was to be limited to the English Laws. His 'Rule of Law' was a standard principle based on which a constitution may be judged. His principles could be standards to judge the rules and laws of any constitution in the modern world. While Common Law System was developing in India, it passively adopted the Rule of Law because both concepts owe their origin to the British Jurisprudence.[9] If Dicey were to be believed, existence of the Rule of Law itself suffices for the need of any other separate Administrative Law as it is capable of controlling the arbitrary state actions, and hence, the English system did not need any separate Administrative Law. Independent codified provisions have already been created for ensuring the compliance of Natural Law in India. Dicey's Rule of Law was widely accepted by various nations even after attracting several criticisms.[10] The Indian courts had to specifically uphold the constitutionality of Rule of Law in several judgments even after the

[6] Drew Desilver, *Despite Global Concerns About Democracy, More Than Half of Countries Are Democratic,* FACTANK (Apr. 22, 2021) https://www.pewresearch.org/fact-tank/2019/05/14/more-than-half-of-countries-are-democratic/.

[7] A.V. DICEY, THE LAW OF THE CONSTITUTION (Oxford, 2013).

[8] id.

[9] M.P. Jain, *supra note* 1, at 779-780.

[10] id.

overt existence of Article 14[11] in the Indian constitution for ensuring 'equality before the law and equal protection of law'.

SOVEREIGN IMMUNITY AS AN EXCEPTION TO DICEY'S RULE OF LAW: A NEED OF THE HOUR?

It would be correct to say that the King based the doctrine of sovereign immunity on a hypothesis; the King could never err and is always correct in his actions. With the wide-spreading colonial rule, the doctrine was extended to the Crown's territories. Ruling India for over two hundred years, the British substantially affected its legal system. It was because of the colonial rule that this doctrine could enter the legal system of India and impact various case laws based on the doctrine, absolving the Crown from liabilities towards the Indians in multiple cases.[12]

Though the reason for the existence of this provision of sovereign immunity during the rule of the Crown could be well understood without acknowledging the fair or unfair existence of the provision, the extension of this provision even after the independence of India is questionable. Certainly, a legal system does not change in a second, but it is also to be noted that India had almost a complete reformation of laws after independence wherein multiple changes in many provisions took place, but the judicial amendments in sovereign immunity came much later, with no legislative enactment so far. The State of India enacted its Constitution in 1948 wherein 'Equality before the law and equal protection of law' was preserved as one of the fundamental rights given to the Indian citizens. But the state simultaneously chose to continue with pre-enacted provisions of CrPC and IPC, wherein, the sovereign of India has been indirectly attributed with certain privileges as immunities. But due to uncertainty in the codified provisions, judicial decisions provided the clear stance of sovereign immunity.

Where Article 300[13] of the Constitution of India indicates that direct provisional immunity to the state of India is absent, the foreign states in India find themselves immune against suits, without the permission of the State. Section 86 of the Code of Civil Procedure 1908 provides that "*no suit may be instituted against foreign states in India, except with the prior written consent of the government.*"[14] In furtherance to Section 86 (1), Section 86 (2) of the Code of Civil Procedure provides for the government to not provide its consent to any suit against a

[11] INDIA CONST. art. 14.

[12] L&L *Partners, Sovereign Immunity in India,* LEXOLOGY (Nov. 18, 2020) https://www.lexology.com/library/detail.aspx?g=5521ec58-6c1c4577a285abed6baae0b4#:~:text=India%20has%20adopted%20a%20restricted,consent%20of%20the%20Indian%20government.

[13] INDIA CONST. art. 300.

[14] Civil Procedure Code, § 86, (1906).

foreign nation until it satisfies certain conditions. As per section 86 (2), "*the government may only consent to a suit against a foreign state where the foreign state:*

has instituted a suit in a court against the person desiring to sue the foreign state; by itself or another, trades within the local limits of the jurisdiction of the court;

Owns immovable property within those limits and is to be sued regarding such property or for the money charged thereon; or has expressly or impliedly waived the privilege accorded to it".[15]

In *Veb Deautfracht Seereederei Rostock v. New Central Jute Mills company Ltd. and Anr* [16] (DSR Lines), the Supreme Court observed "the object of making the government's consent a requirement for instituting a suit against a foreign state was to ensure that parties with legitimate claims are not left without a remedy, and that sovereign states are not subject to frivolous and vexatious litigation in Indian courts." The decision was well received because of the reasonings that held its back. The concept of sovereign immunity in India can still be reasonable, to prevent individual authorities from litigating with a foreign nation and allow any scope for foreign tensions.[17] In such a sensitive matter of international relations, the representative sovereign of the state must have a right to decide to ensure safety, security, and preservation of the nation's foreign relations.

Certain immunities are incorporated in the Diplomatic Relations (Vienna Convention) Act[18] which are available to diplomatic missions and their members in India. Some articles of the Convention, including Articles 29, 30, 31, 32, 37, 38, and 39, have been enforced as law in India, extending sovereign immunity to the family members, staff members, and the servants of diplomatic agents. It is noteworthy that in *Mirza Ali Akbar Kasani v. United Arab Republic & Anr*[19] a five-judge bench of the Supreme Court held "Section 86 (1) CPC modifies the international doctrine of sovereign immunity to a certain extent, and when a suit is instituted against a foreign state with the consent of the government, it is not open for a foreign state to rely upon the doctrine of sovereign immunity under international law". This observation signifies and indicates the slight change that the provision of 'sovereign immunity to foreign states' has faced in India, the indication being on the stricter side.

Along with these provisions, it can be observed that the Constitution of India intended for the Rule of Law to govern the nation.[20] Constitution has overtly been made the most superior body of law in India by providing in the text of our constitution that the Legislative and Executive authorities would derive their legal powers from the Constitution. This supreme power is observable in the text of Article 13 (1) of the Constitution[21] wherein it is laid down that any law in derogation of the constitutional laws shall be void and applicably

[15] id at cl. 2.
[16] Rostock v. Jute Mills Co., 1 SCC 282 (1994).
[17] L&L Part.ners, *supra note* 12.
[18] Diplomatic Relations (Vienna Convention) Act (1972).
[19] Kasani v. United Arab Republic, 1 SCR 319 (1966).
[20] Nikhil Jain, *Sovereign Immunity*, ACADEMIKE (Nov. 21, 2020) https://www.lawctopus.com/academike/sovereign-immunity/.
[21] INDIA CONST. art. 13 cl. 1.

invalid, mandating all the laws to be necessary for conformity with the Constitution. Article 21[22] and Article 14[23] strengthen the 'Rule of Law' by ensuring the protection of a person's life and liberty against arbitrary state or executive actions and bestowing upon them the right to equality of treatment and law, respectively. Separation of powers is another check over the absolute power and arbitrary action of the sovereign. By enlisting all these actions, the Constitution of India effectuates all the essentials required for a country to follow the Rule of Law.[24]

The old notion of sovereignty is nothing more than just a concept now. States these days have strengthened, and most of them now cease to be police states. Instead, the concept of welfare states prevails in the current context. To maintain compatibility with the developing socio-economic conditions, the concept of sovereignty must also develop. What should be prevalent among us is the concept of legal sovereignty instead of its mere conceptual version. It is human for a state's administration to commit mistakes because ultimately, the governing authorities comprise a human army. Hence, if an individual is treated in a certain way for a mistake, there is no reason to defend the governing authorities for the same mistake just because they are notionally on a higher pedestal.[25] The treatment must be equal. The source of power has also changed in today's context. It is no more the single authority in which all the power vests. Power has been bifurcated, and the source of all those powers is now the citizens. This is another reason for the concept of sovereign immunity to have vanished in current times. But considering that a state is sometimes required to take exceptional decisions for the welfare and betterment of a nation, it requires immunity in such cases because bestowing an absolute liability in such cases would act as a disincentive for the government to perform welfare functions.[26] Thus, analyzing the whole situation, evolution is mandatory in law to make them compatible with the changing environment and requirements. A new outlook for interpreting the laws, which indeed is the primary task of the judiciary, is therefore necessary.[27]

The credit of new interpretation of the provision of sovereign immunity has to be attributed to the series of cases that produced various principles in a linear chain which when read in continuity, give a proper insight into how the status in India would have been at a particular time. The analysis enables one to have a clear comparison of the time-lapse and evolution of those case laws.

[22] INDIA CONST. art. 21.
[23] INDIA CONST., *supra note* 11.
[24] MORLEY'S DIGEST OF INDIAN CASES (1850).
[25] FRANCIS WILLIAMS, FIFTY YEARS MARCH: THE RISE OF THE LABOUR PARTY 118 (Odhams Press 1949).
[26] id.
[27] Nikhil, *supra note* 20.

THE ERA OF A CONCEPTUALISED SIMULTANEOUS EXISTENCE OF THE DOCTRINES: AN ANALYSIS OF PRE-INDEPENDENCE AND POST-INDEPENDENCE JUDGMENTS

The origin of the usage of the phrase "Sovereign Immunity", in India can be traced back to the period of colonial rule where the Crown was the governing authority of India. This doctrine was imported to India, along with common law principles, from the United Kingdom. Some provisions of the various Government-of-India Acts, namely Section 65–1858, Section 32–1918, and Section 176–1935, were codified concerning sovereign immunity. But these provisions were not determinate enough to maintain any scope of subjectivity, and so did not stand alone.[28] So, the actual power concerning the determination of the positioning vested with the courts. The courts have tried to settle the debate on sovereign immunity in India, however, the views have differed from time to time.

After the independence of India, the Government-of-India-Act[29] was abolished and hence it enacted several other provisions concerning sovereign immunity in multiple statutes. To name some of them: Section 86 of The Civil Procedure Code 1908 expressly provides for 'foreign immunity' which prohibits any suit from being instituted against foreign states in India, except with the prior consent of the government, Section 86 prohibits any suit from being instituted against the government of India without a notice, which may not amount to absolute immunity but certainly a partial one as superiority. However, sovereign immunity has been determined only via judgments and reports, even after independence.

The case of *P & 0 Steam Navigation Co. v. Secretary of State for India*[30] was the earliest reported case on the doctrine of sovereign immunity, wherein the court stated "the fact that the Company exercised sovereign powers as a delegate of the Crown did not make it a sovereign. Therefore, the Crown Immunity could not extend to it."[31] The court elaborated that where actual sovereign power vests in an act, sovereign immunity would lie against it. The court distinguished sovereign and non-sovereign functions, regarding the Crown and upheld the principle of sovereign immunity. Briefly, the court held that where sovereign functions were being carried out, the immunity of the Crown could be extended to its representatives. But in cases of other general functions, no immunity stands applicable. The Court determined the sovereign function test in the judgment.

In *Secretary of State v. Earl Bhanil* [32], the Court held that "the immunity of the East India Company was extended only to "Acts of State" strictly so-called, and that the distinction based on sovereign and non-sovereign functions of the East India Company was not well-

[28] M.P.Jain, *supra note* 1, at 764,765.
[29] The Government of India Act (1935).
[30] Navigation Co. v. Secretary of State for India, 5 BHCR (1861).
[31] id.
[32] Secretary of State v. Bhanil, 5 ILR (1882).

founded."[33] The ratio was subsequently supported by the Law Commission of India Report 1956.

Where these two cases merely mentioned the distinction of sovereign and non-sovereign functions, the case of *State of Andhra Pradesh v. Pinise*[34] clarified an essential characteristic of a sovereign function. The court clearly stated that because power has been delegated under a statutory provision, the same will not cease to have a character of sovereign function. This decision was much ahead of its time and somehow laid down a partial answer similar to the answers put forth in cases like *Ajay Hasia v. Khalid Mujib*[35] and *Pradeep Kumar Biswas*[36], which are now being followed, to the essential question of 'extension of sovereign function'. The judgment introduced the concept of 'State Instrumentality'. But this did not elucidate the concept and restricted itself to the question of sovereign immunity.

The case of *Mata Prasad v. Secretary of State*[37] exempted the Crown from every liability towards the acts committed by their representatives while discharging both sovereign and non-sovereign functions, by holding that the rule of master-servant liability will not apply in cases against the Crown. The case was certainly an incorrect determination of the tortious liability of the sovereign. A similar stance was echoed in the judgment of *India v. Harbans Singh*[38], wherein principles of tortuous liability were not applied, and the government was exempted from liability of its servant's acts by technical application of the doctrine of *Pari Delicto*. This doctrine essentially withdraws the scope of grant of any affirmative relief in a dispute, owing to the fact that both the parties involved were equally at fault. But after this case, the courts defined 'commercial contracts,' and based on the definition, certain corrective decisions were taken whereby liability was duly attributed to the government for the acts of its servants. In cases like *Maharaja Bose v. Governor-General in Council,*[39] *Calcutta Motor Cycle v. India*[40] and *A.K.G. Kalwani v. India*[41], the court took the initial stand supporting the tortious liability of the state by upholding that the government is immune from proceedings against the tortious acts committed by its employees, only in cases of sovereign functions, where it enjoys a general immunity. But a firm progressive stand was taken in the landmark judgment of *Rajasthan v. Vidhyawati*[42], wherein the status of tortious liability of the sovereign liability was re-examined. The Apex Court opinioned, "the Immunity of the Crown in the United Kingdom was based on the old feudalistic notions of justice that the King was incapable of

[33] id.
[34] State of Andhra Pradesh v. Pinise, 1 ALT 242, (1993).
[35] Hasia v. Mujib, 2 SCR 79 (1981).
[36] Biswas v. Indian Institute of Chemical Biology, Civil App 992 (2002).
[37] Prasad v. Secretary of State, (1930) 5 ILR.
[38] India v. Singh, (1959) P H 39.
[39] Bose v. Governor General in Council, CHC 242 (1952).
[40] Calcutta Motor Cycle v. India, CHC 1 (1953).
[41] Kalwani v. Union of India, CHC 430 (1960).
[42] The State of Rajasthan v. Mst. Vidhyawati and Another, SCR 989 (1962).

doing a wrong."[43] Now that we have our Republican constitution, by observing one objective of it, the sovereign has to have a widespread army of personnel working for it. Hence, no principle or 'public interest' could justify the exemption of the state from tortious liability in the present context. Hence, it shall not be difficult to hold that the State shall be equated with any general employer for ascertaining its tortious liability. It is essential to note that no distinction as to sovereignty and non-sovereignty of functions was made and the decision was highly progressive and well-reasoned.

Though the decision of the *Vidyawati case*[44] implies the court's ascent towards holding the state liable for tortious acts, the court certainly did not specifically overrule the sovereign function test for determinations of liability. While passively continuing with the test, the court merely restricted its significance. The ambiguity, in this case, was later clarified in the case of *Kasturilal Ralia Ram Jain v. The State of Uttar Pradesh*[45]. Court laid down a clear principle by bifurcating tortious liability into two parts: against sovereign acts and non-sovereign acts. If against the former, tortious liability shall not lie. If against the latter, tortious liability shall certainly lie. This judgment was a clarifier and laid down the progressive principles that were formulated so far, primarily by the Vidyawati case. This judgment was certainly another step towards the progressive take of the judiciary on the liability of the State towards its subjects. But the court failed to consider the modern form of tortious liability of the State, which otherwise would have had made the court do away with the distinction of sovereign and non-sovereign functions of the State. The Court indeed took a feudalistic approach towards the issue and failed to consider the government's liability. Such liability is recognized in the present context. The court in the present case failed to expand its boundaries and look beyond the distinction of sovereign and non-sovereign functions of the state. The emphasis could have rather been laid upon the distinctness of lawful and unlawful acts of the government. If there lies a right with the state to do an act, then it must be deemed lawful. To the contrary, if there lies no right, it shall be termed unlawful.[46]

Effectively, there has been no settled test to determine sovereign and non-sovereign functions of the government. The distinction is primarily artificial and is not backed by any sound reasoning. Appropriately, it goes against the doctrine of Unjust Enrichment because such a distinction is unjustly enriching the government by exempting it from its liability towards certain acts, thereby passively causing a loss to the general individuals. Earlier, the only way to make the distinction was to determine whether the act could be carried out by private entities or not.[47] If yes, it is a non-sovereign function. But later, 'statutory mention' of a duty further evolved as a test to determine whether a function was a sovereign or a non-sovereign function of the state. But the test was inherently flawed, as it is not mandatory for a sovereign duty to be essentially laid down under a statute, a common principle held in most of the current cases. An act can be regarded as a sovereign function even in situations

[43] id.
[44] id.
[45] Jain v. State of Uttar Pradesh, SCR 375 (1965).
[46] Nikhilesh Koudinya, *Limits of Sovereign Immunity*, LATEST LAWS (Nov. 22, 2020) https://www.latestlaws.com/art.icles/limits-of-sovereign-immunity/.
[47] Navigation, *supra note* 31.

where it has got no statutory basis.[48] Precisely, all these cases supported the existence of Sovereign immunity as an exception to Dicey's Rule of Law, evolving from liberal to stricter with passing of years.

THE JOURNEY OF ABSORPTION OF SOVEREIGN IMMUNITY IN INDIA

The Court, in its strict interpretation, essentially kept hopping between sovereign and non-sovereign functions of the state as the basis for determination of its liability, either forming or not forming an exception to Dicey's Rule of Law. Though even in recent cases, the court did cling on to the distinction between sovereign and non-sovereign functions to form the base of a judgment; it becomes clear on a precise analysis that interpreting the term has certainly been restricted in the latter cases and resultantly increased the liability of the government.[49] Courts have gone ahead to take a stand for completely absolving the doctrine of sovereign immunity, considering it non-essential for current times.

Directly via Judgments

In the landmark judgment of *Challa Ram Konda*[50], the Court outrightly propounded that the existence of the theory of sovereign function does not bring with itself, the right to violate the fundamental rights of individuals. Special mention was given to protecting the Right to Life under Article 21[51] of the Constitution of India. In another judgment, it was held that whatever activities the government carries on in the name of compliance with Directive Principles of State Policy or for welfare, such activities cannot be legal and hence cannot attract immunity. Those functions are still not in a state wherein they can be said to be exclusives to the sovereign. It is to be noted that the judgment was both partially progressive and partially regressive in its opinion. In *Union of India v. Ram Kamal*[52], the court highlighted the impracticability and inefficaciousness of the doctrine of sovereign immunity by calling the doctrine a "judicial fiction". The court also suggested that owing to the changing socio-economic conditions, it is now a duty cast upon the judiciary to boycott the usage of this fiction and let the nation come out of it. Finally, in the case of *State of Andhra Pradesh v. Challa Ramkrishna Reddy & Ors.*[53], it was succinctly held by the apex court that in present times, the distinction of sovereign and non-sovereign function holds no relevance and hence the concept of sovereign immunity is futile and of no use now.[54] In *Rudul Shah v. State of Bihar*[55], it was for the first time that the Apex Court awarded damages for a writ petition. In another

[48] M.P. Jain, *supra note* 1, at 771.
[49] M.P. Jain, *supra note* 1, at 773.
[50] Reddy v. State of Andhra Pradesh, ACJ 668 AP 235 (1990).
[51] INDIA CONST., *supra note* 23.
[52] Union of India v. Bezbarua, Gau 116 (1953).
[53] State of Andhra Pradesh v. Reddy, (2000).
[54] id.
[55] Shah v. State of Bihar, SCR 508 (1983).

landmark case of *Bhim Singh v. State of Rajasthan and Ors.*[56], an extension was given to the principle laid down in the case of Rudal Shah and they awarded damages for unlawful detention.

In the first report of the Law Commission of India, a recommendation concerning dropping the use of a distinction between sovereign and non-sovereign functions and relaxing the immunity given to the sovereign of India was given. Quoting the Law Commission of India report, it was said-

"In a Welfare State, it is necessary to establish a just relation between the rights of the individual and the responsibility of the State. While the responsibilities of the State have increased, the increase in its activities has led to a greater impact on the citizens. The law must, as far as possible, be made certain. The citizens must be in a position to know the law."[57]

There is no reason to convince the conscience of people why the government should not place itself on the same level of liability while carrying out public functions. The only exception that can be drawn is only if a statute expressly provides for the same.

Indirectly via the Rule of Law

These provisions essentially point out an era where the existence of sovereign immunity was vanishing. Along with these cases where sovereign immunity was directly held to be of lessening effect, some cases on the Rule of Law pointed out the exhausting status of sovereign immunity. The first case of this category was the case of *A D M Jabalpur v. Shivkanth Shukla*[58]. The court here dealt with the persisting question as to whether the principle of Rule of Law existed in any Indian law other than Article 21 of the Constitution.[59] The question concerned the suspension of Articles 14[60], 21[61], and 22[62] of the Constitution of India from enforcement during the proclamation of an emergency. While the majority, in this case, denied the assertion to the question, it was Justice H.R. Khanna's dissenting opinion that was of the utmost value and became a lead for future cases. Justice Khanna observed, "Even in absence of Article 21 of the Constitution, the State has got no power to deprive a person of his life and liberty without the authority of law. Without such sanctity of life and liberty, the distinction between a lawless society and one governed by laws would cease to have any meaning. Rule of Law is now the accepted norm of all civilized societies".[63] His view in the judgment was highly progressive; a need of the hour.

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[56] Singh v. State of Rajasthan, WLC 109 (1992).
[57] Law Commission of India Report, (Apr. 24, 2021) https://lawcommissionofindia.nic.in/reports/Report277.pdf.
[58] A D M Jabalpur v. Shukla, SCC 521 (1976).
[59] id.
[60] INDIA CONST. *supra note* 11.
[61] INDIA CONST. *supra note* 23.
[62] INDIA CONST. art. 22.
[63] id.

Afterwards, in the case of *Chief Settlement Commissioner Punjab v. Om Prakash and Ors*[64], the Supreme Court observed that the most important feature of the Indian constitution is the 'Rule of Law' concept and that the whole constitution revolves around that. If any administrative action does not meet with standards of the Rule of Law, it is eligible to be struck off as and when the matter is brought into notice by the affected person or group of persons. Extending further via the case of *Satvant Singh Sawhney v. D. Ramarathnam*[65], the apex court had held that if an executive action operates prejudicially to any person, some legislative authority must expressly support it on reasonable grounds.

In the leading case of *Secretary, State of Karnataka and Ors. v. Uma Devi and Ors.*[66], the Constitution Bench of the court had laid down the essential idea of upholding Article 14 read with Article 16[67] in every case. The court held that the "Rule of Law" is at the centre and a court in contravention of the spirit of our Constitution could pass the core of the Constitution of India and hence, no order could be passed. Essentially, the courts are restricted from passing any order which contravenes or derogates Article 14 and Article 16 of the Constitution. It has to uphold these articles in every case, as these articles together represent the Rule of Law. Further, the Apex Court came up with the 'Basic Structure doctrine' in the landmark judgment of *Kesavananda Bharati v. State of Kerala*[68]. It upheld the Rule of Law as the most intrinsic and crucial part of the said basic structure. Being the foremost ingredient in the list of essentials, any act of the Legislature or Parliament, showing that how the Rule of Law is at an upper hand over all the other authorities of men could never amend this feature of the Rule of Law.

The Indian constitution has made sure that the Rule of Law is maintained in the country in some form or the other. The Courts also attempt to maintain the Rule of Law in the country on their behalf. This is primarily done by referring to the original legislative intent behind the disputed provision in cases where the language or the applicatory principles of the provision are unclear. The apex court in the case of *Union of India and Anr. v. Raghubir Singh*[69] enumerated that a substantive amount of degree that governs the functioning of the state and its subjects, flows from the decisions of the courts in India.

After having many judgments on the status of sovereign immunity in India, it is an established fact that sovereign immunity is not applicable in India anymore. But notably, the functions performed by the sovereign have expanded enough that the sovereign performs functions in almost every sphere of work today. If no immunity is granted to the government for performing such functions, it will in fact be a disincentive for it to indulge in those

64 Commissioner v. Prakash, SCR 655 (1969).
65 Sawhney v. Ramarathnam, SCR 525 (1967).
66 State of Karnataka v. Devi, Civil App 3595-3612 of 1999 (2006).
67 INDIA CONST. art. 16.
68 Bhart.i v. State of Kerala, 4 SCC 225 (1983).
69 Union of India v. Singh, SCR 316 (1989).

spheres of work for public welfare.[70] It is practically impossible to completely discard the immunity accorded to the sovereign.[71] Hence, to keep the essence of the non-applicability of sovereign immunity in India, we have created a special form of liability and certain exceptions to it. To put it simply, exceptions have been created from the general liability of the government, to hold it not liable in certain cases.

A general contractual liability arises in every case when a government enters into a contract, technically called a government contract or a public contract. For contracts to be government contracts, there are three necessities: The contract must - qualify under Section 10 of the Indian Contract Act[72], qualify under Article 299 of the Constitution of India[73], and one of the parties shall be the government. In such contracts, the government is held liable at par just like the other individuals. However, in the underlined types of contracts, a government will not be held liable and will be absolved of its liability.

Contract of service employment- A contract between the government and an individual. When it starts, it is a contract. But when an individual accepts the contract, the contract gets governed by statutes and gets extra immunities by the virtue of that statute. So, in such cases, the contractual relationship is equal to contract + statutory provisions, i.e. not a pure contract. Hence, such forms of contracts are not recognized as government contracts.

Statutory contract- As against a government contract that is entered in the executive capacity, a statute gives power to the government to enter such contracts.

Both the Statutory and Service Employment contracts get immunity expressly and externally from other statutes, and hence, are an exception to the general rule of no sovereignty. If the 'government contract' lacks certain essentials, it will cease to be a government contract and hereafter will not attract any liability. Generally, if it is a government contract, the liability of the government will be equal to that of a private individual. But once the contract is unenforceable under Article 299, the contract would be invalid, and the government would not be liable.

But to avoid individuals from suffering a loss due to this easy exemption of government from its liability, an exception has been created to this exception. If this exception applies and a contract ceases to qualify as a government contract, the government will still be liable to repay any loss caused to the private party by the termination of such a government contract. If the government was subjected to unjust enrichment from the party, it will be liable to recoup the party's loss.

Apart from the contractual liability of the government, the government has been awarded liability based on the 'act of state' principle.[74] Synonymous to the contractual liability, the

[70] Francis, *supra note* 26.
[71] Morley's Digest, *supra note* 25.
[72] Indian Contract Act, § 10, (1872).
[73] INDIA CONST. art. 299.
[74] Rao and Co. v. State of A.P., 6 SCC 205 (1994).

liability of the sState in India exists for its tortious acts as well. The state will have vicarious liability for the acts of its servant, be it authorized or unauthorized.[75]

CRITICISM AND CONCLUSION

The practice of sovereign immunity finds its roots in erstwhile centuries, where the sovereign used to be immune to reprimands for any wrongs done. The outright immunity to the sovereign turned out to be disastrous for the public rights. History represents the potential annihilation that absolute sovereign powers and protection can cause. Be it the killing of Jew-masses in the Gas Chambers of Germany, the Massacre of Peterloo, the Jallianwala Bagh Massacre of India, Chinese troops storming the Tiananmen Square in China, etc.; all are instances of sovereign atrocities left facing no repercussions. Since the crimes committed by the state are wrapped under the age-old doctrine of "the king can do no wrong", states, where sovereign immunity applies, may still have such barbaric acts covered under the ambit of protection bestowed by the doctrine of sovereign immunity.

With the transformation of the structure of societies and that of the models of ruling authorities, the world has become more liberal in its approach regarding the notion of rights and equality. During the past few years, civilians have essentially chosen to identify and determine their rights by a more objective weightage. The government is knowingly an ensemble with a lot of helpers who indeed are the state machinery that many times commit wrongs and crimes for fulfilling their larger motive. Considering the part incidents and the aforementioned known fact, the citizens have actively protected their rights while being more conscious and alert as against the embezzlement of their rights. Obliged to accommodate public demands, people-elected-governments have been making laws inclusive of the general principles of Natural Justice that leave almost no scope for arbitrariness and following the constitution which inherently ensures certain fundamental rights. This has now become a practice and has been ensured by the courts thereto.

Amid such practices of incorporating Natural Justice Principles and ensuring fair play by the government towards the civilians, a question arises against the persisting practice of sovereign immunity regarding the arbitrariness it carries by attributing a differential treatment to the government as compared to the citizens, for the commitment of similar wrongful acts. With the current laws being circumventing from arbitrariness and favouritism, the existence of such laws raises questions over the efficiency of the impact of the right laws. Mulling over the question, intrinsic doubts concerning the necessity and rationale behind the continuance of such principles transpire.

Though the pile of cases indicated the resulting uselessness and ineffectiveness of the doctrine of sovereign immunity in India along with the Rule of Law, the case of *State of*

[75] A.R. Blackshield, *Tortious Liability of Government: A Jurisprudential Case Note*, 8 JILI 1966 (Nov. 22, 2020) https://www.jstor.org/stable/43949926?seq=1

Andhra Pradesh v. Challa[76] clearly and categorically denied any utility of the provision in the present context. Though the judgments do not accord any exhaustive list of when a function would be immune and when not, it has been ensured that immunity will be granted only in 'statutory contracts' and the exceptional case of rare cases in the current times. Whatever the case may be, now there is at least a clarity on the most prominent issue. These issues being: whether all the other general-public-activities undertaken by the government of India will be considered as its sovereign activities or not; and whether such activities will be immune by sovereign immunity or not. The answer is certainly in negation, for both the questions. Neither will such activities be called sovereign functions, nor any sovereign immunity will govern them. But there are certain exceptions to the rule. Certain specific kinds of contracts have been existing in India which do not attract any liability for the wrongs of the government.

These provisions being outcomes of judgments cannot be considered a determined law. But this certainly leads us to the trend and practice of the courts in India regarding the simultaneous keeping of the provision of sovereign immunity and the Rule of Law. Conclusively, India can be said to have a stricter interpretation of the provision of sovereign immunity, attributing more liability to the government for its functions and lesser immunity. India is equating the liability of the government more than that of other individuals. India has a greater regard for the Rule of Law, but partial sovereign immunity still existing.

CONFLICT OF INTEREST

The author declare that the research work does not have any conflict of interest and the was conducted in the absence of any commercial or financial relationships that could be construed as a potential conflict of interest.

[76] State of Andhra, *supra note* 54.