DOCTRINE OF SOVEREIGN IMMUNITY: EVOLUTION AND EVALUATION

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Abstract

The Doctrine of Sovereign Immunity says, "A king can do no wrong." This principle has been widely followed around the world. The king is above Law. This principle came into being during the time and existence of Monarchy. Today, in this era of democracy where citizens make and break governments, it is assumed that this doctrine must have lost its sheen. But the sad state of affairs is that, even after proclaiming democracy, governments all around the world have chosen to hide behind this archaic principle. The Rule of Law says that no one is above the law. But yet, according to most of the constitutions of the world, governments cannot be held liable like a common man. The paper traces the journey of the India and UK with respect to the Doctrine of Sovereign Immunity especially with respect to the tortuous liability of the State. The focus is on drawing parallels with the help of case laws to define and describe the adherence and repeal of this doctrine.

Keywords: Sovereign Immunity, Tort, State, monarchy, doctrine, government, India, UK

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A DETAILED ANALYSIS OF THE GOVERNMENTAL LIABILITY IN CONSTITUTIONAL TORTS IN INDIA AND USA

INTRODUCTION

In any modern society, interactions between the State and the citizens are large in their number, frequent in their periodicity and important from the point of view of their effect on the lives and fortunes of citizens. Such interactions often raise legal problems, whose solution requires an application of various provisions and doctrines. A large number of the problems so arising fall within the area of the law of torts. This is because, where relief through a civil court is desired, the tort law figures much more frequently, than any other branch of law. By definition, a tort is a civil wrong, (not being a breach of contract or a breach of trust or other wrong) for which the remedy is unliquidated damages. It thus encompasses all wrongs for which a legal remedy is considered appropriate. It is the vast reservoir from which jurisprudence can still draw its nourishing streams. Given this importance of tort law, and given the vast role that the State performs in modern times, one would reasonably expect that the legal principles relating to an important area of tort law, namely, liability of the State in tort, would be easily ascertainable. However, at present, this ideal is not at all achieved, in reality, in India.[1]

The State liability for the acts of omission and commission committed by its servants, not being a static concept, has been governed by written or unwritten laws. Liability of State for the tortious acts of its servants known as tortious liability of State makes it liable for the acts of omission and commission, voluntary or involuntary and brings it before Court of Law in a claim for non liquidated damages for such acts. This liability is also a branch of Law of Torts. Law of Torts like various other laws has travelled to this country through the British in India and now stands varied due to being regulated by certain local laws and Constitutional provisions.[2]

The first judicial interpretation of State liability during the East India Company was made in *John Stuart's case*, 1775. It was held for the first time that the Governor Genera~ in Council had no immunity from Court's jurisdiction in cases involving dismissal of Government servants. In ***Moodaly* v. *The East India Company***[3] the Privy Council expressed the opinion that Common law

[1] NATIONAL COMMISSION TO REVIEW THE WORKING OF THE CONSTITUTION
A Consultation Paper on *LIABILITY OF THE STATE IN TORT* http :// lawmin. nic. in/ ncrwc/ finalreport/ v2b1-13. htm (last visited on 10/11/14 at 09:42pm)

[2] TORTIOUS LIABILITY OF STATE UNDER THE CONSTITUTION http:// ijtr. nic. in/articles /art68.pdf (last visited on 10/11/14 at 09:38pm)

[3] 1775 (1 Bro-CC 469)

doctrine of sovereign immunity was not applicable to India.

The Old and archaic concept of Sovereign immunity that "King can do no wrong" still haunts us, where the state claim immunity for its tortious acts and denies compensation to the aggrieved party.[4]

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.[5]

Under the English Common Law the maxim was "The King can do no wrong" and therefore, the King was not liable for the wrongs of its servants. But, in England the position of old Common law maxim has been changed by the Crown Proceedings Act, 1947. Earlier, the King could not be sued in tort either for wrong actually authorised by it or committed by its servants, in the course of their employment. With the increasing functions of State, the Crown Proceedings Act had been passed, now the Crown is liable for a tort committed by its servants just like a private individual. Similarly, in America, the Federal Torts Claims Act, 1946 provides the principles, which substantially decides the question of liability of State.

The question of tortuous liability of State has raised many interesting debates in juridical arena. In India, there is no legislation, which governs the liability of the State for the torts committed by its servants. It is article 300 of the Constitution of India, 1950, which enumerates the liability of the Union or State in tortious act of the Government.

In the ***Privy Purse case*** [6]the Court had to consider the action of the President de-recognising all the Rulers under Article 366(22) of the Constitution. It was contended on behalf of the Union of India that the action of the President was in exercise of his sovereign power and was not amenable to judicial scrutiny. The Supreme Court rejected the contention and held that there is nothing like sovereign power under our Constitution in the matter of relationship between the executive and the citizens[7]. It held that the functions of the President stemmed from the Constitution and not from the British Crown. Hedge, J. observed[8]:

"Our Constitution recognises only three powers viz. the legislative power, the judicial

[4] http:// www. neerajaarora. com/doctrine-of-sovereign- immunity/ (last visited on 10/11/14 at 09:49pm)

[5] http:// www. neerajaarora. com/ doctrine-of-sovereign- immunity/ (last visited on 10/11/14 at 09:49pm)

[6] *Madhav Rao Scindia* v. *Union of India*, (1971) 1 SCC 85

[7] Id. on pages 53, 74, 75, 166, 169

[8] Id. on page 169

power and the executive power. It does not recognise any other power. In our country the executive cannot exercise any sovereignty over the citizens. The executive possesses no sovereignty.... There is no analogy between our President and the British Crown. The President is a creature of the Constitution. He can only act in accordance with the Constitution."

The Court failed to see how the Government of India can consider itself a superior power in its relationship with the citizens of this country[9].

However, despite such categorical and socially relevant observations, there does seem to exist areas of doubt where the ghost of 'sovereign power' and 'sovereign immunity' of the State still casts its shadow. It is a matter of deep regret that even after 1971, the courts in India continue to accept the distinction between 'sovereign' and 'trading' activities of the State and have on several occasions absolved the State of its liability for tort committed in the course of the former following ***Kasturi Lal case*** [10]decided in 1965.[11]

The Article 300 of the Constitution originated from Section 176 of the Government of India Act, 1935. This could be traced back from the Section 32 of the Government of India Act, 1915, the genesis of which can be found in section 65 of the Government of India Act, 1858. Section 65 of the Government of India Act, 1858 provided "All persons and bodies politic shall and may have and take the same suits, for India as they could have done against the said 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.

LIABILITY OF THE STATE

UNDER Article 300 OF THE CONSTITUTION

Article 300(1) of the Constitution provides, inter alia, that the State may sue or be sued in relation to its affairs in cases like those in which the Dominion of India or a corresponding Province or an Indian State might have sued or been sued if the Constitution had not been enacted.

Clause (1) of Article 300 of the Constitution provides first, that 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; secondly, that the Government of India or

[9] Id. on page 166
[10] *Kasturi Lal Ralia Ram* v. *Union of India*, AIR 1965 SC 1039
[11] State Liability in Tort — Need for a Fresh Look http:// www. ebc-india .com/ lawyer/ articles/ 94v2a2.htm (last visited on 10/11/14 at 09:51pm)

the Government of a State may 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 be sued, "if this Constitution had not been enacted", and thirdly, that the second mentioned rule shall be subject to any provisions which may be made by an Act of Parliament or of the Legislature of such State, enacted by virtue of powers conferred by the Constitution.[12]

Thus Article 300(1) relates back through successive Government of India Acts to the legal position immediately prior to the Act of 1858. In each case, therefore, the question arises whether a suit would lie against East India Company had the case arisen prior to 1858. If it did, the State can be sued, while if it did not, the State is not liable for the tort committed.[13]

Even though more than 50 years have elapsed since the commencement of the Constitution, no law has so far been made by Parliament as contemplated by article 300, notwithstanding the fact that the legal position emerging from the article has given rise to a good amount of confusion. Even the judgments of the Supreme Court have not been uniform and have not helped to remove the confusion on the subject, as would be evident from what is stated hereinafter.[14]

UNDER THE ACT of 1833

Under the Act of 1833 (3 and 4 William IV ch. 85), enacted by the British Parliament, the governance of India was entrusted to the East India Company. The Act declared that the Company held the territories in trust for His Majesty, his heirs and successors. When the governance of India was taken over by the British Crown in 1858, an Act was passed in that year (Act 21 and 22 Vic. ch.106), entitled the Government of India Act, 1858, Section 65 of that Act declared that the Government's liability in this behalf shall be the same as that of the Company[15]. It would be appropriate to set out the section in full:

"The Secretary of State in Council shall and may sue and be sued as well in India as in England by the name of the Secretary of State in Council as a body corporate; and all persons and bodies politic shall and may have and take the same suits, remedies and proceedings, legal and equitable, against the Secretary of State in Council of India, as they could have done against the said Company; and the property and effects hereby vested in Her Majesty for the purposes of to Government of India, or acquired for the said purposes, shall be subject and liable to the same judgments and executions as they would, while vested in the said Company, have been liable, to in respect of debts and

[12] *Supra note* 1
[13] *Supra note* 11
[14] *Supra note* 1
[15] *Ibid*

liabilities lawfully contracted and incurred by the said Company."

UNDER THE ACT OF 1915

This very provision, contained in the Act of 1858, was practically continued by section 32 of the Government of India Act, 1915. Sub-sections (1) and (2) of that section read as follows:

"(1) The Secretary of State in Council may sue and be sued by the name of the Secretary of State in Council, as a body corporate.

(2) Every person shall have the same remedies against the Secretary of State in Council as he might have had against the East India Company, if the Government of India Act 1858, and this Act had not been passed."

UNDER THE ACT OF 1935

Even when the Government of India Act, 1935, was enacted, (replacing the Act of 1915), the same legal position was continued by section 176(1) of the Act, which read as follows:

"The Federation may sue or be sued by the name of the Federation of India and a Provincial Government may sue or be sued by the name of the Province, and, without prejudice to the subsequent provisions of this Chapter, may, subject to any provisions which may be made by an Act of the Federal or a Provincial Legislature enacted by virtue of powers conferred on that Legislature by this Act, sue or be sued in relation to their respective affairs in the like cases as the Secretary of State in Council might have sued or been sued if this Act had not been passed."

PRE-CONSTITUTION JUDICIAL DECISIONS

THE CALCUTTA VIEW: *P & O Case*

The East India Company had dual role of performing commercial functions and of exercising sovereign power as a representative of the British Crown. It was in the latter role that the East India Company claimed sovereign immunity based on the maxim 'the king can do no wrong'.[16] This dual character of the East India Company has been explained in the ***Peninsular and Oriental Steam Navigation Company case (P & O case)***[17].

The facts of the case were that a servant of the plaintiff's company was proceeding on a highway in Calcutta, driving a carriage which was drawn by a pair of horses belonging to the plaintiff. He met with an accident, caused by negligence of the servants of the Government. For the loss caused by the accident, the plaintiff claimed damages against the Secretary of State for India. In that case, the plaintiff filed an action under Section 55 of Act IX of 1850 to recover from the Company Rs 350 being the damages sustained by reason of injuries caused to a horse of the plaintiff through the negligence

[16] *Supra note* 11

[17] (1861) 5 Bombay HCR App 1

of certain servants of the Company. Sir Barnes Peacock, holding the Company liable, said[18]:

"There is great and clear distinction between acts done in the exercise of what are usually termed as sovereign powers, and acts done in the conduct of undertaking which might be carried on by private individuals without having such power delegated to them....When an act is done or contract is entered into, in the exercise of powers usually called sovereign powers, by which we mean powers which cannot be lawfully exercised except by a sovereign, or a private individual delegated by a sovereign to exercise them, no action will lie."

The aforesaid judgment laid down that the East India Company had a two fold character:

(a) As a sovereign power and

(b) As a trading company.

The liability of the company could only extend to in respect of its commercial dealings and not to the acts done by it in exercise of delegated sovereign power. As the damage was done to the plaintiff in the exercise of non-sovereign function, i.e. the maintenance of Dockyard which could be done by any private party without any delegation of sovereign power and hence the government cannot escape liability and was held liable for the torts committed by its employees.[19]

The Supreme Court in ***Kasturi Lal case*** [20]relied on these observations of Sir Peacock to hold that the English maxim 'the king can do no wrong' was applicable to the East India Company and hence to the State in India, granting it immunity from an action in tort committed in the exercise of its 'sovereign power'.

THE ALLAHABAD and MADRAS VIEW:

Immunity confined to acts of State

In ***Secretary of State Vs. Hari Bhanji***[21], the Madras High Court held that State immunity was confined to acts of State. Turner CJ, in coming to this conclusion, pointed out that in the P & O Case (Supreme Court, Calcutta), Peacock CJ did not go beyond acts of State, while giving illustrations of situations where the immunity was available. The position was thus explained (in the Madras case):

"The act of State, of which the municipal courts of British India are debarred from taking cognisance, are acts done in the exercise of sovereign power, which do not profess to be justified by municipal law ……where an act complained of is professedly done under the sanction of

[18] *Ibid* on pages 15-16

[19] http:// www. neerajaarora. com/ doctrine-of-sovereign-immunity/ (last visited on 10/11/14 at 09:49pm)

[20] *Kasturi Lal Ralia Ram* v. *Union of India*, AIR 1965 SC 1039

[21] (1882) ILR 5 Mad. 273

municipal law, and in exercise of powers conferred by that law, the fact that it is done by the sovereign powers and is not an act which could possibly be done by a private individual does not oust the jurisdiction of the civil court".

It should, however, be mentioned that the Madras judgment in ***Hari Bhanji***[22] also adds, that the Government may not be liable for acts connected with public safety (even though they are not acts of State).

The Madras High Court re-iterated this view in ***Ross Vs. Secretary of State***[23]***.***

The Allahabad High Court took a similar view in ***Kishanchand Vs. Secretary of State***[24].

However, in ***Secretary of State Vs. Cockraft***[25], making or repairing a military road was held to be a sovereign function and the Government was held to be not liable, for the negligence of its servants in the stacking of gravel on a road resulting in a carriage accident injuring the plaintiff. (The more liberal approach of *Hari Bhanji*[26] was thus slightly modified).

THE BOMBAY VIEW: Immunity available, only for acts of State

In the Bombay case of 1949 – ***Rao Vs. Advani***[27], Chagla CJ and Tendolkar J., held that the Madras view (***Hari Bhanji*** case) was correct. The Bombay case was not one of a claim to damages for tort, but related to a petition for certiorari to quash a Government order for the requisitioning of property, as proper notice had not been given. On appeal, the Supreme Court – ***State of Bombay Vs. Khushaldas Advani***[28], reversed the High Court, holding that natural justice was not required to be observed, before requisitioning any property. B K. Mukherjea J. (as he then was), approved the Madras view and accepted the definition of "act of State" given in ***Eshugbayi Vs. Government of Nigerla***[29]. Other judges of the Supreme Court did not express any views on this point. Mukherjea J. took care to point out, that in the ***P & O case***[30], the question at issue was, whether the Secretary of State for India could be sued for a tort committed in the course of a business. Whether he could be sued for cases not connected with business, was not at issue, in the ***P & O case***.

POST CONSTITUTIONAL JUDICIAL DECISIONS

***Vidyawati Case*: A broad approach**

So far as the Supreme Court is concerned, ***State of Rajasthan Vs. Vidyawati***[31], is the first post-Constitution judgment on the subject under consideration.

[22] (1882) ILR 5 Mad. 273
[23] AIR 1915 Mad. 434.
[24] (1881) ILR 2 All 829
[25] AIR 1915 Mad 993; ILR 39 Mad. 35
[26] (1882) ILR 5 Mad. 273
[27] AIR 1949 Bom. 277, 51 Bom LR 342
[28] AIR 1950 SC 222
[29] (1931) AC 662, 671
[30] (1861) 5 Bombay HCR App 1
[31] AIR 1962 SC 933

That was a case where the driver of a Government jeep, which was being used by the Collector of Udaipur, knocked down a person walking on the footpath by the side of a public road. The injured person died three days later, in the hospital. The legal representatives of the deceased sued the State of Rajasthan and the driver for compensation / damages for the tortious act committed by the driver. It was found by the court, as a fact, that the driver was rash and negligent in driving the jeep and that the accident was the result of such driving on his part. The suit was decreed by the trial court, and also by the High Court. The appeal against the High Court judgment was dismissed by the Supreme Court.

The position of law, obtaining both prior and subsequent to 1858, the position obtaining under article 300 of the Constitution and the facts and circumstances leading to the formation of the State of Rajasthan, were all reviewed by the Supreme Court in ***State of Rajasthan Vs. Vidyawati,*** (supra), which held as under:

"The State of Rajasthan has not shown that the Rajasthan Union, its predecessor, was not liable by any rule of positive enactment or by Common Law. It is clear from what has been said above, that the Dominion of India, or any constituent Province of the Dominion, would have been liable in view of the provisions aforesaid of the Government of India Act, 1858. We have not been shown any provision of law, statutory or otherwise, which would exonerate the Rajasthan Union form vicarious liability for the acts of its servants, analogous to the Common Law of England. It was impossible, by reason of the maxim "The King can do no wrong", to sue the Crown for the tortious act of its servant. But it was realised in the United Kingdom, that that rule had become outmoded in the context of modern developments in statecraft, and Parliament intervened by enacting the Crown Proceedings Act, 1947, which came into force on January 1, 1948. Hence the very citadel of the absolute rule of immunity of the sovereign has now been blown up. Section 2 (1) of the Act provides that the "Crown shall be subject to all those liabilities, in tort, to which it would be subject, if it were a private person of full age and capacity, in respect of torts committed by its servants or agents, subject to the other provisions of this Act. As already pointed out, the law applicable to India in respect of torts committed by a servant of the Government was very much in advance of the Common law, before the enactment of the Crown Proceedings Act, 1947, which has revolutionised the law in the United Kingdom, also. It has not been claimed before us, that the common law of the United Kingdom, before it was altered by the said Act with effect from 1948, applied to the Rajasthan Union in 1949, or even earlier. It must, therefore, be held that the State of Rajasthan has failed to discharge the burden

of establishing the case raised in Issue No. 9, set out above."

"Viewing the case from the point of view of first principles, there should be no difficulty in holding that the State should be as much liable for tort in respect of tortious acts committed by its servant within the scope of his employment and functioning as such, as any other employer. The immunity of the Crown in the United Kingdom was based on the old feudalistic notions of justice, namely, that the King was incapable of doing a wrong, and, therefore, of authorising or instigating one, and that he could not be sued in his own courts. In India, ever since the time of the East India Company, the sovereign has been held liable to "be sued in tort or in contract, and the Common law immunity never operated in India. Now that we have, by our Constitution, established a Republican form of Government, and one of the objectives is to establish a Socialistic State with its varied industrial and other activities, employing a large army of servants, there is no justification, in principle, or in public interest, that the State should not be held liable vicariously for tortious acts of its servant. This Court has deliberately departed from the Common Law rule that a civil servant cannot maintain a suit against the Crown. In the case of ***State of Bihar Vs. Abdul Majid***[32], this Court has recognised the right of a Government servant to sue the Government for recovery of arrears of salary. When the rule of immunity in favour of the Crown, based on Common Law in the United Kingdom, has disappeared from the land of its birth, there is no legal warrant for holding that it has any validity in this country, particularly after the Constitution. As the cause in this case arose after the coming into effect of the Constitution, in our opinion, it would be only recognising the old established rule, going back to more than 100 years at least, if we uphold the vicarious liability of the State. Article 300 of the Constitution itself has saved the right of Parliament or the Legislature of a State to enact such law as it may think fit and proper in this behalf. But, so long as the Legislature has not expressed its intention to the contrary, it must be held that the law is what it has been, ever since the days of the East India Company."

THE *Kasturi Lal* CONTROVERSY

In ***Kasturi Lal case*** [33]a police officer misappropriated the gold deposited in police Malkhana after seizing it from the plaintiff on suspicion. Later he absconded. It was found that the police officers were negligent as they failed to observe the provisions of the U.P. Police Regulations in taking care of the gold seized. The Supreme Court held that since the negligence of the police officers was in the exercise of statutory powers, which could

[32] (1954) SCR 786: (AIR 1954 SC 245)

[33] *Kasturi Lal Ralia Ram* v. *Union of India*, AIR 1965 SC 1039

be characterised as sovereign powers, the State was not vicariously liable for the same.

The Court relied on Sir Peacock's observations in ***P & O case*** [34]to hold that if an activity could not be performed by a private individual, such activity could be termed as sovereign activity and the State is not vicariously liable for any tort arising from the exercise of such activity.

It is submitted that the decision in ***Kasturi Lal case*** [35]is not legally sound and cannot be considered good law for the following reasons[36]:

(*a*) The Supreme Court in *Kasturi Lal case* relied on Sir Peacock's observations in ***P & O case*** [37]to reason that the maxim 'the king can do no wrong' applied to the East India Company and hence to the State in India. The Court however overlooked another observation of Sir

Peacock[38] to the effect that "the general principles applicable to sovereign and State, and the reasoning deduced from the maxim 'the king can do no wrong', would have no force" in determining the question whether East India Company was liable in tort. This statement of Sir Peacock had been cited by the Bombay High Court in ***Advani case*** [39], a judgment which was upheld by the Supreme Court in 1950[40] . It is surprising that the Supreme Court in ***Kasturi Lal case*** [41]did not even refer to its own earlier decision of 1950.

(*b*) The illustrations of 'sovereign power' given by Sir Peacock, coupled with his statement quoted above, indicate that he meant 'sovereign power' to be understood as acts of State in the strict sense. Act of State cannot be directed against the citizens of that State but only against another State. According to Dicey[42] "liability of East India Company extends to all wrongful acts which are not covered by the narrow meaning which the Courts apply to the term 'Act of

State', whether or not they be acts which could have been done by a private individual or trading corporation."

(*c*) ***P & O case*** [43]is an authority for the proposition that the Secretary of State can be sued for a tort committed in the conduct of business (trading activity of the State). Whether he can be sued in cases not connected with the conduct of business (sovereign activity of the State) was not really a question for the Court to decide.

(*d*) Even if it is presumed that Sir Peacock had said what was attributed to him in

[34] (1861) 5 Bombay HCR App 1
[35] *Kasturi Lal Ralia Ram* v. *Union of India*, AIR 1965 SC 1039
[36] *Supra note* 11
[37] (1861) 5 Bombay HCR App 1
[38] (1861) 5 Bombay HCR App 1
[39] *P.V. Rao* v. *Khushaldas S. Advani*, (1949) 51 Bombay LR 342 at 410
[40] *Province of Bombay* v. *Kusaldas S. Advani*, 1950 SCR 621: AIR 1950 SC 222
[41] *Kasturi Lal Ralia Ram* v. *Union of India*, AIR 1965 SC 1039
[42] Introduction to the ninth edn. of Dicey's *Law of Constitution* (1952)
[43] (1861) 5 Bombay HCR App 1

Kasturi Lal case [44], that is, the maxim 'king can do no wrong' applied to East India Company, the fallacy lies in overlooking Article 372 which provides for continuance of the existing common law after the commencement of the Constitution. In U.K., the case of ***Adam* v. *Naylor***[45] resulted in the passing of the Crown Proceedings Act, 1947, which abolished the concept that the 'king can do no wrong' and subjects the Crown to all liabilities in tort just like a private individual. It is true that Crown Proceedings Act was not extended to India. However, having been passed by the British Parliament on 31st July 1947, it modified the common law as it stood prior to 15th August 1947, the date of the commencement of the Indian Independence

Act. Since the Crown Proceedings Act became operative from January 1, 1948 i.e. prior to the commencement of the Constitution, the common law as modified by the Crown Proceedings Act, 1947 would have been the 'law in force' vide Article 372, Explanation 1. Obviously the maxim 'king can do no wrong' was no part of common law that could be extended in ***Kasturi Lal case***[46].

It can however be argued that the modified common law had not received judicial recognition between January 1, 1948 and January 26, 1950 and hence it could not be extended vide Article 372. It is submitted that it is a question of fact in each case whether any particular branch of common law became a part of the law of India or in any particular part of it. Since several judicial decisions had held that common law principles granting immunity to the Crown and its servants for an action in torts applied to the East India Company, it could be countered the subsequent modification of such principles did not require express recognition. It is interesting to note at this juncture that the only judicial decision in the said period on this aspect, had expressly held[47] that the maxim 'the king can do no wrong' had no application to the East India Company.[48]

DISTINCTION BETWEEN SOVEREIGN AND NON-SOVERIGN FUNCTIONS OF THE STATE

This distinction between sovereign and non-sovereign functions was considered at some length in ***N. Nagendra Rao Vs. State of AP*** [49]. All the earlier Indian decisions on the subject were referred to. From a reading of the judgment in ***Nagendra Rao***[50], one can discern the following strands[51]:

[44] *Kasturi Lal Ralia Ram* v. *Union of India*, AIR 1965 SC 1039
[45] (1947) KB 204
[46] *Kasturi Lal Ralia Ram* v. *Union of India*, AIR 1965 SC 1039
[47] *Province of Bombay* v. *Kusaldas S. Advani*, 1950 SCR 621: AIR 1950 SC 222
[48] *Supra note* 11
[49] AIR 1994 SC 2663; (1994) 6 SCC 205
[50] AIR 1994 SC 2663; (1994) 6 SCC 205
[51] *Supra note* 1

(a) Non-existence of the distinction:

In the modern sense, the distinction between sovereign or non-sovereign functions does not

exist.

(b) Non-liability for political acts:

One of the tests is, whether the State is answerable for such actions in courts of law.

Examples of non-liability are-functions which are indicative of external sovereignty and are political in nature, (such as) defence, foreign affairs, etc.

(c) Immunity ends with political acts:

Immunity ends with political acts, described above. No legal or political system can place the State above (the law), as it is unjust and unfair for a citizen to be deprived of his property

illegally by (the) negligent act of officers of the State without any remedy.

Statutory power is to be viewed as a statutory duty.

(d) The demarcating line: primary and inalienable functions:

The demarcating line between "sovereign" and "non-sovereign" powers, has largely disappeared. Therefore, barring functions such as administration of justice, maintenance of law and order and repression of crime etc. which are among the primary and inalienable functions of a constitutional Government, the State cannot claim any immunity.

(e) Misfeasance doctrine:

Vicarious liability of the State is linked with the negligence of its officers. The law of misfeasance in discharge of public duty having marched ahead, there is no rationale for the proposition that even if the officer is liable, the State cannot be sued.

(f) Kasturi Lal's case: inalienable functions

Kasturi Lal case was related to powers of arrest, search etc. The power to search and apprehend a suspect under the Criminal Procedure Code is one of the inalienable powers of the State.

It would be evident from the ***Nagendra Rao*** and other case laws on the subject, that definiteness of the precise contours and certainty of principles of universal application are lacking. While holding that the distinction between sovereign powers and non-sovereign powers has become academic in the present day Welfare State, the court in *Nagendra Rao* (with respect) again affirms and accepts the theory of "primary and inalienable functions". One can understand the difficulty faced by the Bench in *Nagendra Rao's* case. It was a Bench of two judges, whereas *Kasturi Lal's* case was decided by a Constitution Bench of five judges.

Vidyawati was also decided by a Constitution Bench of five judges).[52]

NEW TREND IN JUDICIAL DECISIONS

The new trend in compensations and providing relief in cases depicts the new-fangled interpretation of State liability by the Judiciary. Since there was failure of Parliament action, the courts tried to improve the situation through their pronouncements. They have tried to adjust the archaic law to the realities of modern State and have limited State Immunity by holding more and more functions of the State as non- sovereign.[53] But, still the courts regarded maintenance of law and order as a Sovereign function.

The use of lathicharge on an unruly procession by the police was in the ambit of immunity and not justiciable[54]. This position needs redress.

In ***Satyawati Devi V. Union of India*** [55]the court held the state liable and said that carrying hockey and basketball teams in an Air Force vehicle cannot be a sovereign function. The test applied by the courts was 'whether it was necessary for the State for the proper discharge of sovereign functions to act through its employees rather than a private agency.'

In ***State of M.P. V. Ram Pratap*** [56]also, the State was held liable for an injury caused by a trick of Public Works Department because the activities of the department were such as could be carried out by a private person also.

In ***Common Cause, a Registered Society V. Union of India*** [57]relying heavily on the *Nagendra Rao Case*, the court held that allotment of petrol pumps by a minister could not be treated as 'act of state' and there can be no immunity from action. The court stated that "much of the efficacy of" *Kasturilal case* as a "binding precedent has eroded." Prior to the above decision the court also circumvented *Kasturilal case* and held that the state would be liable for the tortuous act of a truck driver engaged in famine relief.

Furthermore that the sovereign function of the state must be narrowly and strictly construed. Such a work can be undertaken by private individuals as well, there is nothing peculiar about it so that it might be predicated that the state alone can legitimately undertake such a work.[58]

After the codification of liability in torts under the Consumer Protection Act 1986, Motor Vehicles Act, the Public Insurance Act 1990, Prevention of Food Adulteration Act 1954, Drugs and Cosmetics Act 1940 etc. the

[52] *Ibid.*
[53] Ashwin Abhinav: Government Liability in Torts in the 21st Century, AIR Journal, Vol.90 Feb. 2003 p. 28
[54] State of Madhya Pradesh V. Chironjilal AIR 1981 MP 65
[55] AIR 1960 SC 610
[56] AIR1972 MP 219
[57] AIR 1999 SC 2979
[58] Shyam Sunder V. State of Rajasthan AIR 1974 SC 890

liability has been fixed on the violator, be it State or private individuals. Thus the locus of State Liability can be more easily determined in such cases. Aside this, new dimensions of State liability are evolved by the courts from time to time.[59]

Chandrima Das Case: A REMARKABLE APPROACH

In ***Chairman Railway Board V. Chandrima Das*** [60]the establishment of Yatri Niwas to provide boarding and lodging to passengers on payment of charges was regarded as a commercial activity of the Union of India and cannot be equated with the exercise of sovereign power. The employees who run the Railways, manage railway stations and Yatri Niwas constitute the government machinery and if they commit tortious act, the government can, subject to satisfaction of other legal requirements be vicariously liable. In the instant case, rape was committed on a foreigner by railway employees while she was staying at the railway Yatri Niwas.

The Supreme Court observed: "the theory of sovereign power which was propounded in *Kasturi Lal case* has yielded to new theories and is no longer available in a welfare state. It may be pointed out that the functions of the government in a welfare state is manifold." The distinction between public and private law and the remedies under the two was emphasised.

It was held that "where public functionaries are involved and the matter relates to the violation of fundamental rights or the enforcement of public duties, the remedy would still be available under the public law notwithstanding that a suit could be filed for damages under private law."

Thus the scope of tortious liability has been extended to even the cases of rape, which ordinarily is an act of individual volition. It opens up the possibility of development of public law torts which requires different considerations than the private law torts and which is more suitable for State liability in torts. The sovereign area is shrinking and the non sovereign area is expanding through judicial activism. It also leads to the emerging concept of constitutional liability of the State.[61]

EXEMPLARY DAMAGES FOR CONSTITUTIONAL TORTS

In keeping with the new approach, the courts have granted exemplary damages in certain cases to highlight the abuse of power and holding that the duty of the State was greater and admits no exception as well as to set an example.

[59] Tortious Liability Of State: A New Judicial Trend In India http:// www. sciencepub. net/ researcher/ research0605/008 _24607research060514_43_51.pdf (last visited on 10/11/14 at 09:39pm)

[60] AIR 2000 SC 988

[61] *Supra note* 65

The trend began with ***Rudal Shah case***[62], where a person was held in jail for a period of fourteen years even after his acquittal. He was deprived of his life and liberty in violation of a procedure established by law. He demanded relief like rehabilitation, reimbursement of expenses which he might incur on medical treatment and compensation for illegal confinement. The Supreme Court gave compensation of Rs. 35,000 as an interim measure without restraining his remedy to recover damages under private law. Justice Y.V Chandrachud categorically said "the State must repair the damage done by its officials to the petitioner. This right to compensation is in the nature of palliative for the unlawful acts of instrumentalities that act in public interest and put the State's sovereign power as their shield." It has been observed by the Court that the object of public law is not only 'to civilize public power', but also to assure citizens that they live under a legal system which aims to protect their rights and interests. This remedy is not in derogation of any other remedy under private law or criminal law.[63]

It shows that the emphasis was laid on his injury in keeping with the rules of law of torts instead of being on the power that caused it. In a recent case the court has gone to the extent of providing relief for negligence of Public Health Officials.[64] A poor lady having a number of children got herself operated at a government hospital for complete sterilization but she gave birth to a child later. The court awarded damages to the lady equal to the cost of bringing up the unwanted child upto the age of eighteen. This establishes the principle of vicarious liability of the state for negligence of the medical officials. The court regards running of hospitals as a non-sovereign function.

In ***Sebastian M. Hongray V. Union of India***[65], the scope of the remedy in Rudal Shah was extended to cases where the army takes people into custody and fails to explain his whereabouts when asked to produce him. The damages given by the court were upto Rs. 1,00, 000 to each of the wives of the two persons.

In ***Bhim Singh V. State of Jammu and Kashmir***[66] cases of unlawful and malicious detention were also covered. The court granted damages of Rs. 50,000 and opined that police torture and custodial violence if not effectively controlled, are abuse of every legal system.

An important case deserving mention is ***Saheli V. Commissioner of Police***[67]. The illegal acts of Delhi policemen were brought to notice by a women's organization. A lady tenant was harassed by the landlord in

[62] Rudal Shah V. State of Bihar (1983) 4 SCC 141
[63] Supra, note 23, p. 30
[64] State Of Haryana V Santra AIR 2000 SC 1888
[65] AIR 1984 SC 1026
[66] AIR 1986 SC 494
[67] AIR 1990 SC 513

conspiracy with the police so that she may vacate the house. She was attacked and molested with the help of police officials, implicated in a false case, and called to the police station where her nine year old son was slapped and beaten. After a few days, the boy died, for which exemplary damages were claimed by 'Saheli'. The court ordered compensation of Rs. 75,000 to the mother of the deceased. The court also held that there will be no distinction between the case violating fundamental rights and legal rights.

The courts have thus departed from the proposition in *Kasturi Lal case*, though they did not openly denunciate it. In *Nilabati's case*, the court made it clear that it would not hesitate, in deserving cases, to go a step further and create a new relief to check abuse of power and preserve rule of law.[68]

In ***Peoples' Union for Democratic Rights V. State of Bihar***[69], twenty one persons died as a result of police firing at a peaceful meeting. The court gave compensation of Rs. 20,000 for each death, without prejudice to any just claim of compensation which could be filed by their legal representatives.

D.K. Basu V. State of West Bengal[70] is an important case wherein the Supreme Court considered a petition under public interest litigation to deal with case of custodial violence and deaths in police lockups. The Supreme Court held that if the functionaries of government become law breakers, it is bound to breed contempt for law and encourage lawlessness. In its effort to set a human rights trend, the court said that right to life cannot be denied to convicts, undertrials, detenues and others in custody, except according to procedure established by law. It was also stated by the court that pecuniary compensation is an effective remedy for redressal of infringement of right under Article 21 by public servants. The objective was to apply balm to the wounds and not punish the offender. The court also gave some directions to all states regarding arrest and detention.

The above view is now followed and monetary compensation can be awarded for custodial death or torture in civil proceedings too. The nature of liability would remain same, irrespective of the forum.[71] Indeed, the human rights angle is very important in assessing the accountability of the State in its unjustified actions.

OBSCURITY IN APPLICATION

There is considerable obscurity as to the way in which the distinction between sovereign and non-sovereign functions is applied in practice.

[68] *Supra note* 65
[69] AIR 1987 SC 355
[70] AIR 1997 SC 610

[71] Yadav Surendra: Changing Dimensions of State Liability in India, Indian Socio-legal Journal, Vol.29, 2003

Thus, (for example), it has been held that the following are sovereign functions[72].

(i) Commandeering goods during war: *Kesoram Vs. Secretary of State*[73]

(ii) making or repairing a military road: *Secretary of State Vs. Cockraft*[74]

(iii) administration of justice: *Mata Prasad Vs. Secretary of State*[75]

(iv) improper arrest, negligence or trespass by police officers: *Kedar Vs. Secretary of State*[76]

(v) removal of an agent, by the labour supplying association under an ordinance[77]

(vi) negligence of officers of the court of wards, in the administration of estate in their charge: *Secretary of State Vs. Sreegovinda*[78]

(vii) removal of a child by the authorities of a hospital, maintained out of the revenues of the state: *Etti Vs. Secretary of State*[79]

(viii) negligence of the chief Constable, in seizing hay under a statutory power[80]

On the other hand, in the following cases the State has been held liable, on the ground that the tortious act was committed in the exercise of non-sovereign functions of the State.[81]

(i) Negligence in the seizure of goods under a statutory, power: *Shivabhajan Durga Prasad Vs. Secretary of State*[82]

(ii) Torts committed by the police, while making a lathi charge on a procession, are not actionable against the State, as the police are performing functions concerning law and order, delegated to them under section 30, Police Act: *State of MP Vs. Chirojilal*[83]

(iii) State is not liable, where the police assault a member of a mob, for dispersing, it when there was apprehension of attack on the office of the S.D.O.: *State of Orissa Vs. Padmalochani*[84]

However, the State may agree to grant compensation to the victims of such acts[85].

(iv) Moreover, the position may be different, where a person's constitutional right to trade is involved and he seeks relief through writ: *P. Gangadharan Pillai Vs. State of Kerala*[86]

On the other hand, in the following cases, the function was held to be non-sovereign[87].

(i) Accident caused by a driver of the Public Works Department, while carrying materials for building a road bridge, is a non-sovereign function: *Rup Ram Vs. Punjab State*[88].

[72] *Supra note* 1
[73] (1928) ILR 54 Cal. 969
[74] ILR 39 Mad. 351
[75] ILR 5 Luck. 157
[76] ILR 9 Rang. 375
[77] ILR 37 Mad. 55
[78] (1932) 36 Cal. WN 606
[79] AIR 1939 Mad. 663
[80] ILR 28 Bom. 314
[81] *Supra note* 1
[82] ILR 28 Bom 314; 6 Bom LR 65
[83] AIR 1981 MP 65.
[84] AIR 1975 Orissa 41
[85] AIR 1987 SC 355.
[86] AIR 1996 Ker 71
[87] *Supra note* 1
[88] AIR 1961 Punj 336

(ii) Doctor in a Government hospital. performing sterilisation operation of a lady patient, left a mop inside her abdomen. She developed peritonitis as a consequence and died. Government was held liable: *A. H. Khodwa Vs. State of Maharashtra*[89] (It is a non-sovereign function).

(iii) Taking ailing children to a primary health centre is not a sovereign function: *Indian Insurance Co. Association Vs. Radhabai*[90]

(iv) Famine relief is not a sovereign function: *Shyam Sunder Vs, State of Rajasthan*[91]

(v) Carrying away detenues, in order to prevent them from indulging in a riot, is not a sovereign function: *State of Punjab Vs. Lal Chand Sabharwal*[92]

(vi) Maintaining a treasury, where excise duties are to be deposited, is not a sovereign function: *State of UP Vs. Hindustan Lever Ltd.*[93]

(vii) Where vehicles are seized by a Government officer under statutory powers, Government is a bailee and is liable for negligence in looking after them: *State of Gujarat Vs. Memon Mohamed*[94]

STRICT LIABILITY IN GOVERNMENT TORTS

There is strict liability of State in the case of torts injuring the fundamental rights of the citizens. The fundamental rights form the basic structure and the courts cannot shy away in providing relief in case of their infringement. There is a specific remedy under Article 32 by way of Rights against Constitutional Remedies, which is again a fundamental right. The courts have recognized strict liability in these cases and pronounced far reaching judgements. However, they can be more appropriately discussed in a discussion on Fundamental Rights. The writer would restrict herself here to a discussion only on relevant aspects of strict liability in state action. The ever increasing abuse of power by the public authorities and their arbitrary interference with the life and liberty of the individuals which is a fundamental right under Article 21 of the Constitution, coupled with the new social outlook that places emphasis on individual liberty, has resulted in an approach by the Courts where they consider abuse of public power as violative of the constitutional guarantee. In such cases, the courts have directed State to pay compensation to the victim.[95]

In ***Nilabati Behra's case***[96] J.S. Verma J observed: "……it may be mentioned straightaway that award of compensation in a proceeding under Article 32 by this court or by the High Court under Article 226 of the Constitution is a remedy available in public

[89] (1996) ACJ 505 (SC)
[90] AIR 1978 MP 164.
[91] AIR 1964 SC 890.
[92] AIR 1975 P&H 294
[93] AIR 1972 All 456, 442
[94] AIR 1967 SC 1885
[95] *Supra note* 65
[96] AIR 1993 SC 1960

law, based on strict liability for contravention of fundamental rights to which the principle of sovereign immunity does not apply, even though it may be available as a defence in private law in an action based on tort……".

In this case, a person was caught by the police and kept in police custody. His dead body was found on the railway track with multiple injuries the next day. The police concocted a story that he tried to run away from the prison and then committed suicide.

The court wanted the inquiry to be conducted by the District Magistrate or through some independent agency. In such circumstances, the burden lay on the State to show how death was caused. The State could not prove its innocence and thus was directed to pay compensation to the tune of Rs. 1.5 lacs as per the trend developed through the case law. The Court showed judicial activism and said that new tools could be evolved to advance remedy to the people who are not equal against the State, especially in case of violation of Fundamental Rights.

In ***All India Lawyers Union V. Union of India*** [97]a child of municipal school was crushed to death by a vehicle when he was crossing the road to drink water because water was not available in school premises. The court regarded as negligence of school authorities and awarded damages on a writ petition filed under Article 226. Thus the defense of sovereign immunity is not available when the officers of the government are guilty of interfering with the life and liberty of citizens not warranted by law. The State is not only constitutionally but also morally and legally liable to indemnify the wronged person.

The Supreme Court has also introduced the notion of Strict and Absolute Liability in case of an enterprise engaged in hazardous activity in ***M.C.Mehta v. Union of India.*** [98]The Court said that this case is not about the officers of the State, but the principle would be applicable to the non-sovereign functions of the State. This liability is not subject to any of the exceptions under the rule in ***Rylands v. Fletcher***[99]. If any industry causes any damage, compensation is to be paid to the victims. "The measure of compensation must be correlated to the magnitude and the capacity of the enterprise because such compensation must have a deterrent effect. The larger and more prosperous the enterprise, the greater the amount of compensation payable by it."

In the light of above judgment, it is submitted that the rule of sovereign immunity must also be scrapped and the State must also be compelled to pay compensation in certain circumstances.

The Supreme Court in ***Union Carbide Corporation v. Union of India***[100] has again

[97] AIR 1999 Del 120
[98] 1987 1 SCC 395
[99] 1868 LR 3 HL 330
[100] AIR 1990 SC 273

said that the measure of damages to be paid by the alleged tort feaser as per the nature of the tort involved in the suit has to be correlated to the magnitude and the capacity of the enterprise. The distinction between acts of state and sovereign immunity is irrelevant now because the concept of sovereign and non- sovereign actions is itself diluted. Today, the emphasis is on making the State liable for any tort committed by its servants which injure a citizen violating his rights.[101]

NEED FOR A LEGISLATION - THE PRESENT SCENARIO:

From the brief discussion of the present state of the law relating to liability of the State in tort in India, it is apparent that the law is neither just in its substance, nor satisfactory in its form. It denies relief to citizens injured by a wrongful act of the State, on the basis of the exercise of sovereign functions, a concept which itself carries a flavour of autocracy and highhandedness. One would have thought, that if the State exists for the people, this ought not to be the position in law. A political organisation which is set up to protect its citizens and to promote their welfare, should, as a rule, accept legal liability for its wrongful acts, rather them denounce such liability. Exceptions can be made for exceptional cases – but the exceptions should be confined to genuinely extraordinary situations.[102]

ARTICLE 300: A WEAK FOUNDATION:

Keeping aside the injustice, in point of substance, of the existing law, there are several other serious defects in the present position. The foundation of the present law is article 300 of the Constitution. Its language necessarily takes one, through successive steps of (what may be called) tracing back of the genealogy of the law, to a moment of time residing in the 19th Century – that too, to a moment when the country was governed or dominated by alien rulers. The law is, in effect, based upon archaic provisions. In this sense, article 300 has turned out to be a weak foundation, on which to build up an edifice of the law on the subject.[103]

POST CONSTITUTIONAL DECISIONS:

Besides this, even if one keeps one's researches limited strictly to post-Constitution decisions, the picture is equally confusing. There is a manifest conflict of judicial decisions. In theory, the dividing line between sovereign and non-sovereign functions is the criterion of liability. But there are serious disparities in the stance adopted by various courts in this regard. Courts themselves have expressed their uneasiness

[101] *Supra note* 65
[102] *Supra note* 1
[103] *Ibid.*

about this test and about the difficulties in its practical application, particularly in *Kasturi Lal case a*nd *N. Nagendra Rao case.*[104]

NEED FOR CERTAINTY AND CODIFICATION:

This Commission is strongly of the view, that this is one area of the law where the need for a clear statement of the law in a statutory form is urgent and undeniable Jurists may hold different views as to the relative merits of codified and un-codified law. But this is definitely an area where a statutory formulation is badly needed, in the light of the considerations set out in the preceding paragraphs. We consider it desirable that the general should be reduced to particular. Abstract doctrines must be converted into concrete propositions; and the law should present itself in legislation that is at least easily accessible and conveniently readable. So far as the subject under consideration is concerned, the legal maxim. *Ubi jus incertum, ibi jus nullum* (where the law is uncertain, there is no law), can be applied, with great force.[105]

POSITION IN USA: EXEMPTION TO STATE ACTION

The typical constitutional tort involves an individual who was injured because of a government official's alleged wrongdoing, like an unreasonable search, or custodial rape. It is, thus, hard to precisely determine the difference between constitutional and common law torts.[106] Essentially, constitutional tort law marries the substantive rights granted by the Constitution to the remedial mechanism of tort law.[107] The difference between constitutional torts and a civil action against the government is accentuated by the inapplicability of the common law defence of "sovereign immunity" to constitutional tort. Fundamental rights are designed to limit the reach of the state, while sovereign immunity would effectively bar the vindication of those rights, when the state transgresses them.[108]

The U.S. has a written Constitution guaranteeing a Bill of Rights, which contains the Due Process of Law clause. The said clause confers wide powers on the judiciary to provide complete justice, and to order monetary compensation in appropriate cases. Traditionally, however, the Constitution has not been made the basis for affirmative remedies. There has been a strong bias towards nullifying the effect of constitutional violations, as in ***Mapp v. Ohio***[109]*,* wherein it was simply held that evidence gained by the State in contravention of the Fourteenth Amendment could not be used in the courts.

From the mid-twentieth century, courts expanded the range of remedies available for

[104] *Id.*
[105] *Id.*
[106] S. Nahmod, *Section* 1983 *and the "Background" of Tort Liability, (1974)* 50 IND.L.J. 5.
[107] M. Wells, *Constitutional Remedies, Section* 1983 *and the Common Law,* (1998) 68 MISS. L.J. 157, 157.
[108] R.C. JHA, FUNDAMENTALRIGHTS AND SOVEREIGN IMMUNIIT 26-46 (1995).
[109] 367 U.S. 943 (1961).

constitutional violations. The constitutional tort action emerged from two Supreme Court judgments, wherein the Supreme Court acknowledged that the common law could not adequately regulate the government's unique power to inflict injuries, and established a system where the Constitution, rather than state common law systems, governs the actions of federal and state officials, which cause injury to individuals.

In ***Monroe v. Pape***[110]*;* the Court held that section 1983[111] extends to a State official's acts that exceed his authority, creating an avenue for individuals to argue that the Constitution itself regulated State government officials' acts, and the number of section 1983 cases brought to federal courts exploded, as they were not restricted any more to only the State law. It was observed by some commentators that this appeared to be the beginning point of the evolution of the concept of "Constitutional Tort."[112]

In 1971, in the landmark case of ***Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics***[113]*,* the American Supreme Court held that the violation of the Fourth Amendment could be made the basis of a civil suit against erring federal officers. This filled the remedial gap created after *Monroe,* for individuals wishing to bring suits for the misconduct of federal officials. Harlan, J., in a famous statement, said:

"For people in Bivens' shoes, it is damages or nothing."

Thus, the American Bill of Rights is a constitutional limitation, powerful enough to be directly made the basis of an action for damages, without awaiting legislative authorization. There is no reason why the same should not hold true for fundamental rights in the Indian Constitution.[114]

CONCLUSION

It is ironical that the State in India relies on the English maxim 'the King can do no wrong' to claim immunity for any tort arising from the exercise of its 'sovereign power'

[110] 365 U.S. 167 (1961).

[111] The sweeping language of 42 U.S.C. § 1983 (commonly known as § 1983) provides that:
"Every person who, under color of any [state law] subjects, or causes to be subjected, any [person] to the deprivation of any [constitutional rights] shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."
The United States Congress enacted § 1983, in 1871, in response to the widespread violence against blacks in the South, and it is the foundation of most suits against state and local government employees to remedy federal law violations.

[112] M.S. Shapo, *Constitutional Tort:* Monroe *v.* Pape, *and the Frontiers Beyond,* (1965) 60 Nw. U. L. REV. 277, 324, *cited from* Whitman, *Constitutional Torts, supra* note 4, at 6.

[113] where six federal agents entered the appellant's residence at night, arrested, manhandled and searched him, and repeated the same at their headquarters. The Court felt that in the absence of effective alternative remedies, the Fourth Amendment could directly be made the basis of an action for damages without waiting for a legislative mandate. Thus, the Supreme Court sanctioned an affirmative remedy based directly on the Constitution.

[114] CONSTITUTIONAL RIGHTS VIOLATIONS AND COMPENSATORY JURISPRUDENCE IN INDIA AND U.S.A.: JUSTIFICATIONS AND CRITIQUE https:// www. nls. ac. in/ students/ SBR/ issues/vol181/18106.pdf (last visited on 10/11/14 at 09:43pm)

when the maxim is no longer in existence in England. A Bill entitled "The Government (Liability in Tort) Bill, 1967" was introduced in the Lok Sabha. It has yet to become law. However, since the ratio in ***Privy Purse case***[115]is the law of the land by virtue of Article 141 of the Constitution, it is not necessary to have a law on the Statute Book like the one in England to make the State, in India, liable for a tort arising in the course of its activities. It is liable. It would not be appropriate for the State in these circumstances to continue to raise the plea of 'sovereign power' or of 'sovereign immunity' to escape its liability in tort.[116]

Various trends like the exemplary damages trend, human rights trend and checking the abuse of power by the officials can be noticed. In a welfare State, it is essential to establish a just relationship between the rights of individuals and the responsibilities of the State. No democratic system guaranteeing elected representatives to run the government can permit an executive as a sovereign. The common law doctrine of absolute immunity of the crown was never applied in India in toto. The National Environment Tribunal Act, 1995 prescribes the 'no fault liability' or the strict liability of the State. The Law Commission has rightly observed in its First Report that there is no reason why the Government should not place itself in the same position as private employer, subject to the same rights and duties as imposed by the Statute. In fact, this is what the doctrine of Rule of Law commands; and this doctrine is the part of basic feature of the Constitution. Thus, not only legally, the State becomes constitutionally liable to compensate for injuries generated by its officials. The above discussion also highlights the role of the courts as guardians of the fundamental as well as legal rights of the people. However, in the present changing conceptions of State Liability, a more vigorous approach is desirable to safeguard the civil liberties so that the employees of the State do not commit tortious actions in the garb of sovereignty. There are many cases of this genre which do not get determined, even after lapse of considerable time. The rights of these citizens remain violated. The enforcement agencies, therefore, have to be strengthened besides the active interest taken by the courts in awarding effective remedies. It is only by such rule that justice can be rendered to the helpless victims against the monolithic institution of the State and its atrocities to keep pace with the growth of jurisprudence in this area.[117]

[115] *Madhav Rao Scindia* v. *Union of India*, (1971) 1 SCC 85

[116] *Supra note* 11

[117] *Supra note* 65