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"DEVELOPMENT OF THE DOCTRINE OF SOVEREIGN IMMUNITY IN ENGLAND AND INDIA- COMPARATIVE ANALYSIS"

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ABSTRACT

According to the Doctrine of Sovereign Immunity, a king is immune from punishment. Around the world, this idea has been widely adopted. King is above the Law. Throughout the period of and during the reign of the monarchy, this principle was created. Today, it is considered that this theory must have lost its lustre in this era of democracy where voters make or break governments. But the sad reality is that governments all across the world have opted to rely on this antiquated principle even after proclaiming democracy. According to the Rule of Law No one is above the law, in essence, A government's sovereign immunity prevents it from being sued in its own courts without its approval. The British Common Law has established sovereign immunity. "Rex non potest peccare" or "the king can do no wrong," is a legal principle. However, most international constitutions prohibit holding politicians accountable in the same way as regular people. The idea has its origins in the notion that the King of England, who exercised divine power, was impervious to wrongdoing. The courts would not permit a lawsuit against the king as a result, with a few carefully stated exceptions. The English colonisers later took this idea of sovereign immunity to the Indian colonies, and it eventually made its way into our legal system as well. Sovereign immunity, in its most basic definition, is the legal immunity enjoyed by governmental bodies. The writings of Bodin, Austin, and Hege provided the philosophical foundation for the early concepts of sovereign immunity. The article charts the development of the doctrine of sovereign immunity in India and the UK, focusing in particular on the state's tort responsibility. The emphasis is on using case law to draw analogies and define and explain the application and repeal of this concept.

KEYWORDS:

Sovereign Immunity, State, King, India, US, Doctrine

I. INTRODUCTION

In any modern society, interactions between the State and the society are numerous, frequent, and significant in terms of how they affect the welfare and well-being of the society. Such contacts frequently result in legal issues that must be resolved by using various rules and doctrines. Such encounters frequently pose legal issues, the resolution of which necessitates the application of several rules and doctrines.

A vast number of the issues that have arisen come under the purview of tort law. This is because, while seeking redress in a civil court, Tort law appears far more frequently than any other discipline of law. The culpability of the state for the actions of omission and commission committed by its personnel has been controlled by written or unwritten rules.

Tortious liability of the state for the tortious acts of its servants renders the state accountable for acts of omission and commission, voluntary or involuntary, and brings it before a court of law in a claim for non-liquidated damages for such conduct. This liability is also a component of tort law. Tort law, for example Various additional laws have migrated to this nation via the British in

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India and are now diverse as a result of being governed by specific local laws and Constitutional requirements. In 1775, John Stuart's case provided the first legal interpretation of State responsibility under the East India Company, It lasted for the first time as, the Governor General in Council was not immune from Court jurisdiction in situations involving the discharge of government employees.

The Privy Council ruled in Moodaly v. The East India Company[442] that the Common Law idea of sovereign immunity did not apply to India. In the Privy Purse case, the Court had to assess the President's conduct of delegitimizing all Rulers under Article 366(22) of the Constitution. The Union of India maintained that the President's action was in the exercise of his sovereign power and hence not subject to judicial review. The Supreme Court rejected the argument, ruling that there is no such thing as sovereign authority under the Constitution as in terms of the relationship between the executive and the citizenry of our Constitution. Despite such unequivocal and socially significant conclusions, there appear to be areas of dispute where the ghost of the State's "sovereign authority" and "sovereign immunity" still casts its shadow.

It is deeply regrettable that, even after 1971, Indian courts have continued to accept the distinction between the State's "sovereign" and "trading" activities, and have on several occasions absolved the State of liability for tort committed in the course of the former following the Kasturi Lal case. As a result of the chain of legislation beginning with the Act of 1858, the Government of India and the governments of each state are in line of succession to the East India Company. To put it another way, The government's obligation is the same as that of the East India Company prior to 1858.

II. DOCTRINE OF SOVEREIGN IMMUNITY IN ENGLAND

a) ORIGIN:

The immunity of the local sovereign affected the development of the idea of sovereign immunity in England. The idea of sovereign immunity has a lengthy history and has evolved through time. Historians and scholars trace the major source of this notion to the concept that "the king can do no wrong." The phrase "the king can do no wrong" might refer to four distinct things. Throughout its history in England, it has been defined and interpreted in a variety of ways, including:

(1) The King is literally above the law and, by definition, cannot do wrong. This notion culminated in the 17th century under the banner of "divine rights of the king."

(2) Even if the king's acts are not lawful by definition, there is no recourse through the courts.

(3) (True Origin) The King has no power or capacity to do wrong (for example, King Henry III assumed power while still a minor)

(4) The King is perfectly capable of doing wrong but cannot do so legally.[443]

b) CORPUS JURIS CIVILIS:

The notion of "the monarch cannot do wrong" may be traced back to the period of the Justinian code. Numerous comments in Justinian's Corpus Juris tend to support the concept that the emperor possessed total and unrestricted power. Two Digest sections, both attributed to the great jurist Ulpian, are commonly cited as examples of Roman law: "Princeps Legibus Solutus Est" is the first," which translates as "the emperor is not bound by legislation," and the second is "Quad Principii

[442] Original Citation: (1785) 1 Bro CC 469

[443] Act Of State And Sovereign Immunity: A Further Inquiry Christine G. Cooper- Loyola University Chicago Law Journal Volume 11

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Placuit Legis Habet," which translates as "anything pleases the prince is law."

c) SOVEREIGN IMMUNITY IN 13TH CENTURY:

It was permissible to sue the Crown beginning in the thirteenth century. We discover the first English record of the aphorism "that the monarch can do no wrong" During Henry III's minority, a proclamation of factual truth, because the King lacked legal authority and could do no good or ill. The maxim evolved from humble beginnings "by degrees until it became a core principle of the [English] constitution." The Crown's constitutional prerogatives changed over time, but the King always had a zone of independent authority that neither Parliament nor the courts could infringe on, and conventional legal standards did not always apply to the King. Blackstone maintained that contract proceedings against the King were successful not because of legal right, but because "no sensible ruler will ever refuse to stand to a valid contract." Blackstone also recognised that certain of the King's "public oppressions" were legal. Similarly, Locke (and Blackstone, who accepted Locke's logic) believed that tort cases against the King were unconstitutional because their potential for causing harm to the "public peace and security of the government" exceeded the necessity to recompense people, harmed as a result of the King's personal misdeeds.[444]

d) 16th, 17th AND 18th CENTURY: TIMES OF CHANGE

English law history adopted a particularly intricate method for reining in royal authority. The mechanisms that emerged in the 13th and 14th centuries did not bear fruit until the 17th century, but they foreshadow the road that England would pursue towards democracy. Everything altered in the 17th and 18th centuries. England endured the upheavals of war and revolution. This shift resulted in a new constitutional system, accompanied by a strengthened Parliament and a significantly weaker King. Resurrecting historical texts and processes favourable to Parliament's claims, such as Magna Carta, impeachment, and government accountability, were among the strategies used. In the 16th century, the mediaeval concept of personal kingship gave way to a dual vision of the crown that incorporated both the personal attributes of the king and the corporate function of government. Because of this duality, English law developed two sorts of sovereign immunity: royal person immunity and government immunity.

e) CASE OF THE DUCHY OF LANCASTER (1562):

It was about the legality of King Edward VI's activities while he was minor. During Queen Elizabeth I's reign, a legal issue arose about the validity of King Edward VI's underage purchase of Duchy holdings. The crown attorneys unanimously concluded that the royal act was legal, noting that the monarch "had two bodies in him." His natural body is mortal and vulnerable to infirmities and old age; his 'body politic,' consisting of policy and governance and created for the guidance of the people and the management of the general welfare, cannot be seen or touched.

f) CALVIN'S CASE (1608)[445]:

These advances in the 18th century resulted in the essential convention of the responsible government, which is accountable to Parliament and the royal courts of law for all government actions. This was also the time when the divine rights doctrine collapsed and was rejected as a model for English governance. This argument was offered by the Stuart Kings to buttress their claims of political dominance, but it was rejected by English legal

[444] Sovereign Immunity As A Doctrine Of Personal Jurisdiction By Caleb Nelson Harvard Law Review- Https://Www.Jstor.Org/Stable/1342562 Jstor

[445] Calvin's Case (1608), 77 ER 377, (1608) Co Rep 1a

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professors and subsequently decisively crushed by Parliament.

g) BANKER'S CASE[446]:

As a result of his continued financial troubles, Charles got loans from a number of lenders on the condition that he return them from future earnings. To prevent the bankers' demands for immediate repayment, Charles issued a proclamation in 1667 establishing and protecting his inviolable obligations to repay these debts.. He directed the Chancellor, [447]Treasurer, and Exchequer officials to do the same. After five years of making good, Charles' severe need for money to wage a war with Holland prompted him to impose a "halt" on the Exchequer—a stoppage of payments to bankers. In 1677, Charles granted the bankers pensions of six percent per year for the rest of their lives, to be paid from the hereditary excise granted by Parliament. The Crown, however, ceased paying again in 1683, and payments remained unpaid when the Bankers' Case started in 1690.

h) CROWN PROCEEDINGS ACT OF 1947[448]:

By virtue of this Act, the subject has been granted the ability to file civil proceedings against the Crown in both tort and contract. The principles defining master-servant responsibilities were now universally applied to the Crown, and his Majesty's petition of right and monstrance de droit processes were abolished.. The English have abandoned their old structure in order to create an integrated law that is better in line with the necessities of modern society. This legislation defines numerous instances in which the crown may be held accountable.

i) UK PATENTS ACT, 1949[449]:

The UK Patents Act of 1949 states that "any Government department, and any person permitted in writing by the Government department, may create, use, and exercise any patented invention for the purposes of the Crown." The House of Lords ruled in Pfizer Corp v Ministry of Health that using patent drugs to benefit in-and-out patients of National Health Service hospitals was a use of the invention for Crown services, and that importing patented goods was a use of an invention that the minister could authorise under section 46.

j) COMPETITION ACT, 1998 (SECTION 73):

Section 73 of the legislation addresses Crown Application of the Act and, as a result, specifies the limits within which sovereign immunity may be asserted. Section 73 of the Competition Act states in its first clause that any provision made by or under this act binds the crown, but the crown is not criminally liable as a result of any such provision, the crown is not liable for any penalty imposed by such provision, and nothing in this act affects her majesty in her private capacity.

III. DOCTRINE OF SOVEREIGN IMMUNITY IN INDIA:

PRE- CONSTITUTIONAL JUDICIAL DECISIONS

a) P & O STEAM NAVIGATION COMPANY V. SECRETARY OF STATE[450]

The court found that the Secretary of State was liable for the losses caused by government personnel' negligence since the negligent act was not committed in the performance of a sovereign function. The court distinguished between activities taken in the exercise of "sovereign authority" and actions taken in the running of businesses that might be carried out by private individuals without such authority.

[446] 1967 AIR 816

[447] Doctrine Of Sovereign Immunity: Evolution And Evaluation- By Nimisha Jha- The Lex-Warrier: Online Law Journal- ISSN (O): 2319-8338

[448] introduced a Bill which received the Royal assent on July 31, 1947, under the title of the Crown Proceedings Act, 1947.

[449] A UK patent may help if you want to take legal action against someone who uses your invention without your permission

[450] (1861) 5 Bom. H.C.R. App. I,p.1

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The responsibility might only emerge in the situation of non-sovereign functions. The East India Corporation had two personalities:[451]

(a) as a sovereign authority and

(b) as a trade company.[452]

b) NOBIN CHUNDER DEY V. SECRETARY OF STATE[453]

The Calcutta High Court fully implemented the remarks by dismissing the plaintiff's claim for damages for wrongful refusal of a licence to sell certain excisable liquors and drugs, which resulted in the closure of his business, on the grounds that granting or refusing a licence was a sovereign function beyond the scope of the State's tortious liability. Since then, a number of court decisions have relied on the difference between the sovereign and non-sovereign duties of the state.

c) CONSTITUTIONAL PROVISIONS, JUDICIAL DECISIONS AND OTHER ACTS

As seen by the preceding decisions, the idea of sovereign immunity dominated Indian courts from the mid-nineteenth century until recently. When legitimate claims for damages were presented in the courts and were defeated by an archaic concept that no longer seemed to be relevant, there was much irritation and calls for revision. The Indian courts continued to limit the scope of sovereign duties in order to ensure that real victims received just compensation. In its initial report, the Law Commission recommended that this antiquated theory be repealed. Because the proposed bill to abolish this theory was never approved, it was left to the courts to assess whether it was compatible with the Indian Constitution. The notion of sovereign immunity is not expressly established in the constitution. As a result, the principles of sovereign immunity are not expressly stated, but must be traced through various sections of the constitution and other legal enactments.

d) Article 300:

Section 176 of the Government of India Act, 1935 inspired Article 300 of the Constitution This may be traced back to Section 32 of the Government of India Act of 1915, which was based on Section 65 of the Government of India Act of 1858.. "All people and bodies politic shall and may have and take the same proceedings, for India, as they could have done against the said Company," Section 65 of the Government of India Act of 1858 said.

e) Indian Patent Law and State Immunity

Section 47 of the Indian Patent Act of 1970 states that "any machine, apparatus, or other article in respect of which the patent is granted, or any article made by using a process in respect of which the patent is granted, may be imported or made by or on behalf of the Government for the sole purpose of its own use;" and "any process in respect of which the patent is granted may be used by or on behalf of the Government for the sole purpose of its own use." The term "use of government" is left open-ended here, and no remuneration is provided to the patentee if such use is made.

Mr. H.M. Seervai's highly respected work "Constitutional Law of India" states that sovereignty has two aspects, one external and one internal, and that the Union of India possesses entire exterior sovereignty. An act of state can occur only when the Union of India engages with foreign nations and their subjects. Indian states cannot utilise a state act since they lack exterior sovereignty under our Constitution.

[451] Sovereign Immunity As A Doctrine Of Personal Jurisdiction By Caleb Nelson Harvard Law Review- Https://Www.Jstor.Org/Stable/1342562 Jstor

[452] Doctrine Of Sovereign Immunity: Evolution And Evaluation- By Nimisha Jha- The Lex-Warrier: Online Law Journal- ISSN (O): 2319-8338

[453] *(1876) ILR 1 Cal 12*

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f) State of Rajasthan Vs. Vidyawati[454]

Vidyawati was the driver of a vehicle owned and maintained by the State of Rajasthan for the Collector's official use, and she drove recklessly to the Collector's residence, murdering a pedestrian. The Court rejected the State's claim of sovereign immunity, finding that driving the jeep did not entail sovereign functions, and so the State would be held liable. The Supreme Court emphasised in this ruling that the State has welfare and socialistic functions in current times, and that defending State immunity on the basis of historical feudalistic ideas of justice cannot be sustained.

g) Iqbal Kaur v. Chief of Army Staff [455]

An accident occurred as a result of negligent driving by a Sepoy driving a government vehicle on his way to deliver motor driving training to new recruits. It was ruled that this was not an act of sovereign power, and the driver as well as the Union of India were held liable for the losses.

h) N. Nagendra Rao & Co. v. State of A.P[456]

The court held the State of Andhra Pradesh liable for the appellant's losses as a result of the State authorities' improper exercise of authority under the Essential Commodities Act of 1655. The court emphasised that no civilised society could let a government to play with the people of a country while pretending to be sovereign. It is irrational and unjust to place the State above the law. No legal system can raise the state above the law since it is unlawful and unfair for a person to be wrongfully deprived of his property owing to the carelessness of state officials with no remedy.

In a welfare state, the state's responsibilities include not only defending the country, administering justice, and maintaining law and order, but also regulating and controlling people's conduct in almost every sector. The arbitrary distinction between sovereign and non-sovereign powers has practically evaporated. As a result, the State cannot claim immunity for activities such as administering justice, maintaining law and order, and suppressing crime, all of which are important and inherent functions of a constitutional government.[457]

CONCLUSION

The state needs exceptional capabilities in order for the nation to run efficiently. However, if the scope of these powers is not specified, it might be fatal. There is a need to elaborate on the scenarios in which sovereign immunity may and cannot be utilised as a defence. To guarantee that justice is provided to the common man, The constant invocation of sovereign immunity as a defence for all State activity must be avoided. While the concept of sovereign immunity has long existed in England, it has now been codified and a full explanation of the state's authority and immunity is provided.

This concept's understanding is always developing. Over the years, many historians have questioned and interpreted it. The State Immunity Act of 1978 and the Crown Proceedings Act of 1947, among other pieces of legislation and court decisions, have helped to confine the use of sovereign immunity to certain fields.[458]

The Doctrine of Sovereign Immunity has just recently arrived in India, and it has been vulnerable to changing times and beliefs. In India, unlike the United States and the United Kingdom, no special code dealing with this notion has been adopted. In this context, the theory of sovereign immunity related to the

[454] 1962 AIR 933, 1962 SCR Supl. (2) 989
[455] *AIR 1978 All 417*
[456] 1994 AIR 2663 1994 SCC (6) 205 JT 1994 (5) 572 1994 SCALE (3)977
[457] Sovereign Immunity As A Doctrine Of Personal Jurisdiction By Caleb Nelson Harvard Law Review- Https://Www.Jstor.Org/Stable/1342562 Jstor
[458] The Doctrine Of Sovereign Immunity Of Foreign States And Its Recent Modifications By Manuel R. Garcia-Mora- Https://Www.Jstor.Org/Stable/1069928 Jstor

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state's immunity from culpability when performing sovereign tasks. However, the boundary between sovereign and non-sovereign activities has eroded over time. Precedents are the major source for understanding the applicability of sovereign immunity, and the judiciary has utilised cases throughout history to limit the extent of sovereign immunity. The spectrum of sovereign immunity has also been integrated to some extent in provisions of numerous pieces of legislation, including section 3 of the Monopolies and Restrictive Trade Practices Act of 1969 and sections 29(h) and 54 of the Competition Act of 2002. To avoid misuse of this principle, a legal act dealing entirely with the concept of sovereign immunity is urgently needed.

REFERENCES

- Doctrine Of Sovereign Immunity: Evolution And Evaluation- By Nimisha Jha- The Lex-Warrier: Online Law Journal- ISSN (O): 2319-8338
- Sovereign Immunity As A Doctrine Of Personal Jurisdiction By Caleb Nelson Harvard Law Review- Https://Www.Jstor.Org/Stable/1342562 Jstor
- The Doctrine Of Sovereign Immunity Of Foreign States And Its Recent Modifications By Manuel R. Garcia-Mora- Https://Www.Jstor.Org/Stable/1069928 Jstor
- Act Of State And Sovereign Immunity: A Further Inquiry Christine G. Cooper- Loyola University Chicago Law Journal Volume 11