“The Doctrine Of State Immunity and its Implication”

By:

ManishaChaturvedi

Associates,

VB Law Associates

SOVEREIGN IMMUNITY

The Old and archaic concept of Sovereign immunity that "King can do no wrong " stillhaunts us, where the state claims immunity for its tortious acts and denies compensation tothe aggrieved party.

MEANING AND ORIGIN

Sovereign immunity is a justification for wrongs committed by the State or itsrepresentatives, seemingly based on grounds of public policy. Thus, even when all theelements of an actionable claim are presented, liability can be avoided by this justification.
The doctrine of sovereign immunity is based on the Common Law principle borrowed from the British Jurisprudence that the King commits no wrong and that he cannot be guilty ofpersonal 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[1].This doctrine held sway in Indian courts since the mid nineteenth century to till recently.When a genuine claim for damages is brought in the courts, and it is refuted by an ancientdoctrine seemingly having no relevance, there is bound to be resentment and demands forreview. The Indian courts, in order not let genuine claims be defeated, kept narrowing thescope of sovereign functions, so that victims would receive damages[2].The Law Commission too in its very first report too recommended the abolition of thisoutdated doctrine. But for various reasons, the draft bill for the abolition of this doctrinewas never passed, and thus it was left to the courts to decide on the compatibility of thisdoctrine in accordance with the Constitution of India[3].

Article 300 of the Constitution of Indiaspells out the liability of the Union or State in act of the Government.

ARTICLE 300

Initially in India, the distinction between sovereign and non-sovereign functions wasmaintained in relation to principle immunity of Government for the tortuous acts of itsservants. In India, there is no legislation, which governs the liability of the State. It is article300 of the Constitution of India, 1950, which specifies the liability of the Union or Statewith respect to an act of the Government.

The Article 300 of the Constitution originated from Section 176 of the Government of IndiaAct, 1935. Under section 176 of the Government of India Act, 1935, the liability was Co-extensive with that of secretary of State for India under the Government of India Act,1915, which in term made it coextensive with that of the East India Company prior to theGovernment of India Act, 1858.Section 65 of the Government of India Act, 1858, providedthat all persons

[1]1 'Doctrine of Sovereign Immunity ',NeerajArora,available at http://www.neerajaarora.com/doctrine-of-sovereign-immunity/, last viewed May 23, 2010.
[2]'Sovereign Immunity- No Defence in Private Law ',AmardeepGarje,available at http://ssrn.com/abstract=1347948

[3]Law Commission of India, First Report, pages 40-42, para V.

shall and may take such remedies and proceedings against Secretary ofState for India as they would have taken against the East India Company[4].

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

Article 300 reads as:

(1) The Government of India may sue or be sued by the name of the Union of India andthe Government of a State may sue or be sued by the name of the State any may,subject to any provision which may be made by Act of Parliament or of theLegislature of such State enacted by virtue of powers conferred by this Constitution,sue or be sued in relation to their respective affairs in the like cases as the Dominionof India and the corresponding provinces or the corresponding Indian States mighthave sued or been sued if this Constitution had not been enacted.

(2) If at the commencement of this Constitution –

(a) any legal proceedings are pending to which the Dominion of India is party, theUnion of India shall be deemed to be substituted for the Dominion in thoseproceedings; and(b) any legal proceedings are pending to which a Province or an Indian State is aparty, the corresponding State shall be deemed to be substituted for theprovince or the Indian State in those proceedings.

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

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

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

JOURNEY OF THE DOCTRINE

PRE CONSTITUTIONAL ERA

In India the story of the birth of the doctrine of Sovereign Immunity begins with thedecision of Peacock C.J. in P. and *O. Navigation Company* v. *Secretary of State for India*[5], inwhich the terms "Sovereign" and "non sovereign" were used while deciding the liability ofthe East India Company for the torts committed by its servants[6]. In this case the provisionof the

[4]M.P.Jain&S.N.Jain,'Principles of Administrive Law '.5th Edition (2009)

[5]5 Bom HCR

[6]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.

Government of India Act, 1858 for the first time came before the Calcutta SupremeCourt for judicial interpretation and C.J. Peacock determined the vicarious liability of theEast India Company by classifying its functions into "sovereign "and "non sovereign".
Two divergent views were expressed by the courts after this landmark decision in whichthe most important decision was given by the Madras High Court in the case of *HariBhanJi*v. *Secretary of State*[7], where the Madras High Court held that the immunity of the 'EastIndia' company extended only to what were called the 'acts of state', strictly so called andthat the distinction between sovereign and Non-sovereign functions was not a wellfounded one.The Calcutta High Court in one of its earlier cases of *NobinChunderDey*v. *Secretary of Statefor India*[8], had taken the view that in respect of acts done in the exercise of sovereignfunction by the East India company no suit could be entertained against the company.

Again in case of *Secretary of State* v. *Cockraft*[9], the Courts added a further test that if the State derived benefit from the exercise of Sovereign powers, it would be liable. No attempthowever has been made in the cases to draw a clear and coherent distinction betweenSovereign and Non-Sovereign functions at all.

POST INDEPENDENCE

After the commencement of the Constitution, perhaps the first major case which came upbefore the Supreme Court for the determination of liability of government for torts of itsemployees was the case of *State of Rajasthan* v. *Vidyawati*[10]. In this case, court rejected theplea of immunity of the State and held that the State was liable for the tortious act of thedriver like any other employer[11].

Later, in *KasturiLal*v. *State of U.P.*[12]the Apex court took a different view and the entirething got confused once again. In this case, the Supreme Court followed the rule laid downin P.S.O. Steam Navigation case by distinguishing Sovereign and non-Sovereign functions ofthe state and held that abuse of police power is a Sovereign act, therefore State is notliable.

In practice the distinction between the acts done in the exercise of sovereign functions andthat done in non-Sovereign functions would not be so easy or is liable to createconsiderable difficulty for the courts. The court distinguished the decision in Vidyawati'scase as it involved an activity which cannot be said to be referable to, or ultimately basedon the delegation of governmental powers of the State. On the other hand, the powerinvolved in Kasturilal's case to arrest, search and seize are powers characterized asSovereign powers. Finally the court expressed that the law in this regard isunsatisfactoryand the remedy to cure the position lies in the hands of

[7](1882) 5 ILR Mad. 273
[8]ILR 1 Cal 11 (1875)

[9]AIR 1915 Mad. 993
[10]AIR 1962 SC 933
[11] In that case, the claim for damages was made by the dependants of a person who died in an accident caused by the negligence of the driver of a jeep maintained by the Government for official use of the Collector of Udaipur while it was being brought back from the workshop after repairs. The Rajasthan High Court took the view-that the State was liable, for the State is in no better position in so far as it supplies cars and keeps drivers for its Civil Service.
[12]AIR 1965 SC 1039

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

In the case of *State of M.P.* v. *Rampratap*[13], the state was made liable for injury caused by atruck belonging to P.W.D. Similarly, in *AmulyaPatnaik v. State of Orissa*[14], the state was heldliable for the death of a person while traveling in a police van by rash and negligent drivingof its driver. In *Shyam Sunder* v. *State of Rajasthan*[15], the court held the state liable for thetortious act of a truck driver engaged in the State famine relief work.

To ensure the personal liberty of individuals from abuse of public power, a new remedywas created by the Apex court to grant damages through writ petitions under Article 32and Article 226 of the Constitution. In the case of *Rudal Shah* v. *State of Biha*r[16], theSupreme Court for the first time awarded damages in the writ petition itself[17]. In *BhimSingh v. State of Rajasthan*[18], then principle laid down in Rudal Shah was further extendedto cover cases of unlawful detention. In a petition under article 32, the Apex court awardedRs. 50,000 by way of compensation for wrongful arrest and detention.

SAHELI, a *Women's Resource Centre* v. *Commissioner of Police, Delh*i[19], was another bolddecision of the Apex court to give direction to Delhi Administration to pay compensation incase of death due to police atrocities[20]. In *NilbatiBehra*v. *State of Orissa*[21], the Apex courtawarded the compensation to the petitioner for the death of her son in police custody. Thecourt held that the principle of Sovereign immunity does not apply to the public lawremedies under Article 32 and Article 226 for the enforcement of the fundamental rights.

In a landmark decision in the case of *Registered Society* v. *Union of India* [22], the SupremeCourt of India went a step further and held that the court's power to grant damage cannotbe limited only when the fundamental right to life and personal liberty under Article 21 isviolated.

The latest case of *State of A.P.* v. *Challa Ramakrishna Reddy*[23]on the point clearly indicatesthat the distinction between Sovereign and non-Sovereign powers have no relevance in thepresent times. The Apex Court held that the doctrine of Sovereign immunity is no longervalid.

RECENT DEVELOPMENTS

The courts in successive cases continued with the policy of narrowing the scope of

[13]AIR 1972 MP 219
[14]AIR 197 Ori 116
[15]AIR 1972 MP 219 Also see, on the same point, State v. Dole Ram, AIR 1981 HP 87
[16]A.I.R. 1983 S.C. 1086
[17]the petitioner Rudal Shah was detained illegally in prison for more than fourteen years. He filed Habeas Corpus before the court for his immediate release and inter alia prayed for his rehabilitation cost, medical charges and compensation for illegal detention.
[18]A.I.R. 1986 S.C. 494
[19]A.I.R. 1990 S.C. 513
[20]The state was held to be liable for the tortuous acts of its employees when a 9 year boy had died due to the beating by the police officer acting in excess of power vested in him. The court directed the Government to pay Rs. 75000/- as compensation to the mother of the child
[21]A.I.R. 1993 S.C. 1960
[22]A.I.R. 1999 S.C. 2979
[23](2000) 5 SCC 712

sovereign immunity, rather than attempt an express overruling of Kasturilal. Though there were murmurs of disapproval at the principle of Kasturilal in a number of cases[24],the most explicit disapproval came in *State of Andhra Pradesh v. ChallaRamkrishna Redd*y.
The petitioner and his father were lodged in a jail, wherein one day bombs were hurled at them by their rivals, causing the death of the father and injuries to the petitioner. The victims were having previous knowledge of the impending attack, which they conveyed to the authorities, but no additional security was provided to them. On the contrary, there was gross negligence since there was a great relaxation in the number of police men who were to guard the jail on that fateful day. Thus, on the grounds of negligence a suit was filed by the petitioner against the Government.While the case had been dismissed in trial court, the case was allowed in the High Court,where the Court even while accepting the principle of Kasturilal, took consideration ofArticle 21 of the Constitution and came to the conclusion that since the Right to Life waspart of the Fundamental Rights of a person, that person cannot be deprived of his life andliberty except in accordance with the procedure established by law. Further, by virtue of*Maneka Gandhi v. Union of Indi*a[25],the procedure too should have been fair and reasonable.

Thus, the High Court held that since the negligence which led to the incident was bothunlawful and opposed to Article 21, and that since the statutory concept of sovereign immunity could not override the constitutional provisions, the claim for violation offundamental rights could not be violated by statutory immunities. On appeal by the State,the Supreme Court dismissed the appeal and ruled:"The Maxim that King can do no wrongor that the Crown is not answerable in tort has no place in Indian jurisprudence where thepower vests, not in the Crown, but in the people who elect their representatives to run theGovernment, which has to act in accordance with the provisions of the Constitution andwould be answerable to the people for any violation thereof." Thus,the ratio of this casewas that sovereign immunity, which is a statutory justification, cannot be applied in case ofviolation of fundamental rights, because statutory provisions cannot override constitutional provisions. The procedural aspect of this was that aggrieved persons cansuccessfully file their petitions in trial courts for tortious acts committed by State, andthere is no need to approach High Court or Supreme Court under Articles 226 or 32.However,the court in this case even while holding that KasturiLal 's case had paled intoinsignificance and was no longer of binding value, did not consider the cases where nofundamental rights but other legal rights might be violated. The question that arises iswhether in violation of such statutory rights, the sovereign immunity can be effectivelyclaimed. This issue can be decided only by a Constitutional bench of seven or more judges,if the need arises to overrule the KasturiLal case[26].The aforesaid judicial pronouncements clearly laid down the earlier approach of judiciaryas revealed from various judicial pronouncements was to make distinction betweensovereign and non-sovereign functions and exempting the government from tortuousliability in case the activity involved was a sovereign activity. Later on, there has beensignificant change in the judicial attitude with respect to "Sovereign and Non – Sovereigndichotomy " as revealed from various judicial pronouncements where the courts, althoughhave maintained the distinction between sovereign and non-sovereign functions yet inpractice have transformed their attitude holding most of the functions of the governmentas

[24]Chairman, Rly Board v. Chandrima Das, AIR 2000 SC 988; APMV v. Ashok Haribhuni, AIR 2000 SC 3116; Satyawati v. Union of India, AIR 1967 Del 98.
[25]AIR 1978 SC 597
[26] "Sovereign Immunity : No Defence in Private Law ",AmardeepGarje,available at: http://ssrn.com/abstract=1347948

non-sovereign. Consequently, there has been an expansion in the area of governmentalliability in torts.

SOVEREIGN FUNCTIONS & NON-SOVEREIGN FUNCTIONS

NEED FOR DISTINCTION

The Supreme Court has emphasized upon the significance of making such a distinction as inthe present time when, in the pursuit of their welfare ideal, the various governments"naturally and legitimately enter into many commercial and other undertakings andactivities which have no relation with the traditional concept of governmental activities inwhich the exercise of sovereign power is involved "[27]. Therefore, it is necessary to limit thearea of sovereign powers,so that acts committed in relation to "non -governmental andnon -sovereign " activities did not go uncompensated.

INTERPRETATION

The immunity of the crown in the United Kingdom was based on the feudalistic notions ofjustice, namely, that the King was incapable of doing wrong, and, therefore, of authorizingor instigating one, and tha the could not be sued in his own courts … Now that we have,byour constitution, established a Republican form of Government, and one of its objectives isto establish a socialistic State with its varied industrial and other activities, employing alarge army of servants, there is no justification, in principle, or in public interest, that theState should not be held liable for its acts[28].

However, as the Competition Act, 2002, specifies that any activity of the Governmentrelatable to the sovereign functions of the Government including all departments of CentralGovernment dealing with atomic energy, space, defence and currency are excluded fromthe Act 's purview,establishing a distinction between the sovereign and non -sovereignfunctions becomes inevitable.

Thus, an attempt has been made to distinguish the sovereign and non-sovereign functionswith the help of principles laid down in the various judgments rendered by the Apex Court.However,as no interpretation of the term 'sovereign functions 'in contex t of Section 2(h) ofthe Comeptition Act, 2002 exists, the differentiation has to be made with the help ofinterpretation of the term as has been carried out for other legislations.

On the question of 'what is sovereign function', different opinions have been given time andagain and attempts have been made to explain in different ways:

1. Primary and Inalienable Functions:

Krishna Iyer J. in Bangalore Water Supply case said that the definition of 'industry'

[27] *KasturiLal v. State of UP* AIR 1965 SC 1039
[28] *State of Rajasthan v. Vidhyawati*AIR 1962 SC 933

although of wide amplitude can be restricted to take out of its purview certainsovereign functions of the State limited to its 'inalienable functions'.As to what are ‘inalienable functions ’,Lord Watson,in*Coomber v. Justices of Berk*s[29],describes the functions such as administration of justice, maintenance of order andrepression of crime, as among the primary and inalienable functions of aconstitutional Government.

However, the Supreme Court has also held that the definition can include the regal primary and inalienable functions of the State, though statutory delegated functionsto a Corporation and the ambit of such functions cannot be extended so as to includethe activities of a modern State and must be confined to legislative power,administration of law and judicial power[30] .

2. Regal & Non-Regal:

Isaacs, J. in his dissenting judgment in *The Federated Sate School Teachers'Association of Australia v. The State of Victori*a, concisely states thus at p. 585: "Regalfunctions are inescapable and inalienable. Such are the legislative power, theadministration of laws, the exercise of the judicial power. Non-regal functions maybe assumed by means of the legislative power. But when they are assumed the Stateacts simply as a huge corporation, with its legislation as the charter. Its action underthe legislation, so far as it is not regal execution of the law is merely analogous towhat of a private company similarly authorised[31].

These words clearly mark out the ambit of the regal functions as distinguished from the other powers of a State.

3. Governmental Functions:

What is meant by the use of the term "sovereign", in relation to the activities of the State, is more accurately brought out by using the term "governmental" functionsalthough there are difficulties here also inasmuch as the Government has enteredlargely new fields of industry. Therefore, only those services which are governed byseparate rules and constitutional provisions, such as Articles 310 and 311 should,strictly speaking, be excluded from the sphere of industry by necessaryimplication.”[32]

4. Constitutional Functions:

The learned judges in the *Bangalore Water Supply &Severage Board v. A. Rajappa*[33]a Sewerage Board case seem to have confined only such sovereign functions outsidethe purview of 'industry' which can be termed strictly as constitutional functions of

[29](1883-84) 9 App. Cas. 61,74

[30]*State of Bombay and Ors. v. The Hospital MazdoorSabha and Ors.* (1960)ILLJ251SC ,

[31]*Agricultural Produce Market Committee v. Shri Ashok Harikuni&Anr. Etc.* AIR2000SC3116

[32]Beg CJ, Bangalore Water Supply case.

[33](1978) ILLJ 349 SC

the three wings of the State i.e. executive, legislature and judiciary.However, the concept is still the same with insubstantial differences between the terms.This can be noticed by the following observation by the Court in *Nagendera Rao and Co. v.The State of Andhra Pradesh*[34] , as to which function could be, and should be, taken as regalor sovereign function has been recently examined by a Bench of the Court, where in thewords of Hansaria J, the old and archaic concept of a sovereignty does not survive assovereignty now vests in the people. It is because of this that in an Australian case thedistinction between sovereign and non-sovereign functions was categorised as regal andnon-regal. In some cases the expression used is State function, whereas in someGovernmental function.

TESTS

1. Nature and form of activity:

"It is now increasingly necessary to abandon the lingering fiction of a legallyindivisible State, and of a feudal conception of the Crown, and to substitute for it theprinciple of legal liability where the State, either directly or through incorporatedpublic authorities, engages in activities of a commercial, industrial or managerialcharacter. The proper test is not an impracticable distinction between governmentaland non-governmental function, but the nature and form of the activity inquestion."[35]

2. The dominant nature test :

(a) Where a complex of activities, some of which qualify for exemption, others not,involves employees on the total undertaking, or some departments are notproductive of goods and services if isolated, even then, the predominant nature ofthe services and the integrated nature of the departments as explained in the*Corporation of Nagpur* , will be the true test. The whole undertaking will be'industry' although those who are not 'workmen' by definition may not benefit bythe status.

(b) Sovereign functions, strictly understood, (alone) qualify for exemption, not thewelfare activities or economic adventures undertaken by government or Statutorybodies.

(c) Even in departments discharging sovereign functions, if their core units whichare industries and they are substantially severable, then they can be considered tocome within Section 2(j),the definition of 'industry '.

(d) Constitutional and competently enacted legislative provisions may well removefrom the scope of the Act categories which otherwise may be covered thereby.

As per the Bangalore Water-Supply case sovereign functions "strictly understood"alone qualify for exemption; and not the welfare activities or economic adventuresundertaken by the Government. This is not all. A rider has been added that even inthe departments discharging sovereign functions, if there are units which areindustries and they are substantially severable, then they can be considered to be anindustry. As to which activities of the Government could be called sovereignfunctions strictly understood, has not been spelt out in the aforesaid case[36] .

---

[34]AIR1994SC2663

[35]*Ghaziabad Development Authority v. Balbir Singh* AIR 2004 SC 2141.

[36]It may be stated that it is in pursuance to what was stated under (d) above that the amendment of 1982 to Industrial Disputes Act, 1947 was made which provided for exclusions of some categories, one of which is

3. **In relation to what are "sovereign" and what are "non-sovereign" functions,** thisCourt in *Chief Conservator of Forests and Anr. v. JagannathMarutiKondhare andOr*s.[37], holds:
We may not go by the labels. Let us reach the hub. And the same is that thedichotomy of sovereign and non-sovereign functions does not really exist - it wouldall depend on the nature of the power and manner of its exercise, as observed inpara 23 of *Nagendra Rao cas*e.As per the decision in this case, one of the tests to determine whether the executive
function is sovereign in nature is to find out whether the State is answerable forsuch action in courts of law. It was stated by Sahai, J. that acts like defence of thecountry, raising armed forces and maintaining it, making peace or war, foreignaffairs, power to acquire and retain territory, are functions which are indicative ofexternal sovereignty and are political in nature. They are, therefore, not amenable tothe jurisdiction of ordinary civil court inasmuch as the State is immune from beingsued in such matters. But then, according to this decision the immunity ends there.It was then observed that in a welfare State, functions of the State are not only thedefence of the country or administration of justice or maintaining law and order butextends to regulating and controlling the activities of people in almost every sphere,educational, commercial, social, economic, political and even martial. Because of thisthe demarcating line between sovereign and non-sovereign powers has largelydisappeared. The aforesaid shows that if we were to extend the concept of sovereignfunction to include all welfare activities the ratio in Bangalore Water Supply case
would get eroded, and substantially. We would demur to do so on the face of whatwas stated in the aforesaid case according to which except the strictly understoodsovereign function, welfare activities of the State would come within the purview ofthe definition of industry; and not only this, even within the wider circle ofsovereign function, there may be an inner circle encompassing some units whichcould be considered as industry if substantially severable.

4. Predominant Nature of the Activity:

As referred in part (a) of the Dominant Nature Test, the Court in the *Corporation of Nagpur case*[38],evolved another test when there may be cases where the said twodepartments may not be in charge of a particular activity or service covered by thedefinition of sovereign function but also in charge of other activity or activitiesfalling outside the definition. In such cases a working rule may be evolved toadvance social justice consistent with the principles of equity. In such cases thesolution to the problem depends upon the answer to the question whether such adepartment is primarily and predominantly concerned with activity relatable to thesovereign function or incidentally connected therewith.It was also held in the same case that that in a modern State the sovereign powerextents to all the statutory functions of the State except to the business of tradingand industrial transactions undertaken by in its quasi-private personality. Also, the

---

"any activity of the Government relatable to the sovereign functions of the Government including all the activities carried on by the departments of the Central Government dealing with defence research, atomic
energy and space". This was formerly exception No. (6) of Sec 2(j) of mentioned in the amended definition.

[37](1996)ILLJ1223SC

[38]AIR 1960 SC 675

regal functions described as primary and inalienable functions of State thoughstatutorily delegated to a corporation are necessarily excluded from the purview ofthe definition. Such regal functions shall be confined to legislative power,administration of law and judicial power.

In *N. Nagendra Rao & Co. v. State of A.P*[39],defines non -sovereign functions as "discharge ofpublic duties under a statute, which are incidental or ancillary and not primary orinalienable function of the State ".This decision holds that the State is immune only in caseswhere its officers perform primary or inalienable functions such as defence of the countryadministration of justice, maintenance of law and order.The court gave an example where a search or seizure effected under such law could betaken to be an exercise of power which may be in domain of inalienable function. Whetherthe authority to whom this power is delegated is liable for negligence in discharge of dutieswhile performing such functions is a different matter. But when similar powers areconferred under other statute as incidental or ancillary power to carry out the purpose andobjective of the Act, then it being an exercise of such State function which is not primary orinalienable, an officer acting negligently is liable personally and the State vicariously[40] .In fact, all governmental functions cannot be construed either primary or inalienablesovereign function. Hence even if some of the functionaries under the an Act could be saidto be performing sovereign functions of the Government that by itself would not make thedominant object of the Act to be sovereign in nature.

Various decisions rendered by the Supreme Court prior to and after the decision in *Bangalore Water Supply v. A. Rajappa*had been discussed by the Supreme Court in the caseof *State of UP v. Jai Bir Singh*[41], where the court inter alia wished to enter a caveat onconfining sovereign functions to the traditional so described as 'inalienable functions'comparable to those performed by a monarch, a ruler or a non-democratic government.The concept of sovereignty in a constitutional democracy is different from the traditionalconcept of sovereignty which is confined to 'law and order', 'defence', 'law making' and'justice dispensation'. In a democracy governed by the Constitution the sovereignty vests in the people and the State is obliged to discharge its constitutional obligations contained inthe Directive Principles of the State Policy in Part - IV of the Constitution of India. From that point of view, wherever the government undertakes public welfare activities in dischargeof its constitutional obligations, as provided in part-IV of the Constitution, such activitiesshould be treated as activities in discharge of sovereign functions. Therefore, such welfaregovernmental activities cannot be brought within the fold of industrial law by giving anundue expansive and wide meaning to the words used in the definition of industryregarding immunity to sovereign powers.

[39]AIR1994SC2663
[40]*Agricultural Produce Market Committee v. Shri Ashok Harikuni&A*nr. Etc. AIR2000SC3116, para 22.
[41](2005) 5 SCC 1

CONCLUSION

1. Words and Phrases, Permanent Edition, Volume 39A with reference to "sovereignpower" records[42]:

The "sovereign powers" of a government include all the powers necessary toaccomplish its legitimate ends and purposes. Such powers must exist in allpractical governments. They are the incidents of sovereignty, of which a statecannot devest itself. .... In all governments of constitutional limitations "sovereignpower" manifests itself in but three ways by exercising the right of taxation; bythe right of eminent domain; and through its police power[43].

So, sovereign function in the new sense may have very wide ramification but essentiallysovereign functions are primary inalienable functions which only State could exercise.

Thus, various functions of the State, may be ramifications of 'sovereignty' but they allcannot be construed as primary inalienable functions. Broadly it is taxation, eminentdomain and police power which covers its field. It may cover its legislative functions,administration of law, eminent domain, maintenance of law and order, internal andexternal security, grant of pardon. So, the dichotomy between sovereign and non-sovereign
function could be found by finding which of the functions of the State couldbe undertaken by any private person or body. The one which could be undertakencannot be sovereign function. In a given case even in subject on which the State has themonopoly may also be non-sovereign in nature. Mere dealing in subject of monopoly ofthe State would not make any such enterprise sovereign in nature. Absence of profitmaking or mere quid pro would also not make such enterprise to be inside the ambit ofsovereign functions[44].

2. Regal functions are inescapable and inalienable. Such are the legislative power, theadministration of laws, the exercise of the judicial power, Non-regal functions may beassumed by means of the legislative power. But when they are assumed the State actssimply as a huge corporation, with its legislation, the charter. Its action under thelegislation, so far as it is not regal execution of the law is merely analogous to that of aprivate company similarly authorised. This clearly mark out the ambit of the regalfunctions as distinguished from the other powers of a State. This shows that as per theCorporation of Nagpur case those functions alone which are inalienable can be calledsovereign.

3. In welfare State, functions of the State are not only defence of the country oradministration of justice or maintaining law and order but it extends to regulating andcontrolling the activities of people in almost every sphere, educational, commercial,social,

---

[42]*Boggs v. Mcree Min. Co.* 14 Cal. 279

[43]*United States v. Douglas WillanSartoris C*o. 22 p. 92, 96, 3 Wyo. 287.

[44]*Agricultural Produce Market Committee v. Shri Ashok Harikuni&Anr. Et*c. AIR2000SC3116

economic, political and even marital. The demarcating line between sovereignand non-sovereign powers for which no rational basis survives has largely disappeared.Therefore, barring functions such as administration of justice, maintenance of law andorder and repression of crime etc. which are among the primary and inalienablefunctions of a constitutional Government, the State cannot claim any immunity.

4. At present, one of the major debates is privatization. A test suggested by the Courts in India is to work out if the function of the sovereign could have been delegated to aprivate party. For anyone who has studied the administrative state here and abroad, themost complicated question is to understand where the line between public and privateis drawn. Often the effort is abandoned as unproductive. Yet when confronted with thephenomenon of "privatization," the question becomes irresistible; one is compelled todiscover whether a line (or some approximation of it) can be drawn. Identifying thecontinuing role for the state in the context of privatization implicates the public-privatedistinction and its connection to democratic political theory.

5. To decide if privatization has reached its limits, we must know whether inherent sovereign functions of government are being delegated. Certain exercises of publicauthority in the liberal state still must be performed by government. These duties arenon-delegable, or at least not delegable without continuing governmental oversight. Butcertain government functions may be so fundamental as not to be transferable toprivate hands under any circumstances.

6. Expressions of the "public interest" are often used to justify the role of government inour liberal democratic state. Governmental agencies have been empowered to protectthe "public interest, convenience, and necessity." But that phrase may be usedoffensively to curb genuine competition which at times may go against the very purposeof the phrase. The privatization movement also challenges expansive notions of thepublic interest. But this debate is hard to conclude.

7. As history demonstrates, the line between public and private regularly shifts over time[45].Private law traditionally encompassed the common law of contract, torts, andproperty that regulate relations among individuals. These relations are often umpiredand regulated by government. Additionally, the Constitution and courts continuouslyexpand or contract the private category through definitions of industry, property orprivacy. Each time it does, the role of government is expanded or inhibited accordingly.

8. The need of the State to have extraordinary powers cannot be doubted. But with theconceptual change of statutory power being statutory duty for sake of society and thepeople the claim of a common man or ordinary citizen cannot be thrown out merelybecause it was done in exercise of its sovereign functions. Needs of the State, duty of itsofficials and right of the citizens are required to be reconciled so that the rule of law in awelfare State is not shaken.

[45]Indeed, even in France, which has always embraced the public-private distinction in its legal system, the dividing line between the ordinary and administrative courts has to be adjudicated by the Tribunal des Conflits. See L. Neville Brown & John S. Bell, French Administrative Law 144-45 (4th ed. 1993).

BIBLIOGRAPHY

1. 'Doctrine of sovereign immunity ',sourced fromhttp://www.neerajaarora.com/doctrine-of-sovereign-immunity.
2. 'Conceptual dimensions of sovereign immunity under law of tort in India,'Dr.RohitP. Shabran.
3. 'Sovereign Immunity: No Defence in Private Law,AmardeepGarje,available at:http://ssrn.com/abstract=1347948.
4. M.P.Jain&S.N.Jain,'Principles of Administrive Law '.5th Edition (2009).
5. 'Governmental Interface with the Markets:Dealing with complexities faces by the Commission',KarishmaKakkar,sourced fromhttp://www.cci.gov.in/images/media/ResearchReports/KarishmaKakkar.pdf
6. Michael R.Baye&Joshua D.Wright,'Is Antitrust Too Complicated for Generalist Judges- The Impact of Economic Complexity &Judicial Training on Appeals 6 (Geo.Mason L. & Econ. Research Paper Series, Research Paper No. 09-07, 2009), availableat http://ssrn.com/abstract_id=13119888.
7.Law of Torts-R.K.Bangia