CHAPTER-II
CHAPTER - II

THE CONCEPT OF SOVEREIGN IMMUNITY

01. The traditional concept of sovereignty, is the sovereign is Supreme, unlimited, indivisible, inalienable and imprescriptible according to the phrase of French constitution of 1791 perhaps based on the theory Austin or Hobbes. But much water has flown under the bridge of river Thences from Austinian conception of sovereignty to modern democratic sovereignty, forms of Governments also changed from dictatorship to monarchism, from monarchism to totalitarianism, from totalitarianism to parliamentary and presidential types of governments in the world. The democratic system has given rise to unitary type of Governments as in England and France and federal types of governments as in America, Canada, Australia, West Germany (now United Germany of East and West), Switzerland and India. To locate the determinate sovereignty and ground norms as per pure theory of Kelson in the present types of democratic government is like cutting a garden knot. Not only that it is almost impossible in every from the society governed by law to disengage and personify a sovereign, as projected by Austin or Hobbes. Even in England, where monarchism continues in a unitary form with a change it is not possible to locate sovereign authority of ancient conception.

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02. Sovereign Immunity (as in England) means the King cannot be sued without his consent. At least in England, the conception has not meant that the subject was without remedy - Ubi Jus ibi remedium (where there is a right, there is a remedy) principle was being observed from the time immemorial in the King's Bench Court. Claims effecting the Crown could be pursued in the regular courts, if they did not take the form of suits against the Crown, and when it was necessary to sue the Crown "economic" consent apparently used to be given. Long before 1789, it was true that a sovereign immunity was not a bar to relief (Ch.6., P.197) on Judicial Control of Administrative action of Louis Jaffe), where the doctrine of sovereignty in form was applicable, the subject had to proceed by petition of right, but only thing is it was a cumbersome and dilatory process, but nevertheless a remedy. If the subject was the victim of illegal official action, in many cases, he could sue the King's Officers for damage. The prerogative writs like certiorary, mandamus, quo warranto and habeas corpus ran against many officials boards and commissions. This was the situation in England at the time when the American constitution was drafted.

03. Ironically the doctrine of sovereign immunity lost its efficacy when it is translated into other states and federal systems. The Courts concluded that because the King had been abolished, the procedure of "petition of right" is deemed as absolute since there is no one authorized to consent to suit. If there was any successor to the King quo sovereign it was the legislature. It has taken many years for the State and Legislatures
to authorize the suit. Fortunately, the part of the English doctrine and practice which allowed actions and prerogative writs against the Officers was still found to be usable in the new regimes and their expansion and applicability in modern federal, quasi-federal and unitary systems of states can beneficially consider as substitute for petition till new rules are framed with articulate definition of sovereign. The doctrine of sovereign immunity whatever it is, did not have and does not have any impact on the judicial control of administrative illegal actions. But unfortunately, the recent decisions of Supreme Court of India, such as:

1. **THE STATE OF ORISSA VS. PADMALOCHAN (AN EXCESS FORCE USED BY POLICE)** *(AIR 1975, ORISSA, 41)*.

2. **CHIRANJILAL VS. UNION OF INDIA (ON DELEGATED SOVEREIGN POWER TO POLICE)**.

3. **COLLECTOR OF SOUTH ARCOT VS. VENDANTA CHARIAR 1972 (SOVEREIGN FUNCTIONS)**.

4. **UNION OF INDIA VS. HARBAN SINGH 1959 PUNJAB (SOVEREIGN FUNCTIONS)**.

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2. Chiranjilal Vs. Union of India, AIR 1951 SC 42.

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04. In so far as the above decisions recognize ancient doctrine of sovereign immunity, they are at least tolerable. But they should not be starting point for new generalizations, which will certainly become shield of heaven for the wrongs of Public servants and political executives to escape from damages without bearing themselves the responsibility of accountability to the government and the public.

05. In furtherance of sovereign’s immunity, let certain historical facts be uncovered. By the time of Bracton (1268) it was a settled doctrine that the King could not be sued eo nomine in his own courts. This conception created serious problems for the King and his people. Consequently a Variety of devices for getting relief emerged against the Government. Some of them took the form of suits against the King himself, brought as petitions of right requiring his consent. This type of remedy was ever generalized into the broad abstraction of sovereign immunity. Others took the form of suits against an Officer or agency of the Crown not requiring consent. On the basis of said historical development, it be concluded that the King

2. Secretary of State in Council for India Vs. Cockraft AIR 1915 Madras 993.
Government or the State has been sue-able throughout the range of the Law sometimes with consent and sometimes without consent. The necessity of the consent was determined on the basis of expediency rather than the abstract theory that whether the action was really against the State. The litigations against the public officials were clearly manifest. The desire of the King to supervise his own officials, to protect their discretion, to follow different policies other those approved by the Courts, all appeared with their counter-parts in opposition, showing the extent to which relief was available to them against the public officials.

06. Pointing on King’s consent Proff. Mainthand says it would be a logical anomaly for the King to issue or enforce a writ against himself. Because of this, a petition rather than a writ was required says Maithan (Pollock and Maithad - The History of English Laws 518 2nd Ed. 1898)\(^1\).

07. The requirement of the consent a priory was not based on presumption that the King was above the Law. The King as the fountain of justice and equity could not refuse to redress wrongs when petitioned to do so by his subjects (Holds-Worth - A history of English Law 8 (3rd Edition 1944)\(^2\).

08. Kingship, 60 Eng. Hist. Rev. 136 (1945)\(^3\). Bracton says the King was legally bound by law (Id. at 165). “The law makes the King, therefore the King must make a return present to the law by subjecting himself to its rules “Id.at 168”\(^3\)

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1. Pollock and Maithad - The History of English Laws 518 2nd Ed. 1898.
09. Bracton's view can be taken for granted on benevolent King. If it is a despotic King like Frederic the great, his view needs to be revised.

10. Agreeing with Ehrlich (Vinogradoff Ed. 1922) let it be understood that the King though not sue-able in his Court (since it seemed anomaly to issue a write against oneself) nevertheless endorsed on petitions expressing Let Justice be done, thus empowering the Courts to proceed.

11. The above analysis shows that the immunity of the sovereign from suit "Sovereign Immunity", and his capacity to violate or not to violate the law "The King can do no wrong" are distinct and independent concepts. The grant of consent is based precisely on the proposition that the King has acted contrary to law.

12. Justice Holmes assertion on the immunity of sovereign is interesting to note. He says, "A sovereign is exempted from suit, not because of any formal conception or absolute theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which right depends". (Kawanankanoo Vs. Polyblank, 205 U.S. 349, 353 (1907)).

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1. Kawanankanoo Vs. Polyblank, 205 U.S. 349, 353 (1907)
13. The question ipso-facto is who is a sovereign authority in a democracy specifically so in a federal system of Government unless this riddle is solved, the contention of Justice Holmes is only theoretical which is again more or less the view of Austin. In his earlier lectures at Harvard, Holmes suggests that "there might be law without sovereignty.. and even opinion might generate law in philosophic sense against the will of the sovereign". This is only a conjecture and perhaps may be applicable to American federal structure of Government, but again where should "respondent superior" is to be located in America.

14. The question remains unresolved about sovereign power and identifiable unitary sovereign. It is hard to seen on what logical grounds, the activity of either one of Legislative, executive and Judicial bodies of federal structure of Government would compel it being above the Law. So is the case in India.

15. From the Judicial precedents, no logic emerges to determine that a suit against an Officer either is or is not against "the sovereign" or "the State". The discholomy of suits against the "State" and suits against "Officers" is without effective meaning. The clue of the problem is whether Legislative consent is required and whether it is determined by history and policy and not with the logic of whether the suit is against or not against the State. The eleventh amendment of American Federal Constitution is said to cover the above matter. But in India, there is no such constitutional amendment precisely defining sovereign powers of Central and State Governments.
SUI TS AGAINST THE CROWN BY NAME

16. When the suits were in the name of the Crown, there was a practice of handling petitions. The petitions were screened by the special commissions, by the Privy Council or by the Chancellor. Consent was given not on the basis of expediency but of law. The Chancellor makes inquiries, searches the petition. Whether there was a “right” he endorses the petition that “right” be done. These petitions tried on facts by the commission or department and if necessary sent to the Exchequer, the chancery or the King’s bench for ultimate disposition under law, ordinarily a petition of right would not be prima facie refused without legal justification. (Holdsworth History of English Law 13-22 (3rd Ed. 1944).)

17. Where the Crown’s title was involved or attempt was made to reach the Treasury directly against the Crown and so took the form of a petition of right. By statute and tradition other simple procedures not requiring consent of the crown were also used in certain other cases involving Crown’s interests.

18. Also equity entertained some suits against the Crown because of certain procedural prerogatives which chancery provided to the King, certain burdens of disclosures and proof laid down upon a claimant in equity.

19. Exchequer also took an active role in adjudication of property claims against the State. The King was required to do equity but it came to be accepted that only the Court of Exchequer as a Court of Revenue could give such relief.

20. The development of petition of right was given a jolt in 1865 decision which stated that the petition of the right did not permit recovery against the Crown for torts or a Crown servant (*Feather Vs. The Queen* Eng. Rap. 1191, 1205 (Q.B. 1865)). The basis of decision is not the Crown’s immunity from suit, since the power of the Court to entertain the petition of “Right” was equivalent to a waiver of immunity. The reason was that the doctrine of respondent superior was held to be inapplicable. Since King can not commit a tort, no one can commit a tort in his name, one who can not do a thing himself, can not do it by another, was the argument. It was a mistaken notion of respondent superior. This doctrine rests not on principal’s wrong in modern days, but on his duty to make good the damages done by his agent in carrying out the principal’s affairs. According to Holdsworth, (*in his History of English Law 3rd Ed. 1944*). The petition of right covers statutory duties to pay compensation for the use of property point in the same direction.

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ACTION AGAINST OFFICERS

21. In respect of suits against the Officers, it is seen that the Kings Exchequer acting as administrative Court, could at the suit of private individuals discipline the sheriffs and bailiffs (Officials subordinate to the Exchequer itself) and order them to desist and answer to the individual for their trespasses. The modern idea that an official who commits wrong is responsible personally was not yet of absolute effect (Elarlich). The King could claim the act as his own and insulate the Officer from responsibility. *(Elarlich No : XII proceedings against the Crown (1216-1377)).*

22. There have been in the past few instances of action against high officers of State in England against "the King's servants", those high secretaries who function directly for him in the conduct of Government. This may be consequence, not of a doctrine of non-suitability as such but of discretion. *(argument of one of the Judges in Ashby Vs. White)* not privilege against suit but privilege to act or it may be because normally the actions of high officers do not involve the direct interferences associated with tress-pass. Dicey has said:

23. With us every official from the Prime Minister down to a constable or a Collector of taxes is under the same responsibility for every act done without legal justification as any other citizen.

1. *Elarlich No : XII proceedings against the Crown (1216-1377).*
2. *Ashby Vs. White (1703), 2 Ld. Raym, 938.*
Reports abound with cases in which officials have been brought before the Courts and made in their personal capacity liable to punishment or to the payment of damages (*Dice - Law of the Constitution* 189 (1st. Edn. 1923)\(^1\).

24. In a famous case of *Entick Vs. Carrington* (2 Wills 275, 95 Rep. 807) K.B. 1765\(^2\) the Earl of Halifax one of the Lords of King’s Privy Council and one of Principal Secretaries of State had issued warrant and caused to break into the plaintiff’s house to search for seditious papers. The court observed, without preliminary thorough investigation not even a Magistrate can issue a warrant to search for and take away all man’s Books and papers. If law allowed,’ It would destroy all the comforts of society”. The Plaintiff had sued in trespass and recovered.

25. After discussing in detail about “Sovereign immunity " *and the maxim " the King can do no wrong "*” and bringing out clear difference between them, some more light needs to be thrown on another relevant maxim that “the crown is not bound by the statute unless named expressly or by necessary implication”. This rule was also applicable in the colonies, commonwealth countries (*Robertson Vs. Ahern* (1904) 1 CLR 406 and in U.S.A.)\(^3\) to enable the functioning of Governments unimpaired according to Sutherland in his “*Statutory Construction”* 3rd Edition Vol.III P. 184, 185\(^4\), of course,

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3. *Robertson Vs. Ahern* (1904) 1 CLR 406 and in U.S.A.
such principle is a negation of the "Rule of Law". According to Lord Goke, three kinds of statues bind the King Viz:

(Mugdalen College Cambridge Case (1616) Rep. 66 (b)\(^1\)

1) STATUS PROVIDING FOR MAINTENANCE OF RELIGION, LEARNING AND POOR.
2) STATUS TO SUPPRESS THE WRONG.
3) STATUS THAT TEND TO PERFORM THE WILL OF THE FOUNDER OR DONOR.

26. According to Bacon, "where an Act of Parliament is made for the public good, the advancement of religion and justice and to prevent injury and wrong, the King shall be bound by such act. (Lord Parmoor in A.G.V. Dekeyer's Royal Hotel (1920) A.C. 508 (1920) All E.R. 80 (III) P. 110\(^2\). But according to Craies, Maxwell and Halsbury's Laws of England the aforesaid view is not correct and the statute needs to be constructed on its own terms whether it binds the Crown or not. The view of Bacon that the Crown would be bound by the statute if enacted for the public good was discarded. (A.G.V. Hancock (1940) All E.R. 32 P.)\(^3\). Further in Bombay Province Vs. Municipal Corporation AIR 1947 P.C. 34;\(^4\) the Bombay High Court took the view that the Government could be bound by the Statute. The statute was held applicable to the Government

\(^1\) Mugdalen College Cambridge Case (1616) Rep. 66 (b)
\(^2\) Lord Parmoor in A.G.V. Dekeyer's Royal Hotel (1920) A.C. 508 1920 All E.R. 80 (III) P. 110.
\(^3\) A.G.V. Hancock (1940) All E.R. 32 P.)
\(^4\) Bombay Province Vs. Municipal Corporation AIR 1947 P.C. 34
land also. The Privy council overruled the decision of the Bombay High Court and said that, to interpret the principle “The Crown is not bound by the Statute” would be to wintel it down and there was no authority to support the interpretation. If the purpose of the express law would be wholly frustrated or the Law would become meaningless unless the Crown is “held bound by the Statute” then the general presumption that “the Crown is not bound by the Statute” would be rebutted.

27. The Privy Council’s decision appears to have been based on supremacy of sovereign powers. It directly cuts at the root of fundamental rights of a citizen after the advent of Indian Constitution. It was a pre-constitution decision.

28. The protection of the Crown’s immunity from statutes is available to the:

1. SOVEREIGN PERSONALLY.
2. THE AGENTS AND SERVANTS OF THE CROWN WHILE ACTING AS SUCH.
3. THE REST OF THE PERSONS NOT FALLING IN (1) AND (2) ABOVE.

29. In the second category are included not only the officers of the Ministerial status but also all subordinate officers as also the servants holding statutory offices. In the third category, though not servants or agents of the Crown, are considered as “Casimile casu”. They are those performing exclusively or to a limited extent regal Government functions i.e. persons engaged
with the functions of a administration of justice or to maintain Law and Order, making of War and Peace. If a person belonging to the category No : 3 exercises some of the regal functions and certain other functions also, the immunity extends to the regal functions only.

30. The functions of the above three categories of State mentioned supra are shown in the following diagram pointing out sovereign’s immunity and liability according to the activities carried on by the State.

31. Immunity covers the first (1) functions as sovereign and liability arises in the second (2) functions in all the above categories treating as if a private person discharges the functions as non-sovereign. In South-Africa it appears, a presumption is prevailing that the state is not bound by the legislation. Case law does not establish as to how this presumption of common

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law operates in practice in that State. It may be a rule of interpretation and not a prerogative of State. The difficulty is how to reconcile the statutory presumption that the State is not bound by the legislation with the principle of State liability on the other side. If the State is not bound by the statutory rules on the view of Privy Council mentioned supra, the State can never be held liable for the statutory rules on the view of Privy Council mentioned supra, the State can never be held liable for the wrongful acts done during the exercise of statutory powers and duties. It would also mean that the State and all administrative organs would never be bound by the statutory provisions relating to powers, authority organisation and actions of State administration. In such case, it can be safely said that the State as a general rule is not bound by the legislation except when it is clearly apparent or implied by the statute. The State acts as a Government person (organ) and also acts as a private person. An administrative organ can not disregard the Law governing its own organ when it acts like a private person, viz. in entering into a contract, it is bound by legislation as an ordinary individual. Thus the presumption that the Government task. So a Policeman while apprehending a suspect can disregard the traffic rules but a Postman while delivery bag can not disregard the traffic rules, because his task does not require it. *(R.FDe Beer, 1929) T.P.D. 104 P.115)*.


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32. In another case, *Director of Rationing Vs. Corporation of Calcutta, AIR 1960 S.C. 1355*, the Supreme Court of India also, the rule that the "State would not be bound by the Statute" would be applicable even after the constitution as there was nothing to indicate that the rules had changed and Art. 372 continued all the pre-constitutional laws. The rule was applicable not only to monarchic Government but in even a democratic republic as well as federal Government like America. Justice Wanchoo dissented with the above Judgment and took the view that there was no justification in continuing, in a democratic republic, the old rule of interpretation that "the Crown is, not bound by the Statute". Justice Wanchoo's view is in consonance with the "rule of law". That apart, there is express law demarcating sovereign functions and non-sovereign functions in the therefore the views taken by Judges serve only as obiter-dictum and not binding on the future interpretations by the Courts in regard to sovereign and non-sovereign functions of the State.

33. In another important case of "*Superintendent and Legal Rememberancer West Bengal Vs. Corporation of Calcutta (AIR 1967 S.C. 997)*", the Supreme Court overruled its earlier view and pointed out that the common law rule of construction of statute was not applicable throughout India or even to the Presidency towns. In the earlier case of Bombay Province Vs. Bombay Municipal Corporation, the rule was applied by the

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1. *Director of Rationing Vs. Corporation of Calcutta, AIR 1960 S.C. 1355*
2. "*Superintendent and Legal Rememberancer West Bengal Vs. Corporation of Calcutta (AIR 1967 S.C. 997)*"
Privy Council on a concession made by the Counsel. The legislative practice in India too was that, the various legislatures of India used to exempt the Government specially from the statute as an indication that they did not rely upon the presumption of Governments immunity as a sovereign from the statutory provision. The common law rule of the Crown's immunity was based on the prerogative of the Crown having no relevance in a democratic country like India, where there was no Crown. The rule is inconsistent with the democratic principle of "Rule of Law". The State was held bound in the above case. The observation of Justice Bachawat appear to be important as certain legal principles are enumerated by him in respect of taxing or penal statue:

34. 1) If the application of the Act leads to same absurdity, that may be a ground for holding that the State may be excluded from the operation by necessary implication.

35. 2) If the only penalty for an offence is imprisonment, the State can not be convicted of an offence, because the State can not be locked up in prison.

36. 3) If the penalty for the offence is only fine and fine goes to the consolidate fund of the State, it may be presumed that the penal provision does not bind the State, since the legislature could not have intended that the State will be the payer as well as the receiver of the fine. On this analogy, the Union is not bound by the Income Tax Act (Central subject) because, if it paid income-tax it will be both payer and receiver.
37. 4) Likewise, a State is not, prima facie, bound by a State Agricultural Income-Tax Act, where the tax is receivable by it.

38. In Satyanarayan Vs. District Engineer P.W.D. AIR 1962 S.C. 1161, it was held that the Roadways Department of Uttar Pradesh would be liable to pay the tax under Sec. 15 of the Northern India Ferries Act, 1876 which authorised the levy of tax “on all persons, animals, vehicles and other things crossing any river by a public ferry and not employed or transmitted on any public service”. It was held that the State was bound by the provisions of Civil Procedure Code, 1908 (State of Bihar Vs. Sonabati Kumari AIR 1961 S.C.221) and it could be sued at the place of its business, (Union of India Vs. Ladulal Jain AIR 1935 S.C. 1681).

39. Regarding Stature operation, the law, in modern India is inconformity with the “Rule of Law”, that it binds the Government also unless there appears to be a contrary provision in the Statute which may be express or implied. The Government in India, therefore, is liable for a wrongful act by the statutory provisions unless the governmental liability is excluded by the statute. Likewise if there is an express statute levying income tax on the profits earned by the Central Government by way of trade or commerce done in the course of business. The Central

Government will not be immuned from the levy of income tax and if the goods dealt in are such that attract liability to tax, even the statues will levy sales tax on the Central Government transactions treating is as a dealer. Therefore, Bachawnat’s enunciation of principles of certain tax and penalty are not practically applicable, since it is an infallible fact that in the matter of taxation, statues will bind the Government unless there is an express exemption or exemption given by necessary implication.

**ODD GOVERNMENTAL FUNCTIONS**

40. A wrongful act is caused, sometimes, by the Government servants in the activities in which the Government servants are expected to have the same duty of care as private individuals. Then they should bear the same responsibility. But sometimes, the act done by the Government or its servants has no counterpart outside the Government and there the Government may not be liable for wrongs of such Government servants. Justice or the Rule of Law is denied to the victims in such circumstances, because Government’s wrong is protected under the umbrella of legal act.

41. In *River Vs. Commonwealth (1951, 51 S.R.N.S.W. 63)*, the plaintiff applied for import licence. The licence was signed by an officer and it was misplaced by him, and certain
time elapsed before it was delivered to the plaintiff. The plaintiff had to pay enhanced rate of import duty. He brought an action for the negligence of the department in delaying the licence. The Court held that there was no cause of action because the customs Department does not owe any duty to issue the licence promptly. But the Court did not suggest that the Crown is immune for peculiar Governmental activity. This was an inevitable result of narrow construction of precedents concerning actions between the Government and the public. Delays and negative stands are strong weapons in the hands of the Government servants to subject the petitioners to harassment and unwritten punishment and deny social justice. It is high time that the Government both at the Centre and State restrict the delays by law and communicate the decisions within the fixed minimum reasonable time.

42. *In Gibson V/s. young (1899) 21 L.R.N.S.W. (L) (a New South Wales Case)*, the plaintiff, a convicted fellow lost one eye due to bursting of Gauge glass of a steam engine at which he had been, directed to work. His action against the Crown, failing to maintain the engine safely and directing him to work failed.

The Court said if the case was admitted “every sentence would be followed by an action and goal management would be taken out of hands of the skilled officials”. Such actions are certainly

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1. *River Vs. Commonwealth (1951, 51 S.R.N.S.W. 63*
2. *Gibson Vs. young (1899) 21 L.R.N.S.W. (L)*
opposed to public policy. The Courts, however, later on expressed that the action could be brought in negligence in prison matters.

43. *In Parkar Vs. Commonwealth* (1965) 112 CLR 295, a civilian on Board, a ship of Australian Navy died when it collided with another Navy ship, Melbourne and Sant. The collision occurred due to negligence of the officer and the crew of the two ships. The commonwealth was held liable. The duty of armed forces towards civilians greatly alternates during war operations.

44. *In Albion Co.Ltd. Vs. Commonwealth* (1940) 66 CLR 344, the High Court of Australia to direct movement and lightening of all the vessels in Australian territorial waters. Coptic pursuing directed Corose collided with navy-ship Adelaide. The owners of coptic sued the commonwealth for negligence. The High Court of Australia held neither the Commonwealth nor the Armed forces are liable in negligence for acts done during operations. There is no reason as to why the Government should not be vicariously liable during the war operations as it would be same as an act of State, and the decision does not appear to be a good law for Australia. In England ordinary rules of negligence are applied to the Captains of Warship engaged in war. In U.S.A. any claim arising out of combatant activities of military or naval forces, the coast guard during the time of

war is barred. (Sec. 42 of Federal Tort Claims Act). In India, the theory of "Sovereign functions" minimizes the Government for its peculiar Governmental functions. The immunity of Government from the liability for the acts whether termed as peculiar Governmental functions or sovereign functions as in India denies justice and therefore violates "Rules of Law".

**STATUTORY FUNCTIONS**

45. An official acting under the delegated authority of the Government or under general instructions does an act. The principle of agency is applicable in this issue and the act of servant is deemed to be the act of the master on the theory of "respondent superior".

46. But sometime a servant acts, not on the direction of his master, but under the statutory law, duty or power, then it is the act of the servant only and not of the master.

47. The requirement of the fair-play and justice demands that the Government should be liable for the acts of its officials whether the act is done under the delegated exclusive power of the Government or under a statutory duty by an official.

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48. The concept of sovereignty is different from State act. State act deals with another sovereign state or alien person of another sovereign state. The State act has nothing to do with the State sovereignty or its sovereign immunity. Therefore, it does not necessitate to discuss any details about the State act in the subject.

49. In furtherance of sovereign immunity, the following case laws are critically examined to throw more light on the sovereign immunity.

1) **NOBINCHANDER DAY VS. SECRETARY OF STATE ILR 1 CALL.1**

50. In this case, the Government did a breach of contract in auction of excise shops by not granting licence to the plaintiff and not returning his deposit. The Calcutta High Court held the auction of excise as a sovereign and hence action would not lie. Allahabad High Court expressed doubt on the correctness of the decision. *(Kishanchand Vs. Secretary of State ILR 3 All. 29)*

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1. Nobinchander Day Vs. Secretary of State ILR 1 Call.1.
2. Kishanchand Vs. Secretary of State ILR 3 All. 29.
2) **IN SECRETARY OF STATE FOR INDIA IN COUNCIL Vs. ACOCKRAFT, ILR 39 MAD. 351 : AIR 1915 MAD. 993**.

51. In a claim against the Secretary of State in a carriage accident alleged to have been due to negligent stacking of gravel on a military Road maintained by the Public Works Department, it was held that the Secretary would not be liable because the provision of a road and its maintenance, specially a military road and it was a sovereign power of the Government.

3) **IN SECRETARY OF STATE FOR INDIA IN COUNCIL VS. GOBINDA CHOUDHARI ILR 59 CAL. 1289 : AIR 1932 CAL. 834**.

52. The Calcutta High Court held that the suit for damages would not lie against the Secretary for misfeasance, wrongs, negligence or omissions of duties of managers appointed by the Court of Wards because the officers exercised sovereign powers.

53. The officers exercise statutory powers in course of their duties. How their acts were immuned was matter of doubt. It was a pre-constitution period.

4) **KASTURILAL RALIA RAM JAIN VS. THE STATE OF UTTER PRADESH AIR 1965 S.C. 1039**.

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54. The Supreme Court’s Judgment is surely on the wrong side. In this case, the gold suspected and seized from the petitioner was by the Police Officer who misappropriated it from Malkhana and fled away to Pakistan. If not misappropriation, it was a clear case of stealing. Criminal action lay against the Police Officer. The Police Officer’s Official performance was only a statutory duty under law. He did not act under sovereign delegation of powers or instructions. The Supreme Court’s decision that he exercised sovereign powers was ostensibly on the wrong side. The Supreme Court’s pointer that the petitioner on being discharged from accusation was not entitled to get back his seized property is still more lamentable. Justice Gajendra Gadekar had expressed in this case that the remedy lies in the hands of the legislature Kasturial V/s. State of U.P. (AIR 1965 S.C. 1039 P.1049)\(^1\) to hold that loss should lie where it was and the bullion dealer himself should bear loss would be unjust and contrary to the justice and fair play. The man who is deprived of his property by the Government must be recompensed at least in the interest of justice and rule of law. The case certainly has created confusion in the existence of dual criterion of sovereign and non-sovereign functions. It is certainly a rash decision.

5) **STATE OF ORRISA VS. PADMALOCHAN PANDA**  
**AIR 1975 ORI. 41**\(^2\)

55. In an apprehension of danger of attack on the office of the Sub-Divisional Officer, due to violent student and mob

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(35)
squabble the Orrisa Military Police cordoned off the Court without any order from the Magistrate or higher Police authorities. The members of the Police assaulted the mob in which the plaintiff, an Advocate was injured. He claimed damages against the Police and Orissa State. The State was held not liable and it was done in exercise of sovereign powers. The High Court held that the act of Police was in exercise of the sovereign powers of the State. The Court said the sovereign functions of the State must necessarily include, maintenance of the army, various departments of Government for maintenance of Law and Order, and proper administration of the country, which would include magistracy and Police and the machinery for administration of justice. In determining whether immunity should be allowed or not the value of the act, the nature of employment of the person committing it and the occasion for it, have all to be cumulatively taken into consideration.

56. All the details described by the Court goes to show that much depends upon Judge, who interprets what is sovereignty and immunity of the State. There will not be any uniformity in interpretation of sovereign immunity. Such law is bound to be uncertain and damocles sword will always hang on the claim of the victim petitioner. The effect of which would be to deprive a person of genuine claim for compensation.

6) STATE OF MAHARASHTRA VS. KHODWE
(ILR 1980 BOM. 660)1.

57. The Bombay High Court has taken a view that the running of Hospital by the State was a Government function and therefore no action could be maintained against the State

for negligence of the Hospital employees. The Madras High Court’s view also was some (Ethi Vs. Secretary of State AIR 1939 Mad. 663). In management Safdarjung Hospital, New Delhi Vs. Kuldeep Singh Sethe AIR 1970 S.C. 1407 the Supreme Court held that the Hospital was not an Industry unless run for commercial purpose. But the Supreme Court in Bangalore Water Supply Vs. A Rajappa (AIR 1978 S.C. 548) over-ruled the management of Safdarjung Hospital case and observed that the activities undertaken by the Government in pursuit of Welfare polices in compliance with the directive principles of the State Policy of the constitution were not the part of sovereign functions and therefore the State would be liable for the Torts of its employees committed, in the course of doing such acts.

7) COLLECTOR OF SOUTH ARCOT VS. VEDANTA CHARIAR AIR 1972 MAD. 147.

58. A Culvert gave way, a bus plunged into the channel on a highway in which the son of the respondent was killed. The action for damages against the Government could not succeed as the liability could not be attached to highway accidents. Liability was same as sovereign immunity. The Court relied on Kasturilal case and held that the Government was not liable.

1. Ethi Vs. Secretary of State AIR 1939 Mad. 663.
2. Safdarjung Hospital, New Delhi Vs. Kuldeep Singh Sethe AIR 1970 S.C. 1407
The Court observed the maintenance of highway was a sovereign function. The list of sovereign functions holds unending and what the judiciary holds sovereign attracts immunity. This is an unsatisfactory position under Rule of Law.

8) **K.KRISHNAMURTHY VS. STATE OF ANDHRA PRADESH AIR 1961 ANDHRA PRADESH 283**.

59. A boy of five years was casing at road side, a road rather belonging to P.W.Department was returning with high speed after work. The boy was frightened and began to run away. In the process, he fell down and his right arm was fractured, and it was imputed. The Court expressed its shock over the condition of the boy as he was battling for life without any source. The Government was held not liable since it was a function of a sovereign of the State. The Court observed the road roller was evidently being used for the maintenance of high ways and was returning from duty. Making and maintenance of highways is a public purpose and the duty of the Government and not a commercial undertaking (*AIR 1961 A.P. 283 P. 288*)

The Judge made the law is still an inchoate law in our country in the absence of any legislation on sovereign either mending it or ending it in the public interest.

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1. K.Krishnamurthy Vs. State of Andhra Pradesh
   AIR 1961 Andhra Pradesh 283.
2. ibid (AIR 1961 A.P. 283 P. 288).
60. The High Court of Andhra Pradesh, following the ratio in Kasturilal’s case and *Devarselly Ramamurthy Vs. State of Andhra Pradesh (1985) 2 A.P.W.R. 402 (FB)* held that the State is not liable vicariously for the negligence of its officers in discharge of their duties. Regarding seizure of goods in exercise of statutory and sovereign powers, the Supreme Court said that the basis of sovereign immunity in England was both substantive and procedural. The former flowed from the divine right of the Kings and the latter from the feudal principle that the King could not be sued in his own courts, yet it did not mean he was above law. The true meaning of the expression that “the King can do no Wrong” meant that the King has no legal power to do wrong. (*H.W.R. Wade - Administrative Law 6th Edn. P2673*) The sovereign immunity principle was imported into Indian legal system during the British period by the English Judges in India although the maxim “*Lex non-protest peccare*” i.e. “King can do no wrong” had no place in ancient or medieval India. It is purely a British legacy in India. The observations of the Supreme Court of India in Kasturilal’s case throws light on the importance of sovereignty in India. Tracing the law of sovereignty in India, the Supreme Court said, the doctrine of sovereignty in India had no relevance in the present day context when the concept of the sovereignty it has undergone

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drastic change (*Wades Administrative Law at P. 2677*)\(^1\). Regarding modern concept of sovereignty, which was not illimitable and indivisible, the court said the concept of sovereignty and the distinction between sovereign and non-sovereign functions were neither relevant nor indispensable before and after coming in to force of Indian constitution. Medieval concept of sovereignty has undergone a change drastically. The legislature, executive and judiciary have been created to serve the people effectively. The Austinian concept of sovereignty was never introduced by the Britishers in India. The Supreme Court of India in *Maganbhai Ishwar Bhai Patel v/s Union of India*\(^2\), has rightly pointed out on the question, whether the government could transfer certain villages to Pakistan without Parliamentary approval. The constitution bench said, it was a question of one of the authority that, who in the state can be said to possess “Plenum dominium” i.e. plenary powers, depends upon the constitution and the nature of the adjustment. The Supreme Court also referred to Federal State School Teacher’s Association, *Australia v/s State of Victoria (1928-1929)*, 41 CLR 569 P-585\(^3\), reflecting the modern thinking of distinction between sovereign and non-sovereign functions, which was categorized as regal and non-regal functions. The regal powers were confined to legislative power, the administration of laws and exercise of judicial powers. Non-

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1. *Wades Administrative Law at P. 2677*
3. *Federal State School Teacher’s Association, Australia v/s State of Victoria (1928-1929), 41 CLR 569 P-585*
regal functions may be assumed by means of the legislative power. After assumption of these functions, the State is said to act simply as a huge corporation with its legislation as a character. This power of the State is analogous to a private company similarly authorised. The further observation of Supreme Court in this regard is pertinent to sovereignty. "In the modern sense, the distinction between sovereign and non-sovereign powers does not exist. It all depends on nature of power and manner of its exercise. Legislative supremacy under the constitution arises out of the constitutional provisions. The legislature is free to legislate on topics and subjects reserved for it. The executive is free to implement and administer the law. A law made by the legislature may be bad or may be ultra vires. But since it is a legislative power, the person effected can challenge it, but he can not approach court for negligence in making law. Nor can the Government in exercise of its executive action be sued for its decision on political or policy matters. It is in public interest that, for acts performed by the state, either in its legislative or executive capacity should not be answered in Tort. This would be illogical. It would be in conflict with even modern notions of sovereignty. The executive is answerable to the Parliament in its actions relating tort.

69. One of the test to determine if the legislative or executive function is sovereign in nature is whether the state is liable for such actions in courts of law Viz., acts such as defence of the
country raising armed forces and maintaining it, making peace and war, foreign affair, power to acquire or retain territory are functions which are indicative of external sovereignty and are political in nature. They are not amenable to jurisdiction of ordinary civil court. No suit under Civil Procedure Code would lie against it. The State is immuned from being sued on those subjects. The jurisdiction of courts is impliedly barred.”

70. “Immunity ends there. No civilized system can permit an exclusive to play with the people of its country and claim that is entitled to act in any manner since it is a sovereign. No legal or political system can to-day place the executive above law as it is unjust and unfair for a citizen to be deprived of his property illegally by negligent act of officers of the State without remedy. From sincerity, efficiency and dignity of State, as a juristic person, propounded in 19th century as a sound socio-logical basis for state immunity, the circle has gone round and the emphasis now is more on liberty, equality and the rule of law.

71. The modern social thinking of progressive societies is to do away with the archaic state protection and place the state or Government at per with any other juristic legal person. Any water-tight compartmentalisation of the state as “sovereign and non-sovereign” is not sound. The need of the state in the modern situations of political violence is to have extra-ordinary powers can not be unscored with the conceptual change of statutory power being statutory duty for the sake of society and the people,
the claim of common man or ordinary citizen can not be thrown out merely because it was done by an officer of the State even though it is against law and negligently. Needs of the state duty of its officials and right of the citizens are required to be reconciled so that the rule of law in welfare state is not shaken. In welfare state, functions of the state are not only defence of the country or administration of justice, maintenance of law and order and repression of crime etc., which primary and inalienable functions of the constitutional government, the state can not claim any immunity. The determination of vicarious liability of State is linked with the negligence of its officers, if they can be sued personally for which there is an abundance of authority and the law of misfeasance having advanced in its efficacy, there is no reason for the proposition that even if the officer is liable the State can not be sued. The liability of officers personally was not doubted even in early time. (Viscount Canterbury Vs. Attorney General IPH 306 41 English Report, Chancery P. 640).  

72. Since doctrine has been out-dated and sovereignty now rests with the people the State can not claim any immunity and if a suit is maintainable against the officer personally, there is no reason to hold that it would not be maintainable against the State.

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73. "In the strict sense the doctrine of immunity did not apply to East India Company since it was not a sovereign body and the sovereignty did not apply to its activities. The Company was a delegate of the Crown and the activities were permitted under the charter, were impressed with its political character. The State or its officers on its analogy can not claim any immunity for negligence for their statutory duties under the cover of sovereign immunity. The limited sovereign power enjoyed by the Company can not be set up as a defence in any action of torts in private law by the State. Since the liability of the State even to-day is same as was of the East India Company, the suit filed by any person for negligence of officers of the state can not be dismissed as it was in exercise of sovereign power. Kasturilal’s case is available to those rare and limited cases where the statutory authority acts as a delegate of such function, for which it can not be sued in court of law. In a conservative sense, the principle of Kasturilal’s case extended to other cases. But the same principle can not be available to other activities of State enacting a law in its legislative competence”.

74. Explaining Vidyawati and Kasturilal’s cases, the Supreme Court said that the liability of the State to compensate for negligence of officers was to be decided on general principle in the absence of any law framed by the legislature. "In other words, if a legislature enacts a law for compensation or damages for any act done by it or its officers in discharge of that statutory duty, then a suit for it would be maintainable.”

(44)
75. The Court impressed upon the necessity to enact regarding the liability of the Government for the negligence of its servants in keeping with the dignity of the country and to remove the uncertainty and dispel the misgivings.

76. The theory of sovereign immunity renders only the Government immune from vicarious liability for wrongs of its servants, but it does not render the actual wrong doer immune from liability.

77. In Consumer Education and Research Centre V. Union of India (AIR 1995 S.C. 922)\(^1\) Justice K. Ramaswamy has reiterated that "it is a settled law that in public law, claim for compensation is a remedy available under Art. 32 or 226 for the enforcement and protection of fundamental and human rights." The defence of sovereign immunity is inapplicable and alien to the concept of guarantee of fundamental rights. There is no question of defence being already available for constitutional remedy. It is a practical and inexpensive mode of redress available for the contravention made by the State, its servants, its instrumentalities, a company or a person in the exercise of their powers and enforcement of rights claimed under the statutes or licence issued under the statute or for the enforcement of any right or duty under the constitution or law.

78. The trend in the aforesaid Judgment declaring "sovereign

\(^1\) Consumer Education and Research Centre V. Union of India (AIR 1995 S.C. 922).
immunity” principle not applicable to the “Public Law” remedy for the violation of fundamental rights is a positive movement towards Dicean Rule of Law. The claim in public law under Arts. 32 and 226 for compensation is in addition to claim for award of monetary compensation in private law for damages for the tort. That means a claim in public law for violation of fundamental rights and a claim in private law for tort can run in juxta position.

79. However, the critical examination of “sovereign immunity” made supra clearly discloses that the doctrine of sovereign immunity cuts at the root of Dicean Rule of Law throughout legal mechanism. The administration in its working and in implementing its policies and programs comes in direct conflict with the individual interests. Yet the public interest demands the Government to carry on its activities un-hampered for smooth and proper development of the socio-economic programs of the society, maintenance of peace and tranquillity and implementation of other social welfare projects. The Rule of law in its idealistic sense on the other hand demands not only the absence of arbitrariness in the governance but also the protection of individual rights and interest. The doctrine of “sovereign immunity” in our legal system is a great denial of Rule of Law. Securing social justice to the individual is also a public interest and as such, it must out weight the “sovereign immunity”.

(46)
80. Further, sovereign immunity is an anachronistic principle in the federal structure of the Government, where harmonious blending of decisions by the Executive, Legislature and Judiciary in case of constitutional conflicts and confrontations is a rule of wisdom, constitution is supreme in our federal or quasi-federal or unitary federal structure of government. The principle of sovereignty is only a myth. It better suits to monarchic and totalitarian types of governments. It ill suits to democratic governments like India, which has committed to social welfare state and supremacy of written constitution. The Supreme Court of India in many Judgments recently clearly pointed out for dispensing with the principle of sovereign immunity of the State and transparency and accountability of the Government servants. Law Commission of India has recommended to the Government for passing definite law for payment of compensation to the individuals for torts committed by the state and its governments servants, agencies and instrumentalities. In 1967, one recommendation was made and recently in the last month of 1996, another recommendation was made. It is hoped that a definite law will be made by the Government in this regard on the recommendation of the Law Commission of India and also constitutionally dispense with the doctrine of sovereign immunity before entering in the 21st century. Introduction of a Bill in Parliament to define the law of governmental liability would be in the right direction for securing the justice and fairness. By
and large as the society advances in a democratic set up the concept of “sovereign immunity” becomes an anachromism and needs to be done away with altogether since written constitutional supremacy is already available to us. It is hoped that wise counsels will prevail over the executive to pilot the Bill in the Parliament since the present set up of coalition Government at the centre forming a type of cooperative federalism appears to be quite suitable for inclusion in the common minimum programme of the present Central Government.