The Eyewash That Is Sovereign Liability

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Introduction

Sovereignty is the supreme coercive power and it was by possession of this power that the State was distinguished from all other forms of human association.[1] However the concept of Public Interest has changed all this with changes in society. The thinking of progressive societies is to do away with archaic state protection and introduce the concept of contemporary State responsibility.[2] Needs of the State, duty of its officials and rights of the citizen are required to be reconciled, so that the rule of law in a welfare State is not breached. This article attempts to look at Sovereign Immunity as a series of misunderstandings, whether purposeful or otherwise. In this modern context, how can we interpret the history of sovereign immunity? More importantly what are its roots in India ? What is the current constitutional scheme in India regarding sovereign immunity? These are the questions to which answers shall be attempted in this article.

History: The First Misunderstanding

Dicey propounded the equality before the law principle, which most civilized nations have followed since. However, at the outset it must be stated that there is and will always be one major exception to Dicey's idea of equality, and that is the State . "The State cannot be equal in all respects to its citizens because it has to govern".[3] Dicey had thus ignored the extensive immunities and privileges, it is submitted, that the State enjoyed at the time he wrote. In the Middle Ages , the reason why the king could not be sued in his own Courts was the federal principle that a lord could not be sued in his own Court.[4]

However the king was not regarded as above the law. On the contrary, he was under a duty to give the same redress to a subject whom he had wronged, as his subjects were bound to give each other.[5] The maxim "the king can do no wrong" originally meant that the king was not privileged to commit illegal acts.[6] However

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1. H.J., Laski, *Grammar of Politics*, p.46 (5th ed.).
2. *N. Nagendra Rao & Co.* v. *State of Andhra Pradesh*, 1994 (3) SCALE 977.
3. Friedman, *Law in a Changing Society*, 303.
4. Holdsworth, *A History of English Law*, (3rd ed.), 9.
5. *Id.*
6. Pollock & Maitland, *The History of English Law*, (Lawyers literary club ed.), 516.

the courts refused to extend such an interpretation to the field of Torts. The very same courts quoting the very same maxim concluded that the king could neither commit nor authorize tha commission of a tort. Thus by using the same maxim an interpretation contrary to the prevalant one had been achieved, for the gist of the prevalant interpretation was that when the king infringed the law, he should give redressal to the aggrieved subject. It is further submitted that the courts were also wrong in supposing that the imposition of vicarious liability on the king, necessarily involved imposing on him, the commission of the tort, for it is now obvious that vicarious liability need not rest on any such fiction.[7]

It is however submitted that the refusal to extend the petition of rights to tort even at the time of the decision, cannot be founded upon this misconception of vicarious liability. These very courts extended the petition of rights to contract, wherein it must be presumed , the fictional imposition of liability on the king was obviously not considered. Therefore to differ from Atiyah, it is dubious to cite this very fictional imposition of liability as being the reason for not extending the petition of right to tort.

Hence misunderstanding an old maxim (whether purposefully or otherwise) led to the totally unnecessary concept of sovereign immunity. This, it is submitted, was the first misunderstanding

Perpetuation: The Second Misunderstanding

Even during the early period of British rule the courts in India ruled in favour of holding the State responsible for the negligence of it's officers.[8] Therefore one rightly wonders , as the Constitutional bench in *Vidhyawati's* case[9] did, as to how the concept of sovereign immunity even crept into Indian courts post-independence, a time when such immunity had been demolished in the country of it's origin, U.K.[10] The answer, it has been held time and again by various scholars, lies in what has been termed the second misunderstanding. Had it not been for some stray statements in the judgment of *P.&O. Steamship Navigation,*[11] wherein Peacock,C.J., stated "it is clear that the East India Company would not have been liable for any act done....in carrying out hostilities etc.", the perpetuation of sovereign immunity as a defence may never have come about in India.

Whether the above statement was obiter or not, this concession in favour of the East India Company was both unnecessary and unfortunate. This uncalled for

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7. P.S. Atiyah, *Vicarious Liability in the Law of Torts,* (1st ed.), 6-7.
8. *See , Narayan Krishna Lal v. Ms. Vidhyawati & Anr.* , 5 Bom. H.C. Reports (1868-89).
9. *State of Rajasthan v. Ms. Vidhyawati & Anr.* , AIR 1962 SC 933.
10. Crown Proceedings Act, 1947.
11. *P. & O. Steamship Navigation Co. v. Secretary of State for India* , Bom. H.C. Reports Vol. 5 (1868-69) Appendix A.P. 1.

enunciation of the law was seized upon in *Nobin Chander Dey* v. *Secretary of State for India*[12] and much other unnecessary litigation took place in considering what was the distinction between 'sovereign' and 'non sovereign' functions. Even many scholars have wasted their time on what is now considered a frivolous issue. Carol Harlow says that in England, the House, through various cases has edged its way towards a 'sensible' distinction between governmental functions and commercial enterprises of public corporations.[13] How such a distinction would be 'sensible' is not mentioned, In fact, it is submitted, that no such rational distinction can exist between 'sovereign' and 'non sovereign' functions in a time and age where the activities of the state can be said to be all encompassing. It was only in *Hari Bhanji's case*[14]a dissenting opinion stated that—"Acts done in the exercise of sovereign powers but which do not profess to be justified by municipal law are what we understansd to be acts of state of which municipal courts are not authorizedto take cognisance."[15]

What in fact this advocated was a case specific approach, rather than to try and establish a fine distinction between equally important functions of the state like welfare and defence. Hence any act of which the municipal courts are authorized to take cognisance of, whether sovereign or non sovereign, would give rise to state liability and the defence of sovereign immunity would not apply. This principle has only very recently been adopted.[16] Thus the perpetuation of sovereign immunity in India can be traced back to one particular judgment—namely in *P. & O. Steamship Navigation's* case.[17]

Sovereign Immunity in the Constitutional Scheme

Sovereign immunity hardly exists under the Constitution of India. This can be gathered from a study of cases relating to this field in which the law in this regard has been enunciated.An action for compensation against the State under Art. 20 & 21 of the Indian Constitution will lie for bodily harm which includes assault, battery, false imprisonment, physical injuries and death.[18] It will also be available for injury to property.[19] It is interesting to know that the court gives " "compensation" and not "damages". Award of compensation in a proceeding under Art. 32, by the Supreme Court, or under Art. 226 by the High Court is a remedy available in public law based on strict liability for the contravention of fundamental rights, to which the principle of sovereign immunity does not

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12. *Nobin Chander Dey v. Secretary of State for India* , ILR 1 Cal. 11 (1876).
13. Carol Harlow, *Compensation & Government Torts*, (1st ed.), 122-23.
14. *Secretary of State for India v. Hari Bhanji* , ILR 5 Mad. 273 (1882).
15. *Id.*
16. *Supra.* , n. 3.
17. *Supra.* , n. 11.
18. *Supra.* , n. 3.
19. *Id.*

apply.[20] It is interesting to see how the courts are so interested in classification. What the courts wish to say is that when there is a violation of fundamental rights, payment is in the form of "compensation" whereas in the case of a violation of a legal right payment is only "damages". Further the court has read Art.32 in a manner which allows it to "forge new tools" to grant releif to the aggreived person. The power available under Art. 142 is an enabling provision in this behalf.[21] However the exercise of this remedy is to be tempered with restraint to avoid the circumvention of private law remedies where more appropriate.[22] Hence, when the courts mould the relief by granting compensation under Art.32 or 226, they do so by way of penalizing the wrongdoer and fixing the liability on the State when it has failed in its duty to protect fundamental rights. This payment of compensation is not to be understood as it is generally. Compensation is in the form of exemplary damages for the breach of duty and is independant of the rights available to the aggrieved party to claim damages under private law.[23] From all this it is abundantly clear that the concept of sovereign immunity finds no place in the constitutional scheme and courts are more busy trying to forge new ways of redress rather than provide simple damages.

Conclusion

The concept of sovereign immunity arose from a misunderstanding or purposeful misrepresentation of the maxim ' The king can do no wrong.' Secondly, the concept was never present in India in the form adopted by the British. The idea of determining the liability/immunity of a State by looking into documents that are a century old, archaic and out of sync with the present times as they are, additionally are abhorrent to common sense. This even more so as in England the Crown Proceedings Act,1947, has changed the stance of sovereign immunity by making the State liable for its acts. This Act has filled the gaps in Dicey's paradigm of equality before the law. India requires appropriate legislation to tackle the issue. While ruing the position of law with regard to State immunity, Gajendragadkar, C.J., in *Kasturilal's* case stated —" the remedy to cure this position is in the hands of the legislature."[24] As early as 1967 there existed the Government (Liability in Tort) Bill . However this has yet to become law. There is now, more than ever, need to determine State liability so that India too can seal the gaps in Dicey's paradigm of equality.

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20. *Nilabati Behera v. State of Orissa* , (1993) 2 SCC 746.
21. *Id.*
22. *Khatri v. State of Bihar* , (1988) 1 SCC 627.
23. *Supra.* , n. 20.
24. *M/s. Kasturilal Ralia Ram Jain v. State of U.P.* , AIR 1965 SC 1039.