CHAPTER IV

DOCTRINE OF ACT OF STATE AND SOVEREIGN
FUNCTIONS VIS-A-VIS ARTICLE 300

Introduction

The Constitution of India failed to demarcate the extent of immunity of the State for tortious act of its servants under Article 300. But the Western concept of sovereign immunity that “King can do no wrong,” approves the State to claim immunity from liability and denies compensation to the aggrieved party. The concept of sovereign immunity is considered as a shield on the ground of public policy by which nonpayment of compensation is justified by the State. In England, the King can make and unmake any law because sovereignty vests on him and people believe that he cannot do any wrong. All acts of the crown are considered as acts for the welfare of the people. Indian Courts are very particular in providing compensation to the affected individuals. At the same time, it is clear that the sovereign immunity concept cannot be left out. So, this doctrine was held important till recently. But, how to justify the concept when genuine claims are made before the Court and such claims are defeated? In fact the First Law Commission$^1$ in its report recommended the abolition of this outdated doctrine. But, due to various reasons the drafted Bill$^2$ abolish of this doctrine was never

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1. Law Commission of India, First Report(Liability of the State in Tort) 1950
passed. Finally, the question, whether the State is immune from liability or not for the wrongful acts committed by its servants while exercising their official functions, depends upon the decisions of Courts. After having a systematic study of various enactment and judicial decisions, an attempt is made to bring about the scope and extent of sovereign immunity of the State under Article 300 of the Constitution.

4.1 Sovereign Functions

Sovereign functions are those actions of the State for which it is not answerable before the Court of Law. Matters such as defense of the country, raising and maintaining armed forces, making peace in retaining territory, are functions which are indicative of external sovereignty and are not amenable to jurisdiction of ordinary civil Court.

Sovereign functions are primarily inalienable functions, which the State only could exercise. The State is engaged with various functions, but all of them cannot be construed as primary inalienable functions. Taxation, eminent domain and police functions including maintenance of law and order, legislative functions, administration of law, grant of pardon could be found as the sovereign functions of the State.

In the modern sense, the distinction between sovereign or non sovereign power does not suit. It depends upon the nature of the power and the manner of its exercise.
Peninsular and Oriental Steam Navigation Co. v. Secretary of State for India, was the historical case which had drawn the principle of sovereign and non-sovereign functions of the Government while deciding the extent of liability and immunity of the State. The Supreme Court of Calcutta held that the Secretary of State is liable only for the extent of commercial functions and not liable for anything done in exercise of sovereign powers. The dichotomy theory of “Sovereign and Non Sovereign functions determined by the Court in Peninsular case helped the judiciary to interpret the functions of the government when the question of liability of State arose. But there is no uniform and static norm to decide the sovereign functions. The following judicial interpretations are given by the Courts in various cases as sovereign functions to exempt the State from liability. When the functions of the State are carried out by its servants under the provisions of the State the State is not responsible to pay compensation for the wrongful acts of its servants.

i) Performance of Statutory Duty

There is no yardstick to measure to what extent the State is immune from liability for the wrongful acts of servants of State. In Shivbhajan Durga Prasad v. Secretary of State,3 certain bundles of hay were negligently attached by the Chief constable of Mahim, the petitioner was arrested and prosecuted, later he was acquitted by the Court. He sued the Secretary of State for compensation for the negligence of the constable. It was held that the Secretary of State was not liable

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3 ILR 28 Bom. 314 (1904).
for damages on account of the negligence of a Chief Constable, with regard to goods seized not in obedience to an order of the executed government, but in performance of a statutory power vested in him. *Gurucharan kaur v. Province of Madras*, 4 was another case where a Sub. Inspector of Police, acting under a bona-fide, though erroneous belief that he was to detain Maharani of Nabha and wrongfully confined her. Concerning the claim of Compensation, the Government was held not liable, as the police officers have taken the action in pursuance of statutory duty even though under a mistaken view. A statutory duty was thus clothed with a sovereign halo. 5 Also in *Union of India v. Sat Pal*, 6 the plaintiff’s claim for Rs.500/- being the penalty imposed by the Land customs Authority was rejected on the authority of the Supreme Court decisions as the levy of penalty was a power vested in the Land customs officers under the Statute.

**ii) Maintenance of Public Path**

The State maintains public paths, for the welfare of the general public and there is no commercial object in it. So, laying public path and its maintenance are part of sovereign functions of the State. In *McLerny v. Secretary of State*, 7 the Calcutta High Court held that, the Government was not carrying any commercial

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4 AIR 1980 SC 1362.
5 This principle was approved by the Supreme Court in Kasturi Lal v. State of U.P., In State of Bihar v. Bishnu Chand Lal Chaudhary (1985) 1 SCC 449, the claim regarding damages for trespass and unauthorized interference by the Government with proprietary interest failed because Government was acting in exercise of statutory power, honesty and in good faith, within the meaning of section 4 (22) of Bihar and Orissa General Clauses Act, 1917 and its action was protected under section 31 of Bihar State management of Estates and Tenures Act, 1949.
7 (1911) 38 ILR Cal 797.
operations in maintaining a public path and therefore was not liable for damages for the injury sustained by the plaintiff through coming into contact with a post set up by the Government on a public road.

iii) Maintenance of Military Road

Maintenance of military road is one of the sovereign functions of the State. It is carried out by the public works department for the purposes of defense. *In Secretary of State v. Cockraft*,⁸ where the plaintiff was injured by the negligent act of the servant who left a heap of gravel on a military road over which no one was walking. A suit for damages against the Government, was held not to be maintainable by the Madras High Court because the maintenance of roads particularly of a military road was one of the Sovereign, and not the private functions of the government.

iv) Commandeering Goods during War

As stated above, commandeering goods during war is sovereign functions of the State in *Kessoram Poddar & Co. v. Secretary of State*,⁹ the plaintiff company sued the Secretary of State to recover damages for the injury sustained by them by reason of the defendant’s failure to take delivery and pay for certain goods bought by the defendant from it by commandeering Orders. Rejecting the claim, Chotznar J, held that the commandeering Order was one which no one but

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⁸ AIR 1915 Mad. 993.
⁹ AIR 1928 Cal.74.
the Government could make and being an act of the sovereign power, the Secretary of State could not be sued in respect of it.

v) Training for Defence

The training provided by the State for the purpose of defense is to secure the general public and it is the sovereign function. In *Secretary of State v. Nagerao Limbaji*, 10 the plaintiff brought a suit against the Secretary of State for damages for the loss of his finger due to the explosion of an ignition set lying near the area which was used as a practice bombing ground by the military authorities. It was held that the provision of facilities for bombing practice was a public duty undertaken by the State in order to provide training for the army. Such duties are not exercised by the State for its own benefit, but for the protection of the entire population.

vi) Arrest and Detention

Maintence of law and order includes arrest and detention; it is the sovereign function of the State when it is done in good faith. In *M.A. Kador Zailany v. Secretary of State*, 11 where some police officer wrongfully arrested and imprisoned the plaintiff, he filed a suit for damages against the Secretary of State. It was held that, the Government was not liable for the wrongs done by its officers unless the wrongful act is done either by Order or on its behalf and subsequently ratified or

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10 AIR 1943 Nag. 287.
11 AIR 1931 Rang. 294.
adopted by it. Similarly, *In Gurucharan Kaur v. Madras Province*,\(^{12}\) the D.S.P. instructed the police Sub-Inspector to go to the station and prevent certain Maharaja from leaving that station. The fact however was that it was not the Maharaja but his wife, the Maharani and his daughter alone were awaiting the arrival of the train in her own car. On the arrival of the train, the Sub-Inspector acting under a bonafide, though erroneous belief, that he was to detain the Maharani, not only prevented the Maharani from boarding the train but also got the gate in the iron fencing closed and posted two constables near it. A suit was brought by the Maharani and her daughter for wrongful confinement. It was held that the Government could not be held liable for the acts of police done in discharge of their statutory duty in “good faith”\(^{13}\). Thus, if the wrongful restraint by the government servant is made in “good faith,”\(^{13}\) the State is not liable.

Vii) Performance of Military duty

In *Union of India v. Harbans Singh*,\(^ {14}\) where as a result of rash and negligent act of a driver of a truck of the Military Department of the Union of India, who was engaged in Military duty, in supplying meals to military personnel on duty the plaintiff’s father was knocked down and run over. The State was held not liable as the act of the driver was done whilst he was performing sovereign function.

\(^{12}\) AIR 1942 Mad. 539.

\(^{13}\) Section 3 (20) of *General Clauses Act 1897* defines good faith as; A thing shall be deemed to be done in ‘Good faith’ where it is in fact done honesty, whether it is done negligently or not.

\(^{14}\) AIR 1959 P&H 39.
In *Thangarajan v. Union of India*, a defense lorry was carrying carbon dioxide gas from a factory to the ship I.N.S. Jamuna. By the negligent act of the driver it dashed a small boy. On a suit against the State, the Court held that the lorry belonged to the defense department. Union of India was driven in the exercise of sovereign function. So, State is immune from liability.

State is not liable for the acts of its servant when such acts are committed without the authority of law. In such cases, State cannot be held liable because there is no act on the part of the State which holds the State responsible. The officials of the State enjoy a vast discretionary power which affects the individual rights. They should be held liable for improper exercise or abuse of discretion. In this regard, the Indian Law commission has recommended that the State should be liable if in the discharge of statutory duties imposed upon it or its employees, the employees act negligently or maliciously, whether or not discretion is involved in the exercise of such duty.

**Viii) Maintenance of National Highways**

A welfare State has to maintain proper roads for the benefits of the general public. It is part of its sovereign function. In *K. Krishnamurthy v. State of A.P.*, the driver of a motor road roller negligently struck the plaintiff down and his right hand fell under the front wheel. The driver did not stop the engine forthwith. The plaintiff claimed damages from the State for the permanent loss of his limb.

15 AIR.1975 Mad. 32.

16 AIR1965 SC 333.
occasioned by the rash and negligent act of their servant. The Andhra Pradesh High Court, held that the making and maintenance of National Highways is the exclusive duty of the State, and not a commercial function.

ix) Keeping Stolen goods in the Police Malkhana

In *Kasturi Lal v. State of U.P.*, the appellant was arrested by three constables and his belongings like gold and silver were seized on the suspicion that they were stolen properties. When he was released on bail the silver was returned and the gold was kept at the police malkhana in the custody of a head constable. But the constable in charge of the malkhana misappropriated it and fled to Pakistan. The trader therefore, filed a suit against the State of Uttar Pradesh claiming the return of the gold or in the alternative, the full price of the gold. It was proved that the authorities were negligent in keeping the gold in safe custody. Gajendragadkar C.J., observed: If a tortious act is committed by a public servant and it gives rise to a claim for damages, the question to ask is: Was the tortious act committed by the public servant in discharge of statutory functions which are referable to and ultimately based on the delegation of the sovereign powers of the State to such public servant. The act of negligence was committed by the police officers while dealing with the property of Kasturi Lal, which they had seized in exercise of their statutory powers. To arrest and detain a suspicious person and to seize his suspicious possessions are delegated sovereign powers of the Government officers under the Statute. Thus, the State was held immune from liability.

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17 AIR 1965 SC 1039.
This position was also followed in *State of Uttar Pradesh v. Chhotoy Lal*,\(^{18}\) where the police on suspicion, arrested the plaintiff and seized 16 bags of Khandasari sugar of which the movement was banned under the U.P. Control of Supplies (Temporary Power) Ordinance 11 of 1946. But the police could not account for the bags of sugar which had disappeared while in their custody. It was held that, the station officer who seized the plaintiff – respondent’s goods acted in the discharge of statutory duties or to use the words of the Supreme Court “in the exercise of delegated Sovereign power”. Therefore, the State is not vicariously liable for any loss to the plaintiffs resulting from the station officer’s misconduct or negligence or misconduct of any other State official or officials. In *Oma Par shad v. Secretary of State*,\(^{19}\) the Secretary of State was held not liable for any criminal act of his employee, e.g. where a party sued the Secretary of State for the recovery of stolen property, which during the trial of the thieves were kept in the malkhana and were appropriated by the government employee in charge of the malkhana. Keeping the stolen goods in the malkhana was a sovereign function and so there can be no action in respect of them though a private employer will be liable if his servant purloined the goods of ‘x’ left in the possession of his employer. This was explained by Chief Justice Gajendragadkhar, in *Kasturi Lal v. State of U.P.*\(^{20}\)

It is submitted that the reason behind the decision in *Kasturi Lal’s case* is totally illogical as it erroneously adopted the pre-constitutional rule and identified

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\(^{18}\) AIR 1967 All. 3247.

\(^{19}\) AIR 1937 Lah.572.

\(^{20}\) AIR 1965 SC 1039.
statutory power as sovereign power. An official’s immunity corresponding to the statutory power was available only to the bonafide exercise of power, but not to the abuse or misuse of the same. The *Kasturi Lal’s case* is widely criticized by Jurists as it is a clear example of an improper application of an inadmissible test.\(^{21}\)

**x) Malicious Prosecution**

*Maharaja Bose v. Governor General in Council*,\(^{22}\) this is the case of wrongful arrest and malicious prosecution brought against the Governor General in Council for damages. The plaintiff in this case was travelling by the defendants Railway from Howrah to Patna. On February 3, 1944, he boarded an interclass compartment in the 5 up Punjab mail at Howrah. On 4\(^{th}\) at about 1 A.M. when the said train stopped at Asansol Railway station, 3 Indian soldiers forcibly occupied the plaintiff’s seat. The plaintiff protested against this and he informed it to two employees of the Railways. But they did not take any steps in this matter. When the train started moving, the soldiers threatened the plaintiff with violence. Out of fear for his personal safety, he pulled the emergency chain and caused the train to stop. Defendant’s servants to whom the plaintiff had earlier complained reached and made certain enquiries and asked the soldiers to vacate it. When such conversation was going on the Assistant Station master on duty rushed to the compartment and accused the plaintiff for pulling the chain and abused him by using filthy languages and severely assaulted him. Without hearing any more

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\(^{22}\) AIR 1952 Cal 242.
explanation, the plaintiff was dragged out of the compartment, and was given into
the custody of a railway police on false charges and detained there. It was stated
that the plaintiff was a notable dancer and was on the way to take part in a dance
programme at Patna in aid of Red Cross. But the plaintiff failed to disclose his
name and identity so the railway servant arrested him. The plaintiff was tried by
the Magistrate and ultimately acquitted on July 24, 1944 and was released on a
personal bond. The plaintiff claimed compensation on the ground of vicarious
liability. It was argued on behalf of the defendant that in as much as the railway
servant is concerned, he had acted in the ‘bona-fide’ exercise of powers under the
Railways Act.\footnote{Indian Railways Act, 1890. Section 132 empowers a railway servant to arrest without warrant under
certain circumstances.} Hence, no suit lay against the State. In this case, the issues were
that whether the suit is maintainable? Was the plaintiff prosecuted maliciously and
without reasonable and probable cause? Was he wrongfully arrested? And what
damages, if any, did the plaintiff suffer for which the defendant was answerable.

The Court held that the plaintiff had no sufficient cause for pulling the
communication chain. The defendant’s servant was justified in handling the
plaintiff over to the police for non disclosure of his name and address. The Court
also held that the defendant’s servants honestly and reasonably believed the guilt
of the plaintiff and this negated the malice. The suit was dismissed and the State
was not held liable for the act of the employee.
The above decision protects the State’s servant on the ground of statutory immunity. It is evident that the employee of the railway department committed wrong. The theory of benefit applied in this case, showed that the judiciary was also very lenient to the State and the affected ordinary individual was left out without remedy. In *State of M.P. v. Dattamal*,\(^{24}\) one Ramachandra was killed by police firing, while controlling a riot on 21\(^{st}\), July 1954. On the date of occurrence there was a student’s agitation at the main road at Indore. The District Magistrate ordered firing. At that time, Ramachandra and his grandson were nearing their house by car after closing their shop. One of the bullets pierced the car and entered in to the body of Ramachandra, and as a result he died. The legal heirs claimed damages for the illegal shooting. The trial Court ordered damages for the negligent act of the police.

This Order was challenged by the State. The appellate Court reversed the Order of the trial Court and held that maintaining of law and order by way of police firing to control riot amounts to sovereign functions of the State. So, liability would not arise. Thus there is no remedy in Indian law since there is no codified law to deal vicarious liability of State like Federal Claims Act and Crown Proceedings Act.

It is unjustifiable that an innocent businessman was shot dead which threatened the right to life guaranteed by the Constitution. The Court also did not see the loss due to the negligence of the police official. Rejection of damages resulted with the economic stress on the innocent family.

\(^{24}\) AIR 1967 MP 246.
Xi) Maintenance of Law and Order

In *State of Orissa v. Padmalochan*, the Orissa Military Police made a lathi-charge on a mob assembled in front of the District Court to press their demands. It was stated that without any Order from the Magistrate or other police authorities the police personnel assaulted members of the mob, as a result of which the plaintiff received injuries. He filed a suit for damages against the State for injuries caused to him. The lower Court decided in favour of the claimant but on appeal, the High Court pointed out that, the police personnel committed excess in discharge of their functions without authority and that would not take away the illegal act from the purview of delegated sovereign function and held that the injuries caused to the plaintiff by the police while dispersing the unlawful mob were in exercise of the sovereign function of the State.

Similarly in *State of M.P. v. Chironji Lal*, the police, while regulating the procession, made a lathi-charge and caused damage to the property of the respondent, the State Government will not be liable for the damage. The functions of the State of regulating processions is delegated to the police by section 30 of the Police Act, 1861 and the function of maintaining law and order, including the quelling of riots, is delegated to the authorities specified by section 14 of the Code of Criminal Procedure, 1973. Those functions cannot be performed by private individuals. They are powers exercisable by the State or its delegates as “Sovereign Functions” of the State.

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25 AIR 1975 Ori. 41.
26 ‘The Court said: The real difficulty in the case of this nature, however, is the application of the principles laid down by the Supreme Court to the facts of each case.’
Xii) Collection of Revenue

The State is not liable for any wrong done by a public official in the purported exercise of his statutory duties in the area of sovereign activities of the State like collection of revenue etc.

In *Kuppanna Chetty & Co. v. Collector of Anantapur*,\(^ {28}\) the Tahsildar wrongfully attached the movable goods under the Madras Revenue Recovery Act and thereby caused considerable damage to the plaintiffs. The Court held that since the collection of revenue was a sovereign or purely State activity, the State was not liable for any tort committed by a Government employee in the course of such activity in breach of his statutory duties. This was upheld in *State of Andhra Pradesh v. Ankanna*,\(^ {29}\) the revenue officers acted illegally and maliciously detained a bullock-cart belonging to the plaintiff for realizing the land revenue under the Revenue Recovery Act. The Court held that the collection of land revenue is a sovereign function and the State is not liable for the malicious act of its servants, when such act is made under a Statute.

In the Pre-constitutional period, the act of the authorities in refusing license to the plaintiff relating to the imposition and collection of excise duties\(^ {30}\) were held as sovereign functions. The State was also exempted from liability for a wrongful act of the collector of Chittagong who paid the surplus sale proceeds of a Taluk not to the real owner but to another person\(^ {31}\).

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\(^ {28}\) AIR 1965 AP 457.
\(^ {29}\) AIR 1967 AP 41.
\(^ {30}\) Nobin Chunder Day v. Secretary of State, (1876) ILR 1 Cal. 12.
\(^ {31}\) Secretary of State v. Ramnath Bhatta, AIR 1934 cal. 128.
The Andhra Pradesh High Court also held in another decision\(^{32}\) that the Government is not liable for the illegal seizure of the property\(^{33}\) for arrears of revenue due of respondent by a public officer (a head village Munsiff).

xiii) Acts of Courts of Wards

Generally acts of Courts of Wards are considered as sovereign function of the State. So the State is immune from liability when there is any fault of Court of wards. In *Secretary of State v. Srigobinda*,\(^{34}\) the plaintiff’s State was released from the management of the Court of Wards complaining that the manager appointed by the Courts of Wards has not done his duty by realizing all money with diligence. He has also not accounted to the Courts of Wards for certain money which he collected. It is not a case in which the plaintiff can make the Secretary of State or the revenue of India liable.

Xiv) Administration of Justice

One of the functions of the State, in exercise of sovereign power, is to take cognizance of offences coming to its knowledge and to order the trial of such persons in accordance with law. If the persons, discharging administration of the justice, were found to be guilty, the system of judicial functions cannot be carried out properly. So, statutory protection is afforded to them, by the Judicial Officers

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\(^{32}\) Venkataramadas v. Latchanna, AIR 1966 AP 277.

\(^{33}\) Later, the property was sold at an auction by the Government.

\(^{34}\) AIR 1932 Cal. 834.
Protection Act.1960\textsuperscript{35}. This is available to the person whose acts can be deemed to have been in his judicial capacity as a Judicial Officer.

A government servant is vested with both ‘Judicial’ and ‘executive’ powers. He is exempted from liability only if he is discharging “Judicial acts” in the Courts of administration of justice. But if he committed the tort of false imprisonment while acting in his executive capacity, he cannot claim sovereign immunity.\textsuperscript{36}

In \textit{Mata Prasad v. Secretary of State},\textsuperscript{37} the plaintiff was convicted and imprisoned for four and half years for dacoity. He has also to pay a fine of Rs.500/-. But for his good conduct he was released after 2 ½ years. The plaintiff claimed damages against the Secretary of State for wrongful conviction of his officials. The Court held that a person who has been charged by a competent Court and punished for that offence is not, therefore, entitled to sue the Secretary of State for India in council for damages in respect of the act of the State in exercise of its sovereign powers. Similarly, in \textit{Secretary of State v. Sukhdeo},\textsuperscript{38} the magistrate in his official capacity, ordered to seize certain property belonging to the plaintiff in satisfaction of fine imposed on his son. On the suit brought by the

\textsuperscript{35} Section 1 of the Act: No judge, Magistrate, Collector or other person acting judicially shall be liable to be sued in any civil Court for any act done or ordered to be done by him in the discharge of his judicial duty whether or not within the limits of his jurisdiction. Provided that no at the time, in good faith, believed himself to have jurisdiction to do, or order the act complained of.

\textsuperscript{36} This was held in \textit{Anowar Hussain v. Ajoykumar} AIR 1965 SC 1651 the respondent brought a suit against the magistrate who by order wrongfully imprisoned him. The Supreme Court through Shah J., hold the magistrate personally liable and the liability of State was not considered.

\textsuperscript{37} AIR 1931 Oudh, 29.

\textsuperscript{38} (1899) 21 All. 341.
plaintiff for recovery of property, the Court held that the secretary of State was not liable for the seizure of property by the Court.

In *Maha Nirbani v. Secretary of State*, the presiding officer of the criminal Court directed, some ornaments which was delivered by the plaintiff to a police officer, to be returned to the original owner and not to the plaintiff. In the suit by the plaintiff, the Court expressed the view that the State was not liable for the loss resulting from a wrong Order of the Court.

Non-liability of the State can be imposed only if any loss is caused to any person by any officer when he is acting under judicial capacity. On this basis the State was held not liable for wrong warrants issued by the judicial officer, as judicial act belongs to the category of sovereign powers.

4.2 Non-Liability of the State under Legislative Protection

Now the extent of liability and immunity of State under tort depends on the nature of the power and manner of its exercise. The Constitution of India, provides legislative supremacy subject to Judicial review. The Parliament is free to enact any legislation on any topics and any subjects authorized by the Constitutional provisions without violating basic structure of the Constitution. Likewise, the executive is also free to execute the actions through law. Thus the legislature may enact bad law due to its negligence or the law may be affected due to failure of compliance of fundamental rights or public policy. In such circumstances, the affected person cannot approach a

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39 AIR 1922 All. 2705.
Court of law for negligence in making law. The legislature may justify it on the ground of public interest and the executive may also justify it on the same ground. Thus the statutory provisions protect the acts of State for its smooth functioning. Even though it is conflicting with the modern concept of sovereignty, the State should not be answerable in torts. But it is not acceptable that the affected common man is left out without remedy. It is left to the judiciary to render social justice in case when injustice is done due to the legislative or executive action. In such cases, the officers are made personally liable for torts. In such situation the question is why the State is exempted from liability when the officers who are linked with the State are made liable? For better understanding of this chapter, the following are some of the statutory provisions which protect the State from suits. These provisions protect the State for action taken in good faith. The following are protection clauses provided in various legislations exempt the State from liability.

1. **The Information Technology Act, 2000**

Section 34 of The Information Technology Act, 2000\(^\text{40}\) reads: No suit prosecution or legal proceeding shall lie against the Central Government, the Controller or any person acting on behalf of him, the presiding officer, adjudicating officers and staff of the Cyber Appellate Tribunal, for anything which is in good faith done or intended to be done in pursuance of this Act or any rule or regulation or order made there under.

\(^{40}\) Act 21 of 2000
2. Drugs and Cosmetics Act, 1940

Section 37 of Drugs and Cosmetics Act, 1940,\textsuperscript{41} reads as “No suit, prosecution or other legal proceedings shall lie against any person for anything which is in good faith done or intended to be done under this Act”.

3. Chit Funds Act, 1982

Section 88 of Chit Funds Act, 1982\textsuperscript{42} reads as “No suit, prosecution or other legal proceeding shall lie against the State Government, the Registrar or other officers of the State Government, of the Reserve Bank or any of its officers exercising any powers or discharging any functions under this Act in respect of anything which is in good faith done or intended to be done in pursuance of this Act or the rules made there under”.


Section 28 of Consumer Protection Act, 1986,\textsuperscript{43} provides: No suit, prosecution or other legal proceeding shall lie against the members of the District Forum, or the State Commission or the National Commission or any officer or person acting under the direction of the District Forum, the State Commission or the National Commission or executing any order made by it or in respect of anything which is in good faith done or intended to be done by such member, officer or person under this Act or under any rule or order made there under.

\textsuperscript{41} Act 23 of 1940  
\textsuperscript{42} Act 40 of 1982  
\textsuperscript{43} Act 68 of 1986
5. Insurance (Regulatory and Development Authority) Act, 1999

Section 22, of Insurance (Regulation and Development) Act, 1999\textsuperscript{44} reads as “No suit, prosecution or other legal proceedings shall lie against the Central Government or any officer of the Central Government or any member, officer or other employee of the authority for any act which is in good faith done or intended to be done under this Act or rules or regulations made there under”.

6. Narcotic Drugs and Psychotropic Substances Act, 1985

Section 69 of Narcotic Drugs and Psychotropic Substances Act, 1985\textsuperscript{45} provides as “No suit, prosecution or other legal proceeding shall lie against the Central Government or the State Government or any officer of the Central Government or of the State Government any person exercising any powers or discharging any functions or performing any duties under this Act, for anything in good faith done or intended to be done under this Act or any rule or order made there under.”

7. Protection of Human Rights Act, 1993

Section 38 of Protection of Human Rights Act, 1993\textsuperscript{46} provides that “No suit or other legal proceedings shall lie against the Central Government, the State Government or any member thereof or any person acting under the direction either of the Central Government, the State Government, the commission or the State Commission, in respect of anything which is in good faith done or intended to be

\textsuperscript{44} Act 41 of 1991
\textsuperscript{45} Act 61 of 1985
\textsuperscript{46} Act 10 of 1994
done in pursuance of this Act or of any rules or any order made there under or in respect of the publication, by or under the authority of the Central Government, the State Government, the Commission or the State Commission, of any report, paper or proceedings”.

8. **Civil Procedure Code, 1908**

Section 80 of Civil Procedure Code, 1908,\(^{47}\) provides that no suit can be instituted against the government until the expiration of two months after a notice in writing has been given.

Section 82 of the Code of Civil Procedure, 1908, when a decree is passed against the Union of India or a State, it shall not be executed unless it remains unsatisfied for a period of three months from the date of such decree.

Article 112 of the Limitation Act, 1963, any suit by or on behalf of the Central Government or any State Government can be instituted within the period of 30 years.


Section 3 of Monopolies and Restrictive Trade Practices Act 1969\(^{48}\) says that the Act shall not apply in certain cases unless the Central Government [by notification], otherwise directs, this Act shall not apply to

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\(^{47}\) Act 5 of 1908  
\(^{48}\) Act 54 of 1969
(a) Any undertaking owned or controlled by a Government company,

(b) Any undertaking owned or controlled by the Government,

(c) Any undertaking owned or controlled by a corporation (not being a company) established by or under any Central Provincial or State Act,

(d) Any trade union or other association of workmen or employees formed for their own reasonable protection as such workmen or employees,

(e) Any undertaking engaged in an industry, the management of which has been taken over by any person or body of persons in pursuance of any authorization made by the Central Government under any law for the time being in force,

(f) Any undertaking owned by a co-operative society formed and registered under any Central, Provincial or State Act relating to co-operative societies,

(g) Any financial institution.

a) The Act is not applicable in the following situations:-

The undertaking owned or controlled by the Government or Government companies, as the case may be and which are engaged in the production of arms and ammunition and allied items of defense equipment, defense aircraft and warships, atomic energy, minerals specified in the Schedule to the Atomic Energy (Control of Production and Use) Order, 1953 and industrial units under the Currency and Coinage Division, Ministry of Finance, Government of India.
b) Any restrictive or unfair trade practice expressly authorized by any law for the time being in force.

c) A restrictive trade practice flowing from an agreement which has the approval of the central government or if central government is a party to such agreement.

In addition to the above, any monopolistic trade practice which was expressly authorized by any enactment for the time being in force or when it is necessary to

1. Meet the defense requirement of the country,

2. ensure maintenance of supply of essential goods and services, or

3. Give effect to any agreement to which Central Government is a party was also exempted from the purview of the Act.

10. **The Competition Act 2002**

Section 2(h) of The Competition Act 2002, provides an exemption for activities of the government relatable to the sovereign functions of the State. Section 54 of the Act, empowers the Central Government to exempt the application of any provision of the Act to an enterprise performing a sovereign function on behalf of the Central or State Government, through a notification. Thus, one problem with the wordings of these two sections taken together is the confusion as to whether an enterprise carrying out an activity relatable to sovereign functions requires an express notification by the Central Government by

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49 Act 12 of 2003
virtue of Section 54 for exemption; or would anyway be excluded from the scope of an ‘enterprise’ under section 2(h).

Although what a ‘Sovereign function’ is has never been elucidated by the Commission or Courts in the context of competition law, interpretation of the term has been carried out for other legislations. It has been extensively discussed in the context of understanding, the scope of the term other authorities’ under the definition of State’ under Article 12 of the Constitution, which include bodies that are agencies and instrumentalities of the State.


Section 16 of National Security Act 1980,\(^50\) provides protection of action taken in good faith. No suit or other legal proceeding shall lie against Central Government, or a State Government, and no suit, prosecution or other legal proceeding shall be against any person, for anything in good faith done or intended to be done in pursuance of this Act

It is evident that the immunity of the Crown in the United Kingdom was based on the feudalistic notions of justice, namely the King can do no wrong. One should understand the position of the king as an administrator and what are the powers which are considered as sovereign powers? India as a welfare country, having its constitutional law approves immunity to the government unlike various legislations. However the Indian Governmental functions carried out by its servants cannot be left free for their wrong doings. To bring a balance in

\(^{50}\) Act 65 of 1980.
administration and to achieve the goals of the Indian Constitution, the State is protected from liability for its sovereign activities. The Competition Act 2002, also brings a distinction of governmental functions into sovereign functions and non sovereign functions. The sovereign functions as specified in this Act are functions carried out by the departments of Central Government dealing with atomic energy, space, defense and currency which are excluded from the purview of this Act. On the question of ‘what is sovereign function’, different opinions have been given time to time and again and attempts have been made to explain it in different ways:

4.3. Various tests to identify the Nature of Functions of the State

1. Primary and Inalienable Functions

Krishna Iyer J, in Bangalore Water Supply and Seweragre board v. A. Rajappa,\(^{51}\) said that the definition of ‘industry’ although of wide amplitude can be restricted to take out of its purview certain sovereign functions of the State, limited to its ‘inalienable functions’.

As to what are inalienable functions’, Lord Watson, in Coomber v. Justices of Berks,\(^{52}\) describes the functions such as administration of justice, maintenance of order and repression of crime, as among the primary and inalienable functions of a constitutional Government.

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\(^{51}\) AIR(1978) SCC,5 48.  
\(^{52}\) (1883-84) 9 App. Cas. 61,74
However, the Supreme Court has also held that the definition can include the regal primary and inalienable functions of the State, though the statutory delegated functions to a Corporation and the ambit of such functions cannot be extended so as to include the activities of a modern State and must be confined to legislative power, administration of law and judicial powers.\footnote{State of Bombay and Ors. v. The Hospital Mazdoor Sabha and Ors. AIR 1960 SC 610.}

2. Regal & Non-Regal Functions

Isaacs, J. in his dissenting judgment in \textit{The Federated State School Teachers Association of Australia} v. \textit{The State of Victoria},\footnote{(1929) 41 CLR 569} concisely States “Regal functions are inescapable and inalienable. Such are the legislative power, the administration of laws, the exercise of the judicial power. Non-regal functions may be assumed by means of the legislative power. But when they are assumed the State acts simply as a huge corporation, with its legislation as the charter. Its action under the legislation, so far as it is not regal execution of the law is merely analogous to what a private company is similarly authorized.\footnote{Agricultural Produce Market Committee v. Shri Ashok Harikuni & Anr. Etc. AIR 2000 SC 3116.} These words clearly mark out the ambit of the regal functions which are 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” functions although there are difficulties here also in as much as the Government has entered largely new fields of industry. Therefore, only those services which are governed by separate rules and constitutional provisions, such as Articles 310 and 311 should, strictly speaking be excluded from the sphere of industry by necessary implication.\(^{56}\)

4. Constitutional Functions

The learned judges in the *Bangalore Water Supply & Severage Board v. A. Rajappa*,\(^{57}\) a Sewerage Board case seem to have confined only such sovereign function outside the purview of ‘industry’ which can be termed strictly as constitutional functions of 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 *Nagendra Rao and Co. v. The State of Andhra Pradesh*,\(^{58}\) as to which function could be, and should be, taken as regal or sovereign function. It has been recently examined by the Bench of the Court, where in the words of Hansaria. J, the old and archaic concept of sovereignty does not survive as sovereignty now vests in the people. It is because of this, that in an Australian case, the distinction between sovereign and non-sovereign functions was categorized as regal and non-regal. In some cases, the expression used is State function, whereas in some Governmental functions.

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\(^{56}\) Beg CJ, Bangalore Water Supply case.

\(^{57}\) AIR1978 SC 48.

\(^{58}\) AIR 1994 SC 2663.
5. Nature and form of activity

“It is now increasingly necessary to abandon the lingering fiction of a legally indivisible State and of a feudal conception of the crown, and to substitute for it the principle of legal liability where the State either directly or through incorporated public authorities, engages in activities of a commercial, industrial or managerial character. The proper test is not an impracticable distinction between governmental and non-governmental function, but the nature and form of the activity in question”.

6. 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 not productive of goods and services if isolated, even then, the predominant nature of the services and the integrated nature of the departments as explained in the Corporation of Nagpur v Its Employees, will be the true test. The whole undertaking will be ‘industry’ although those who are not ‘workmen’ by definition may not be benefited by the statutes.

(b) Sovereign functions, strictly understood, (alone) qualify for exemption, not the welfare activities or economic adventures undertaken by government or statutory bodies.

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60 AIR 1960 SC 675
(c) Even in departments discharging sovereign functions, if their core units which are industries and they are substantially severable, then they can be considered to come within section 2(j) the definition of ‘industry’.

(d) Constitutional and competently enacted legislative provisions may well remove from 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 adventures undertaken by the Government. A rider has been added that even in the department discharging sovereign functions, if there are units which are industries and they are substantially severable, then they can be considered to be an industry. As to which activities of the Government could be called sovereign functions strictly understood, had not been spelt out in the aforesaid case.61

3. In relation to what are “sovereign” and what are “non-sovereign” functions, this Court in the Chief Conservator of Forests and Anr. v. Jagannath Maruti Kandhare and Ors.62 holds; “We may not go by the labels, Let us reach the hub. And the same is that the dichotomy of sovereign and non-sovereign functions does not really exist- it would all depend on the nature of the power and manner of its exercise.”

61 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 “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 defense research, atomic energy and space”. This was formerly exception No (6) of sec 2(j) of mentioned in the amended definition.

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 for such action in Courts of law. It was stated by Sahai, J. that acts like defense of the country, raising armed forces and maintaining it, making peace of war, foreign affairs, power to acquire and retain territory are functions which are indicative of external sovereignty and are political in nature. They are, therefore, not amenable to the jurisdiction of ordinary civil Court in as much as the State is immune from being sued 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 the defense of the country or administration of justice or maintaining law and order but extends to regulating and controlling the activities of people in almost every sphere, educational, commercial, social, economic, political and even martial. Because of this the demarcating line between sovereign and non-sovereign powers has largely disappeared. The aforesaid observation shows that, if we were to extent the concept of sovereign function 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 what was Stated in the aforesaid case according to which except the strictly understood sovereign functions, welfare activities of the State would come within the purview of the definition of industry; and not only this, even within the wider circle of sovereign function, there may be an inner circle encompassing some units which could be considered as industry if substantially severable.
7. **Predominant Nature of the Activity**

As referred in part (a) of the Dominant Nature Test, the Court in the *Corporation of Nagpur case*,\(^\text{63}\) evolved another test when there may be cases where the said departments may not be in charge of a particular activity or service covered by the definition of sovereign function but also in charge of other activity or activities falling outside the definition. In such cases, a working rule may be evolved to advance social justice consistent with the principles of equity. In such cases, the solution to the problem depends upon the answer to the question whether such a department is primarily and predominantly concerned with activity relatable to the sovereign function or incidentally connected therewith.

It was also held in the same case that in a modern State the sovereign power extends to all the statutory functions of the State except to the business of trading the industrial transactions undertaken by its quasi-private personality. Also, the regal functions described as primary and inalienable functions of the State though statutorily delegated to a corporation are necessarily excluded from the purview of the 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.*,\(^\text{64}\) defines non-sovereign functions as “discharge of public duties under a Statute, which are incidental or ancillary and not primary or inalienable function of the State”. This decision holds

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\(^\text{63}\) AIR 1960 SC 675.

\(^\text{64}\) AIR 1994 SC 2663.
that the State is immune only in cases where its officers perform primary or inalienable functions such as defense of the country administration of justice, maintenance of law and order.

The Court gave an example where a search or seizure affected under such law could be taken to be an exercise of power which may be in domain of inalienable function. Whether the authority to which this power is delegated is liable for negligence in discharge of duties while performing such functions is a different matter. But when similar powers are conferred under other Statute as incidental or ancillary power to carry out the purpose and objective of the Act, then it being an exercise of such State function which is not primary or inalienable, an officer acting negligently is liable personally and the State vicariously.65

In fact, all governmental function cannot be construed as either primary or inalienable sovereign function. Hence even if some of the functionaries under the Act could be said to be performing sovereign functions of the Government that by itself would not make the dominant 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. Rajappa66, had been discussed by the Supreme Court in the case of State of U.P. v. Jai Bir Singh67 where the Court inter alia wished to enter a caveat on confining sovereign functions to the traditional functions, described as ‘inalienable

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66 (1978) 3 SCC
functions’ comparable to those performed by a monarch, a ruler of a non-democratic
government. The concept of sovereignty is confined to ‘law and order’, ‘defense’, ‘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 in the Directive Principles of the State Policy in Part-IV of the
Constitution of India. From that point of view, wherever the government undertakes
the public welfare activities in discharge of its Constitutional obligations, as provided in
Part-IV of the Constitution, such activities should be treated as activities in discharge of
sovereign functions. Therefore, such welfare governmental activities cannot be brought
within the fold of industrial law by giving an undue expansive and wide meaning to the
words used in the definition of industry regarding immunity to sovereign powers.

4.4 Immunity of State under the Doctrine of “Act of State”

There is no doubt that no action may be brought either against the crown or
any one else in respect of an act of State.\textsuperscript{68} An act of State, under the English law
is an act of the executive as a matter of policy performed in the course of its
relations with another State or during its relations with the subjects of that State,
unless they are temporarily within the allegiance of the Crown\textsuperscript{69}. In the words of
Hartley and Griffith\textsuperscript{70}, the term means an act of such character that the Courts have
no jurisdiction to determine its lawfulness. Thus it is an act of a sovereign against

\begin{itemize}
\item \textsuperscript{68} W.V. H. Rogers, \textit{Winfield and Jolowicz on Tort}, 702 ( 14 Edn Sweet & Maxwell, 1994)
\item \textsuperscript{69} Wade and Bradley, \textit{Constitutional Law}, 265 (Edn., 1971).
\item \textsuperscript{70} Hartley and Griffith, \textit{Government and Law} 287 (1976).
\end{itemize}
another sovereign or an alien outside its territory. An act of State derives its authority not from municipal law but from ultra-legal or supra-legal means\textsuperscript{71}. Municipal Courts have no power to examine the propriety or legality of an act of State. The term is defined by various writers,\textsuperscript{72} Lord Atkin in \textit{Eshughay v. The Government of Nigeria} defined the term as:

“An act of the sovereign power directed against another sovereign power not owing temporary allegiance in pursuance of sovereign rights of waging war or maintaining peace on the high seas or abroad, may give rise to no legal remedy. But as applied to acts of the executive directed to subjects within those territorial jurisdictions it has no special meaning, and can give no immunity from the jurisdiction of the Court to inquire the legality of the act”.

A nation is sovereign within its own borders, and its domestic actions may not be questioned in the Courts of another nation. The object of the act of State doctrine is to protect the Executive’s prerogatives in foreign affairs. The act of State doctrine is applied for the act of a governmental body or of a body having governmental powers and must be carried out in the exercise of such governmental or sovereign powers and the act in question must be a formal act or evidenced by formal action such as legislation or an executive order.

\textsuperscript{72} Fitzjames Stephen defines it is “an act injurious to the person who is not as the time at the act a subject of His majesty, which act is done by any representatives of His majesty’s authority, Civil or military and is either previously sanctioned or subsequently ratified by His majesty”. \textit{A History of the Criminal Law of England} (1883 Edn.) vol.2, p.p. 61-62.
a) Act of State and Sovereign Immunity

The Act of State doctrine differs from sovereign immunity doctrine. The Act of State doctrine provides sovereign States with a substantive defense on the merits. But a claim of sovereign immunity, which merely raises a jurisdictional defense. The Courts of one State will not question the validity of public acts performed by other sovereigns within their own borders, even when such Courts have jurisdiction over a controversy of in which one of the litigants had stood to challenge those acts. But this is not so in sovereign immunity. Act of State does not deal with the subjects of the State but deals with foreigners who cannot seek the protection of the municipal law. It is a sovereign act of the government performed in exercise of its executive prerogative sanction for which is derived from sovereignty of the State. Thus the act of State doctrine operates extra territorially and it is difficult to conserve of an act of State as between a sovereign and his subjects.

b) History and Development

The Act of State doctrine was initially developed in US in cases against officials or agents of foreign government and applied as a corollary to the personal immunity of foreign sovereigns. In Underhill v. Hernandez, the Supreme Court of United State of America held that a citizen of the United States was not entitled

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73 Union of India v. Ram Kamal, AIR 1953 Assam 116.
75 168 US 250 (1897) According to Fuller C.J., in a Statement which has come to be known as the “Classic American Statement” of the Act of State doctrine; Every sovereign State is bound to respect the independence of every other sovereign State, and the Courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such act must be obtained through the means open to be availed of by sovereign powers as between themselves.”
to recover damages in a United States Court from a Venezuelan military General who refused to issue a passport to him because the acts of General were held to be acts of the Venezuelan government.

In France and in some continental countries under “Act of State” doctrine, officers acting in their official capacity are not cognizable by the ordinary Courts, nor are they subject to the ordinary laws of the land.

c) Essentials of “Act of State”

The essence of an ‘Act of State’ in the exercise of sovereign power exercised arbitrarily on principles either outside or paramount to the municipal law.\(^\text{76}\) If a transaction takes place in one jurisdiction and the forum is in another, the Court merely declines to adjudicate or makes applicable its own law to parties or property before it. The refusal of one country to enforce the penal laws of another is a typical example of an instance when the Court will not entertain a cause of action arising in another jurisdiction. The United States Supreme Court in *Banco Nacional De Cuba v. Sebbatino*,\(^\text{77}\) Cuba nationalized its sugar industry, taking control of sugar refineries and other companies in the wake of the Cuban revolution. The case involved a claim by Cuba for the price of a cargo of sugar which had been expropriated by the Cuban government, and then sold to a U.S. commodity broker (Farr, whitlock &Co.). In addition to the Cuban claim, Farr was faced with a claim from the receivers of original owner (Sebbatino) who

\(^{76}\) Hidayathullah, J. in Saurashtra v. Menon Haji Ismail, AIR 1959 SC 1383.

\(^{77}\) 398 U.S. (1964)
argued that the Cuban expropriation was contrary to international law. Both the District Court and the Court of Appeals, found in favour of Sebbatino, holding that the Act of State doctrine was in applicable where the relevant foreign act was in violation of international law. However, the Supreme Court reversed this decision. Justice Harlan applied the Act of State doctrine and held that US Courts could not question the validity of the Cuban expropriations even if the plaintiff alleged a violation of international law.

The Supreme Court of United States,\(^78\) held that the Act of State doctrine applies only when a US Court must declare such official act “invalid, and thus ineffective as a rule of decision for the Courts of this country”.

In _Secretary of State v. Hari Bhanji_\(^79\), the plaintiff had sued for the return of a certain sum of money alleged to have been illegally seized from him as import duty on salt. The Madras High Court did not follow _Nobin Chunder Dey v. Secretary of State_\(^80\) and held that the act of State of which the municipal Courts in British India were

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\(^78\) W.S. Kirk Patrick & Co. v. Environmental Tectonics Corp. Int’l, 493 (U.S.1990). In this case the Supreme Court strictly limited its application to cases in which a Court is required to determine the legality of a sovereign State’s official acts under that sovereign’s own laws.

\(^79\) (1882) ILR 5 mad. 273

\(^80\) (1876) ILR 1 Cal.12. In this case the plaintiff was the higher bidder at an auction for selling liquor and drugs. He did all that was necessary to entitle him to the license but he did not get it. The result was that he was forced to close his shops. He sued for compensation for the damages suffered and in the alternative for the refund of the deposit made by him. The suit was against the Secretary of the State for India. The Court held that the impugned act was an act of State as those acts could only be performed in the exercises of the sovereign powers of the State. The claim, it was held, could not be enforced against the Government of India. The decision recognizes the position that the plea that an impugned acts is an act of State in the exercise of its sovereign powers can be available to the State against its own subjects even in times of peace. This is the first case in which the dictum of Barnes Peacock, C.J. in Peninsular Oriental Steam Navigation Company v. Secretary of State, (1861) 5 Bom. H.C.R. App. 1 was so applied that even acts of government officials which were done professedly under the sanction of the municipal law were regarded as such acts of State for which the secretary of State for India was held not liable.
debarred from taking cognizance were acts done in the exercise of sovereign powers which were not justified by municipal law. In India, actions which are purportedly taken under municipal law are denied the status of act of State if the private party only seeks to set aside the action. But if he claims damages in tort the Courts generally examine whether the power exercised was sovereign in nature, and denies relief if it is found in the affirmative. Even though the distinction between sovereign and non sovereign functions was doubted, the view has never been overruled. The present tendency is to minimize the use of the distinction and to award damages.

It follows that to raise a defense of ‘act of State’ three conditions must be fulfilled. The first is that the act must be authorized or subsequently ratified by the government. The second is that act must be committed outside the territory of India, and the third is that the plaintiff must be an alien. Another important thing to remember is, in speaking of the exercise of sovereign power a clear distinction must be made between exercise of power in relation to foreign States, their subjects not within the allegiance, and action under municipal law in relation to subjects.

**d) Instances of “Act of State”**

**a) During War**

During war the acts of a sovereign State affecting alien are not cognizable by municipal Courts. In *Secretary of State for India v. Kamachee Boye* the facts

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81 Bombay v. Khushaldes Adveni, AIR (1950) SC 222 at 249.
85 (1859) VII M.I.A. 476.
were that on the death of Raja Shivaji of Tanjore, the East India Company seized the public and private properties of the deceased Raja. The seizure was made on the ground that the dignity of the Raja was extinct for want of a male heir, and that the property of the late Raja lapsed to the British Government. The widow claimed it as the legal heir of the deceased Raja. The claim was accepted by the Supreme Court of Madras. But, on appeal the Privy Council reversed and it was held that the seizure made by the company on the death of last male Raja was an act of State, which could not be questioned before a municipal Court. The transactions of independent States are governed by laws other than those which municipal Courts administer. In this regard “Lord Kingsdown observed”:

“Of the propriety or justice of that act, neither the Court below nor the Judicial Committee has the means of forming, or the right of expressing, if they had formed, any opinion. It may have been just or unjust, politic or impolitic, beneficial or injurious taken as a whole to those whose interests are affected. It is sufficient to say that, even if a wrong has been done, it is a wrong for which no Municipal Court of justice can afford a remedy.”

A further question is whether a State is bound to indemnify citizens for the damage sustained during actual hostilities? The issue was examined by the House of Lords in *Burmah Oil Co. v. Lord Advocate.*86 The facts of this case if that the installations as well as the petrol were destroyed, to prevent its falling into the hands of the advancing Japanese army. It was clear that, the destruction was carried out on the

86 (1965) AC 75.
orders of the Crown in the lawful exercise of its prerogative power to provide for the
defense of British territory. The question that fell for decision by the House of Lords
was whether the Crown must pay compensation. The House of Lords held that if
property of the subject was damaged by the State during actual hostilities, no
compensation need be given. The plaintiffs had claimed the full value of the property
destroyed, which might have amounted to more than £30,000,000. In that case, Lord
Reid pointed out that the appellants appear to be claiming the full value of these
installations in time of peace. I am holding that they are entitled to compensation and it
will be necessary to consider whether compensation must not be related to their loss, in
the sense of what difference it would have made to them if their installations had been
allowed to fall into the hands of the enemy instead of being destroyed. Lord Pearce also
dealt with the point thus “There may, however, well be a distinction in terms of
compensation. Petrol which is taken and used may be worth its full value. Petrol
which is blown up when it is about to pass into the hands of an enemy, who will
undoubtedly consume it without paying the owner, may be valueless. That matter has
not been argued and is not yet relevant”.

Lord Radcliffe, dissented and held that the State should not be asked to pay
a requisition price for something for which there was at the time no conceivable
purchaser.

Thus the common law rule is that seizure or destruction of private property
within the realm under prerogative power, even during grave national emergency, if not
during actual hostilities could be done only on the footing that compensation was payable. The decision was immediately nullified by the War Damages Act, 1965,\textsuperscript{87} which prevented the payment of compensation in such or similar circumstances. The Assam High Court in \textit{Union of India v. Ramkamat}\textsuperscript{88} examined this aspect. The respondent was a lessee of certain fisheries. He had constructed fish-nurseries with auxiliary installations. In the year 1944, a party of Indian and British soldiers occupied the western half of the northern and the western banks of the fisheries. During this period serious damage was caused to the fishery. The trial Court decreed the suit and awarded damages of Rs.77,000/- with proportionate costs against the Union of India. On appeal, the Assam High Court held that acts in the exercise of sovereign power of the State in time of war, insurrection, rebellion or any other emergency of a like character, affecting the person or the property of the subjects should also enjoy immunity. However, it was held that the State should satisfy the Court as to the necessity and reasonableness of the action before it could claim recognition of immunity. It means that the necessity and the reasonableness of the sovereign act are subject to judicial scrutiny. In the instant case, no evidence was produced on behalf of the State to prove the gravity of the emergency justifying the occupation without recourse to the provisions of the municipal law contained in the Defense of India Act. Occupation by the troops in such circumstances amounted to an act of trespass.

\textsuperscript{87} Section 1(1) of the Wet Dangerges Act. 1965 provides No person shall be entitled at common law to receive from the crown compensation in respect of damage to or destruction of property caused (whether before or after the passing of the Act, within or outside the United Kingdom by acts lawfully done by or on the authority of the Crown during, or in contemplation of the outbreak of, a war in which the sovereign was or is engaged.

\textsuperscript{88} AIR (1953) Ass. 116.
Thus Union of India was held liable to compensate the plaintiff respondent\(^89\) Ram Labhaya C.J. observed: “Indian decisions do not support the contention that the expression “act of State” refers only to acts against foreigners or foreign States. The expression has been used in relations to all acts of the sovereign authority whether they operated extraterritorially or whether they were acts between the State and its own subjects. No distinction has been made between acts of the sovereign authority affecting foreign States or foreigners and those affect the citizens of the State.

The division of sovereignty into two compartments which has taken place in England for purpose of convenience has not been adopted in India. The difficulty in adopting this division was probably historical”.

It seems that the law in India is also similar to that available in England. The learned Chief Justice had evolved the test of necessity and reasonableness of the action for claiming immunity. Though it is impossible for a Court of law to access the necessity and reasonableness of a military action, the test in practice means that if done during actual hostilities the State may claim immunity.

b. International Treaties

An act of State includes signing of treaties. It can only be done by a sovereign and not by a private person. In State of Kerala v. Ravi Varma Raja

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\(^89\) The High Court reduced the decretal amount to a sum of Rs. 5500/-. 
Menon, the Kerala High Court held that, the formation of United States of Travancore and Cochin was an act of State as it was the result of a covenant entered into by the rulers of Travancore, Cochin. Also in Nawab of Carnatic v. East India Company, the suit brought by the Nawab, against the Company was dismissed on the ground that it was an act of State as it was a matter of political treaty between two sovereigns.

c. Annexation or Cession of Territories

The rule that cession of territory or annexation of territory by a sovereign State is an act of State. In East India Company v. Syed Alley, it was held that resumption by the Madras Government of a Jagir granted by former Nawabs, before the date of the treaty, and a regrant by the Madras Government to another for a life State only, was such an act of sovereign power by the East India Company. So the Supreme Court at Madras was precluded from taking cognizance of a suit by the heirs of the original grantee in respect of such resumption. In State of Saurashtra v. Memon Haji Ismail, the Nawab of Junagadh had gifted certain property to the respondent. After the annexation of the State by the Indian Union, the Administrator resumed those properties and the grantee brought a suit against the State for the recovery of the price of those properties. The Supreme Court rejected the suit on the ground that the sovereign act of annexation could not be questioned before civil Courts.

90 AIR 1964 Ker.123.
91 4 Bro CC 198 (1793)
92 (1827) VII M.oo.Ind.App. 555 (1829).
93 AIR 1959 SC1583.
When the princely States were merged into the Union of India, the inhabitants of those States have raised problems as to their rights. The question was how far the newly formed successor governments were bound by the rights enjoyed by the inhabitants under the former rulers. The law is that the prior rights will be recognized only if the successor government had recognized them. The rational of the rule has been explained in *Nayak Vajesingji Joravarsingjai Naayk v. Secretary of State*94, where the Privy Council in consolidated appeals, the three Nayaks of Tanda, Chandwana and Katwada respectively sued the Indian Government for a declaration that they are proprietors of the whole land in the Talukas belonging to them and that they are not bound to accept a lease of the same in the terms offered to them by the Government in 1907. In this case, the Privy Council observed ‘when a territory is acquired by a sovereign State for the first time that is an “act of State”. It matters not how the acquisition has been brought about. It may be by conquest, it may be by cession following a treaty, it may be by occupation of territory hitherto unoccupied by a recognized rule. In all cases, the result is the same. Any inhabitant of the territory can only make good in the municipal Courts established by the new sovereign, such rights as he had under the rules of predecessors will avail him nothing. Even if in a treaty of cession it is stipulated that certain inhabitants should enjoy certain rights that does not give a title to these inhabitants to enforce these stipulation in the Municipal Courts. The right to enforce remains only with the High Contracting Parties.

94 AIR 1924 PC 216.
The above observation was followed by Lord Atkin in *Secretary of State v. Sardar Rustam Khan*,\(^95\) where it was held that as the Khan of Kalat had made over to the British State the whole of his sovereign rights and by the terms of the treaty as well as by virtue of Section 1 of Foreign Jurisdiction Act, 1890, the Government of India had full sovereign rights over the territory in question and had the right to recognize or not to recognize existing titles to land, the respondents could enforce no claim against the Government in the municipal Courts.

The Supreme Court followed the view in *Dalmia Dadri Cement Company v. Income Tax Commissioner*.\(^96\) The Jind State was merged into Patiala and East Punjab States Union in 1948. While the new State was formed all the laws operating in former States were abrogated and the laws prevailing in the Patiala State were made applicable to all the merged States. It became a Part B State of the Indian Union and the Indian Income Tax Act was made applicable. The Company claimed exemption from the imposition of income tax relying on the exemption granted to it by the former ruler of Jind State. The Court rejected the contention holding that the rights granted by the former State could be enforced against the new State only if it accorded recognition to them either by an affirmative declaration or conduct.

In *Premsukhdas v. Rajasthan*,\(^97\) the former State of Bharatpur had allowed certain concessions of 25 per cent reduction from custom duties for those persons who purchased plots in a colony in Bharatpur to do business. The intention was to develop

\(^{95}\) AIR 1941 PC 64.
\(^{96}\) AIR 1958 SC 816.
\(^{97}\) AIR 1967 SC 40.
that area by encouraging people to settle there. On this condition the appellant purchased plot in that area. But when the Bharatpur State was merged in the State of Rajasthan, the latter State repudiated the concession and enacted uniform customs duties throughout the State. The appellant filed a suit for recovery of excess custom duties which he had been compelled to pay on account of disallowance of concessions given by the former State of Bharatpur. The Supreme Court rejected the claim on the ground that the contractual liability of a former State was binding on a succeeding sovereign State only if it recognized the contractual liability. In Pramod Chandra Deb v. Orissa,98 the former ruler had given certain maintenance grants to the junior members of their families. The Supreme Court held that those grants could be enforced against the Government of India in so far as they were recognized by it. There were four such grants of which three had been recognized by the Government. The fourth grant had been annulled by an order issued under the Extra Provincial Jurisdiction Act, 1947 and that grant was held to be unenforceable. In Gwalior R.S. (W) Co. v. India,99 the Gwalior Maha Rajah, by his order dated 18.1.1947 had given exemption from income tax for a period of twelve years to Birla Brothers in the Gwalior State, when they set up new industries and factories there. In pursuance of the Order, the Gwalior State Government had entered into an agreement with the Birla Brothers subsequently the State was merged into Madhya Bharat. Income tax assessment proceedings were launched by the Madhya Bharat State and later by the Central Government. The

98 AIR 1962 SC 1288.
company claimed exemption on the ground of the order of exemption and the subsequent agreement entered into with the State Government. The Madhya Bharat High Court, allowed the claim of exemption on the ground that an obligation was cast on the Gwalior Government to give exemption which in turn devolved on the Central Government under Act 205(1). The Indian Income Tax Act did not abrogate specific exemption already granted to the petitioner by special statutory provisions and virtually the Union Government and its predecessor Government had recognised the plaintiff’s claim.

In *Virendra Singh v. State of U.P*\(^{100}\), the Court took different view of the effect of conquest or cession on private rights. Here the ruler of Sarilla, granted village Rijura to the petitioner on January 5, 1948, and the ruler of Charkari and Sarilla, agreed to unite into the United State of Vindhya Pradesh. While this union was in existence, certain officials of the Government interfered with the rights of the petitioners but the Government of the United State of Vindhya Pradesh issued orders directing the officers to abstain from such interference. Subsequently, the territory was ceded to the Dominion of India, which thereafter constituted the area into a Chief Commissioner’s Province for the purpose of administration; but the four villages granted to the petitioner were detached from the centrally administered State and absorbed into the State of Uttar Pradesh. On August 29, 1952, the Governor of Uttar Pradesh revoked the grants made in favour of the petitioner. The Supreme Court rejected the plea of ‘act of State’ holding there can be no “act of State” by a sovereign State as against its own

\(^{100}\) AIR 1954 SC 447.
subjects. In this case, it was held the plaintiff having become a citizen of India; he could enforce his property rights under Articles 19 and 31.

But the decision of Virendra Singh was overruled by a bench of seven judges of Supreme Court in *Gujarat v. Vora Fiddali*, the facts of the case were that the Ruler of the Sant State ceded the territory of his State to India by an agreement of merger on March 19, 1948. Later, it became a part of the Province of Bombay from August 1, 1949. A week before ceding the State territory to India, the ruler of Sant made a tharao by which holders of certain villages were given full rights and authority over the forests in the villages under the rules. Some of these holders executed contracts in favour of the plaintiffs between May 1948 and 1950. After merger the question arose whether those contracts should be approved or not. Considering that the tharao made by the ruler transferring the forest rights was malafide, the Government of Bombay cancelled the tharao on July, 1949. Before the High Court the plaintiffs succeeded on the ground that the agreement being law was protected by article 372 of the constitution and could not be abrogated by an executive act of the State Government. The Supreme Court by majority held that Virendra Singh was wrongly decided. The tharao was held to be not ‘law’. The Court also held that the integration of Indian States with the Dominion of India was act of State and the Central Government could refuse to recognize the rights created on the eve of merger by the tharao of the Ruler of Sant State and say that it was not acceptable to them and therefore not binding on them.

101 AIR 1964 SC 1043.
The rule was applied to termination of services of employees of former State by the Successor State. In *Amarsingh v. Rajasthan*,\(^{102}\) the appellant was a District and Sessions Judge in the former Bikaner State. The integration of the State of Bikaner into the new State of Rajasthan necessarily involved reorganization of the various services in the several integrating States. When the final reorganization was brought into force the appellant was appointed subsequently as Civil Judge. He was placed in Group C (Civil Judges and Munsiffs) and placed at No. 18 in the list of junior posts. His pay and emoluments were as before and he retained the same grading. His earned increments were not affected, and except for the change in name, his conditions of service were not worse than that in the service of the former State. In the writ petition, he contended that under the guarantee given by the United States of Rajasthan, he was entitled to be posted as a District and Sessions Judge in the new set up and that he had been reduced in rank in violation of article 311. The Supreme Court held that no question of reduction in rank attracting article 311 was involved because all his previous postings in the New State were purely temporary; and so far as Art XIV(1) of the Covenant\(^{103}\) was concerned its guarantee had been fulfilled.\(^{104}\)

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\(^{102}\) *AIR 1958 SC 231.*

\(^{103}\) Article XVI (1) of the Covenant signed by the High Contracting Parties at the time of (30.3.1949) integration of the former State of Bikaner into a new State of Rajasthan Indicates that the old contracts of service are terminated and that those who continued in service did so on the basis of fresh contract, the conditions of which had yet to be determined. The only guarantee (assuming that the person in service at that time can avail himself of it) was that the new conditions were not to be less advantageous than those on which the said person was serving on November 1, 1948. There was no guarantee that they would be the same or better.

\(^{104}\) Followed in Cipriani v. Union of India, *AIR 1969 Goa 76.*
Conclusion

‘Act of State’ is an arbitrary act not based on law, but on the modern version of ‘might is right’.\(^{105}\) The boundaries of the area, within which the rule applies, are sometimes difficult to be draw. The doctrine in English law has only a limited application as defense\(^ {106}\), but it is narrower than the act de government of the French droit administrative.\(^ {107}\) But in America, under the Foreign Sovereign Immunities Act,\(^ {108}\) if a sovereign were to make it amenable to suit in a U.S. Court, then jurisdiction would vest with the U.S. Courts. The jurisdiction over a sovereign in this case may be claimed through terms embodied in the treaty.\(^ {109}\) The Foreign Sovereign Immunities Act demands that Courts apply the nature-of-the-act approach to determine whether an action is commercial or government. Later, this test has been applied in act of State doctrine also. Certainly the nature of an action, whether it is public or commercial, has become an issue of contention in cases where the act of State doctrine may be applicable.


\(^{106}\) Because today, under the Crown Proceedings Act, 1947, the Crown would also be liable directly. The enforcement of treaty, so far as it affects the rights of persons within the jurisdiction must be authorized by Act of Parliament. The Crown has no paramount powers. See H.W.R. Wade, *Administrative Law* 717 (5th Edn. 1985).

\(^{107}\) During the period of Napolean the plea of act de government could be raised in any case of political complexion. But in modern times it extends only to the relations of the Government, on the one hand, with Parliament, and on the other, with foreign States or international organizations. See L. Neville Brown, and J.F. Garner, *French Administrative Law*, 100 (3rd Edn. 1983).
