
A COMPARISON OF SOVEREIGN IMMUNITY IN INDIA AND THE UNITED STATES OF AMERICA

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ABSTRACT

Through this paper, the author seeks to achieve particular objectives. Firstly, the author aims to bring out the essentiality of Sovereign immunity as an anachronistic colonial concept by analyzing and comparing it in the context of Indian and American jurisprudence. Secondly, the author also attempts to evaluate and debunk arguments favoring the same in jurisprudence. Thirdly, the author would use a lens inspired by public policy considerations to review this doctrine and would investigate such relevant historical, legislative, and judicial developments that transpired in America and India. Lastly, the author would utilize such analysis to establish that the scope of sovereign immunity in tort law must be critically reviewed and restricted, if not entirely abolished, by jurisprudence in the United States of America and India.

Introduction

The legal doctrine of Sovereign or Crown immunity refers to the impunity enjoyed by the State and its agents from civil suits and criminal prosecution. It emanates from the Latin maxim, “*rex nonprotest peccare*,” meaning “the king can do no wrong.”

This pro-monarchist principle is one of the colonial heirlooms passed down by the Common Law tradition to Indian and American jurisprudence. Another facet relevant to the discourse is that this principle stands on the monarchist belief that the State cannot be sued in *its* courts without its consent. This is deeply unjustified as the modern-day democratic tradition advocates for the judiciary and, by extension, the courts to be harbingers of justice and just compensation following negligence. These anachronistic beliefs are inherently contradictory to the judicial systems of America and India as these are republican nation-states based on democratic conceptions such as equality before the law, the rule of law, the supremacy of the constitution, et cetera.

Allegedly this ancient doctrine stands in these democratic republics because of public policy considerations used for its problematic perpetuation. The staunchest argument propounded by those favoring Sovereign immunity is based on economic considerations. There is a sense of disinclination toward using public funds to compensate for private injuries. Additionally, it is ironically claimed that providing compensation to private individuals would ultimately harm their interests and those of society as the State would showcase diffidence in taking up beneficial projects due to the fear of excessive litigation. However, this undermines the sanctity of Tort law as it contradicts the fundamental principle that compensation follows injuries irrespective of the stature of the wrongdoer.

Considering the aforementioned and more, the author finds it imperative to examine State sovereignty in the post-colonial legal systems of Indian and American jurisprudence. The author also finds it relevant to do the same as a comparative study that examines recent legislative, judicial, and scholarly developments regarding Sovereign immunity in the two jurisdictions and investigates the need (or lack thereof) for this doctrine to persist while analyzing the evolution of the same.

Evolution And Development

United States of America

While the present-day jurisprudential opinion on State Sovereign Immunity in the United States is uncertain, it is crucial to understand this legal doctrine by tracing its evolution considering the then-prevailing legal, social, jurisprudential, and legislative considerations.

The American Constitution did not regard the question of Sovereign Immunity at all. As such, there is no mention of the same in the constitutional text or the relevant deliberations which occurred as a part of the Philadelphia Convention of 1787. However, the ratification debates discussed the question of Sovereign Immunity, which was supported by the famous federalist triumvirate comprising Alexander Hamilton, John Marshall, and James Madison. This support drew from a need to protect the American treasury, which had been severely drained post the Revolutionary War of American Independence. Conversely, many opposed the same as well. The opposition stemmed from the understanding that Sovereign Immunity is a common law doctrine based on the underpinnings of the king's absolute position at the apex of the feudal pyramid. This view was inconsistent with American constitutional values, including equality and the rule of law. However, the fate of this doctrine remained undecided as there was an apparent textual absence of the same in the constitution which posed a significant problem as the Supremacy of the constitution is the axis around which the entire American legal system revolves. The Supreme court later resolved this in the landmark case of *Chisholm vs. Georgia*, which dealt with the question of state suability by state citizens in a federal court. The facts and outcome of the case are as follows-

In 1792, Alexander Chisholm attempted to sue the State of Georgia in the U.S. Supreme Court over payments due to him for goods that Robert Farquhar had supplied Georgia during the American Revolutionary War. The defendant, Georgia, refused to appear, claiming that as a sovereign state, it could not be sued without consenting to the suit. ¹

In a 4-to-1 decision, the Court ruled for the plaintiff, reasoning that Article 3, Section 2 of the Constitution abrogated the state's sovereign immunity and granted federal courts the

¹ *Chisholm v. Georgia*, *Chisholm v. Georgia*, OYEZ (Oct. 11, 2022), <https://www.oyez.org/cases/1789-1850/2us419>.

affirmative power to hear disputes between private citizens and states. Thus, state conduct was subject to judicial review.²

The implications of this judgment were colossal and contentious. It formally gave federal courts jurisdiction to investigate and remedy claims against the government and its employees. This caused uproar and led to many States disapproving of the judgment. Interestingly, Justice Iredell's dissent in *Chisholm vs. Congress* used Georgia to overturn this decision and propose the Eleventh Amendment in 1794 to protect the Sovereign Immunity of the States. Before examining the overtones that followed this legislative development, it is interesting to note the universality of the power tussle between the Judiciary and the Legislature in almost every state that observes the Separation of Powers doctrine. This struggle for power lies at the heart of the Sovereign Immunity debate, as the extent of judicial review of State governments has been a bone of contention between those who believe in parliamentary supremacy and those who advocate for a proactive judiciary.

The Eleventh Amendment of 1794 significantly reduced the scope of judicial intervention and civil action against the State by conditioning the suability of the State on its consent to be sued in court. Most states adopted this doctrine by the 1800s because of the amendment. The rationale given behind the amendment was that the State would be rendered debilitated if it faced possible liability concerning the actions of its total strength of employees. A point to be noted in this context is that the Eleventh Amendment only disallowed citizens of other states to sue the federal government but kept mum on whether claims could be brought against the state by individuals of the same state. This loophole was later instrumental in weakening the absoluteness of State Sovereignty in American jurisprudence.

Intriguingly, the States reaped the benefits of protection against lawsuits by their citizens for almost a century post the pro-eleventh amendment era. However, with the landmark case of *Hans vs. Louisiana* judgment, the doctrine's hold on the American legal system began to wither. This case was highly relevant as if a citizen can sue their state in state courts was left up for debate by the court. Moreover, this case also established that due to the inconceivability of the thought of an individual suing his state, the framers of the constitution did not even anticipate much less engaging with this dimension. Thus, it was implied that there was no pre-

² *Id.* at 1.

existing constitutional position on the same, and the onus of charting a clear path fell on the Judiciary.

At last, it was held that the State could be sued by its citizens provided it consented to the same. This case laid the ground for other such developments and judgments that narrowed Sovereign Immunity's chokehold on America's constitutionalist republican legal system. Some of these developments are the decision in *Ex parte Young* (1908) which established that to stop a state official from enforcing a state regulation that was judged unconstitutional, a citizen could file a lawsuit against that official. Based on the verdict in *Fitzpatrick v. Bitzer*, the Fourteenth Amendment granted Congress the discretion to revoke a state's immunity from lawsuits to the extent that doing so was required to safeguard constitutional rights.³ The United States Supreme Court held 5-4 in *Welch v. Texas Department of Highways* in 1987, with Justice Antonin Scalia "concurring in part and concurring in the judgment." Justice Antonin Scalia concluded that Congress had considered *Hans* when enacting the Jones Act and the Federal Employer's Liability Act, while four justices upheld *Hans*.⁴ A congressional development worth noting is passing of the Federal Torts Claims Act (1946). The Federal Tort Claims Act (FTCA), which enables litigants to recover damages from the government for the wrongdoing of its workers, was passed into law. However, it was noted that making the federal government liable for torts includes costs for the country's budget and the possibility that officials may make poor choices based less on principled policy goals and more on the need to limit their exposure to financial damages. To maintain a balanced approach, The FTCA places restrictions on the instances in which a plaintiff may file a tort claim against the United States to lessen these possible adverse consequences of eroding the government's immunity from accountability and litigation. For instance, the FTCA has several exceptions that categorically restrict plaintiffs from being awarded tort damages in certain situations. The categories and number of damages that can be claimed in a successful FTCA lawsuit are likewise limited by federal law. Additionally, a plaintiff cannot file a claim under the FTCA unless he has timely satisfied several procedural requirements, such as giving the government a chance to review the plaintiff's claim before the matter is taken to federal court.⁵ Nonetheless, this tradition was reversed, and a pro-State Immunity climate returned, commencing with *Seminole Tribe v.*

³ *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

⁴ *Welch v. Texas Highways Public Transport Department*, 483 U.S. 468 (1987).

⁵ Federal Tort Claims Act, 28 U.S.C. § 1346 (1946).

Florida in the late 1990s; the Rehnquist court produced a string of rulings upholding state immunity from lawsuits under the Eleventh Amendment (1996).⁶

As a result of these shifts in the legal, legislative, and social world, the stance of Sovereign immunity in the American context remains unclear in today's day and age. This has been no barrier to the blatant upholding of this doctrine to shirk accountability and hide, more often than not, arbitrariness behind "sovereign" functions.

India

The doctrine of Sovereign Immunity in India was adopted from the Common law tradition of England. To argue for reducing, if not eliminating, this feudalistic notion of monarchical superiority from the democratic and republican fabric of the Indian jurisprudence, it becomes essential to understand the evolution of the same in terms of social, political, and legal developments.

Sovereign Immunity has had sway over Indian jurisprudence since the nineteenth century. Several cases before the enactment of the Constitution established this doctrine in Indian jurisprudence. As mentioned earlier, the validity of the doctrine was conclusively established for the first time in *P & O Steam Navigation Company v. Secretary of State*. The case's facts entailed a servant of the plaintiff's company traveling down a Calcutta highway in a carriage pulled by a pair of the plaintiff's horses. He was injured in an accident spurred on by government employees' carelessness.

This case is essential as the distinction between sovereign and non-sovereign functions, which form the flesh of the skeleton of this doctrine in Indian jurisprudence, was recognized for the first time. The judge decided that because the negligent act was not carried out in the performance of a sovereign role, the Secretary of State was responsible for the losses brought about by the negligence of government employees. The court made a distinction between acts carried out while in the "exercise of sovereign authority" and those carried out while in the "exercise of a non-sovereign function," that is when conducting out undertakings that could be carried out by private individuals with no such power. Only when non-sovereign functions occur can there be a liability.

⁶ *Seminole Tribe v. Florida*, 517 U.S. 44 (1996).

Another case of relevance that solidified the importance of the distinction between sovereign and non-sovereign functions was that of *Nobin Chunder Dey v. Secretary of State*, in which it was held that The grant or refusal of a license is a sovereign function that is outside the scope of the State's tortious liability, so the Calcutta High Court gave full effect to the remarks when it rejected the plaintiff's claim for damages against the State's wrongful denial of him a license to sell certain excisable alcoholic beverages and drugs, which led to the closure of his business. Since then, several judicial judgments have been based on separating the State's sovereign and non-sovereign powers.

As seen earlier, Indian courts upheld the idea of sovereign immunity from the middle of the nineteenth century until very recently. When sincere claims for damages were brought before the courts and were rejected by an antiquated concept that didn't seem to have any application, there was frequent irritation and calls for revision. Indian courts continued to limit the scope of sovereign powers so that actual victims would obtain just compensation.

Additionally, the constitutional text has never explicitly grounded the doctrine of sovereign immunity. Thus, the principles of sovereign immunity are not expressly mentioned but rather must be observed through multiple constitutional provisions and other legislative enactments, such as article 300, which deals with the liability of the State and maintains that the Government's liability is equivalent to that of the East India Company in the past. This is interesting to note as a disturbing analogy was drawn between the East India Company of colonial India and the government based on republican principles of independent India. This analogy is flawed because the East India Company, which exercised control over some sovereign functions, was not the welfare state that the government of India is proclaimed to be. Hence, it is prudent to assume that the change in the essential nature of the conception of the State mandated a greater responsibility of the republican government to its citizens than the colonial government did to its subjects.

Nonetheless, there have been various refreshing judgments in which the scope of sovereign immunity has been narrowed, and the rights of people against harm committed by the state or its actors have been upheld. One such landmark judgment is *Nilabati Behra V. State of Orissa*. It is essential to understand the sociolegal climate in which this judgment was passed before dealing with its intricacies. The context was that following 1977; the Supreme Court was presented with several writ petitions under article 32 of the Constitution and appeals against decisions of the High Courts under Article 226 concerning cases of wrongful detention and

custodial death. Compensation was given to the wounded person (or to his legal representatives) wherever the arrest was deemed illegal or if it was determined that the inmate's death occurred due to the police officers' misconduct or gross negligence. In the case of *Nilabati Behra V. State of Orissa*, the facts entail that during the investigation of a theft offense in the village, the son of the petitioner was brought into the prison by the police. The following day, her son's lifeless body was discovered on the railroad track, still in handcuffs and suffering from several wounds. Additionally, it should be underlined that there was no convincing, independent proof of any search conducted by the police to find him.⁷

The court granted the petitioner compensation for her son's death while in police custody. It held that a claim in public law for compensation for violations of human rights and fundamental freedoms, the enforcement remedy for those rights, and a claim based on strict liability made by using a constitutional remedy provided for the enforcement of fundamental rights are separate from and additional to the remedy in private law. According to the court's explicit ruling, the principle of sovereign immunity does not extend to the public law remedies under Articles 32 and 226 to enforce fundamental rights. Legal scholars saw this as a win and viewed sovereign immunity and its blatant overuse as threatening individual life, liberty, and freedom.

Another pertinent aspect of this discourse is the importance of article 21 juxtaposed with the question of state sovereignty. This was examined in the case of *State of AP v. Challa Ramakrishna Reddy*. The facts are that the petitioner, and his father were detained in jail, when one day, rivals attacked them with bombs, killing the father and injuring the petitioner. Despite the victims' prior awareness of the attack and their communication of their fear to the authorities, they received no additional security. The number of police officers assigned to guard the jail, on the other hand, was significantly reduced. Consequently, the petitioner launched a lawsuit against the government based on negligence.

The judgment heralded a new era of protecting fundamental rights against sovereign immunity and its inherent arbitrariness. The trial court concluded that the authorities were careless in their supervision of the jail and that this carelessness was to blame for the deceased's death. The lawsuit, however, was rejected on the grounds that the deceased's arrest and incarceration were carried out as part of the State's sovereign powers. The High Court considered Article 21 of the Constitution and concluded that because a person's right to life is a fundamental right, it

⁷ *Nilabati Behra V. State of Orissa*, SCR 1993 S.C. 581 (India).

cannot be taken away from him or her unless done so per the legal process. It was decided that the claim for violation of fundamental rights could not be violated by statutory immunities because the negligence that caused the incident was both illegal and in violation of Article 21 and because the statutory concept of sovereign immunity could not supersede the constitutional provisions. The maxim that the King can do no wrong or that the Crown is not answerable in tort has no place in Indian jurisprudence, where the power vests in the people who elect their representatives to run the Government, which has to act following the provisions of the Constitution and would be answerable to the people for any violation thereof. Hence the Supreme Court ruled to dismiss the appeal made by the State. This judgment establishes the precedent that sovereign immunity does not apply when a fundamental right is violated, effectively limiting its application to cases involving fundamental rights.

While it is commendable that the judiciary is weighing the principles of constitutional rights over the autocratic doctrine in deciding compensation claims of genuine victims, there still exists a need to let go of this colonial hangover and embrace the true spirit of independence.

Similarities and Differences

While looking at the concept of Sovereign Immunity in American and Indian jurisprudence, several observations in terms of the similarities and differences between the two legal systems stand out.

Firstly, the background in which this doctrine was adopted in both these jurisdictions was very different and played a cardinal role in the kind of Sovereign Immunity that was adopted respectively in India and the United States of America. The American legal system was witness to the bruises left by the war of independence on the treasury and as such, wanted to protect public funds from being utilized on “frivolous” lawsuits. When it comes to the situation of India, pre-independence it was clear that the monarch reigns supreme and has the divine right to rule as such, the crown can commit no wrong because of its inherent connection with divinity and its position at the pinnacle of the feudal top chain. This belief was imposed upon the pre-independence legal system of India and became embedded in it. After independence, the supremacy of the constitution was established and the status of Indians with respect to their governing authority went from being passive subjects of the crown to active citizens who elected their representatives. The judiciary was seen as the protector of rights and all men were seen as equal in the eyes of law. These different backgrounds led to different kinds of the same

doctrine being adopted in the two jurisdictions. The doctrine of absolute sovereignty was adopted by the protectionist United States and the doctrine of restricted or qualified sovereignty was adopted by the world's biggest democracy.

Secondly, a common factor is highlighted in both these jurisdictions. There is a lack of a constitutional basis for both, Indian and American sovereign immunity. The doctrine was developed because of either legislative enactments or judicial decisions or both, in the two jurisdictions. There was a sense of organic development of this doctrine with respect to changing political, social, and legal climate in both these jurisdictions.

Thirdly, a stark difference that exists between the two is the codification of this doctrine. The United States of America has codification in terms of the legislations enacted by the Congress to protect sovereign immunity which were discussed above. However, sovereign immunity in India is a result of judicial pronouncements and no legislative enactment has been passed by the Parliament. Hence, in the American context, the doctrine of sovereign immunity also enjoys legislative backing along with judicial support. The same is not the case with India where sovereign immunity is backed by only certain judicial decisions.

Fourthly, Indian jurisprudence has taken a more welfarist approach towards civil rights which are compromised by the government under the garb of "sovereign" functions. India courts have time and again, provided compensation to genuine victims of tortious acts committed by the State since India's independence. Conversely, American courts have adopted a protectionist approach towards the State's interests and often, chosen not to grant remedy to the victims.

Conclusion

While it is of legal concern to analyse the concept of sovereign immunity in context of American and Indian jurisdiction. There arises a need to reconsider the relevance of this doctrine in the modern day. This doctrine will always be based on monarchical superiority and as such, will relegate the status of people from citizens to subjects. There will always be a case for removing this autocratic doctrine which does not find any place in the jurisprudential fabrics of India and the United States.

One must also consider the spillover effect this doctrine has on other areas of legislative and judicial interest. The idea of sovereign immunity has become so embedded in these two jurisdictions that it has transcended the boundaries of civil law. For instance, in India, even if

a local-level member of the legislative assembly has to travel, the total traffic is stopped for his convenience at the discomfort of many people who suffer several consequences. If a private individual undertook a similar action, he would probably be liable for a temporary nuisance. Still, an act of a state official is justified simply because of the status accorded to him. This is also violative of equality before the law, forming one of the pillars of modern jurisprudence.

This doctrine must be looked at from the lens of the present instead of beliefs floating on an ancient tide of superiority. It must be remembered that the question is of remedying the wrong and not justifying it.