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# "A Comprehensive Guide to Civil Sovereign Immunity in India: From Austinian Absolutism towards Diminished Applicability"

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**Abstract**

The notion of the 'King can do no wrong' has existed since feudal times, taking a myriad of shapes and forms through the ages. The doctrine of sovereign immunity is based on dynamic conceptions of sovereignty which encompasses both absolutist and restrictionist theories. Through the process of colonialism, the doctrine has trickled down from England to its various colonies. Pre-Independence Indian Jurisprudence does not tell any different a story. On becoming independent, the Union of India adopted the doctrine but the courts have gradually albeit not consistently, worked on limiting the scope of the doctrine, to stay true to the democratic nature of the country. The journey of this doctrine within the Indian subcontinent has been interesting, to say the least. From the Law Commission of India first suggesting the futility of the doctrine, especially in context of a legal system within a modern welfare state, to the courts initially ignoring the doctrine to circumvent the ambiguous precedent set by them and then later dwindling between different approaches to restrict the potentially wide scope of this doctrine. The journey and evolution of this doctrine has been far from stagnant, and despite many re-definitions of this doctrine, there is still a need for change. There is a need to clearly demarcate the ambit of this doctrine, because a doctrine which grants the sovereign of a state immunity from being tried in its own courts can be exploited, and could lead to serious violations of the rights of the people of the country.

## Introduction

The doctrine of Sovereign immunity has gone through tumultuous times changing eras and various forms of governance. While it was used as a colonial tool to subjugate the Indian populace, its existence in post-independence India has caused courts considerable discomfort. Although Indian courts have often categorised the doctrine as undemocratic and inappropriate in a democratic society, the doctrine has continued to survive in a vastly diminished but ambiguously unclear form. It must be noted that in India, the doctrine of sovereign immunity is not based on a statutory authority, in fact, the doctrine finds no mention in the Constitution of India. As it is with many doctrines whose origins and subsequent developments are purely judicial in nature, the legal ambit and limits of the doctrine remains rather ambiguous, which has resulted in the doctrine facing repeated challenges in the court of law. The courts have attempted to distinguish between sovereign functions**,** for which the state enjoys immunity**,** and non-sovereign functions**,** for which the state can be legally held liable. This paper undertakes a quantitative analysis on the application of sovereign immunity in civil claims by examining judicial decisions both pre and post Indian Independence. The first section of this paper explores the origins of the

doctrine and its various jurisprudential justifications. The second section of the paper focuses on the evolution of the doctrine with respect to various facets of tort law, along with a brief evaluation of International law in relation to tort claims. The fourth section of the paper gives an insight into the contractual liability of the state, which in the present form undertakes commercial activities rampantly, and the interplay between the various Articles of the Constitution and this doctrine is also brought out. The paper concludes by the authors attempting to analyze the judicial decision-making pattern in India in the realm of sovereign immunity, and while doing this, the source for the widespread uncertainty and instability in the judicial history of this doctrine is highlighted.

**The Jurisprudential Origins of the Doctrine of Sovereign Immunity**

The doctrine of Sovereign Immunity, although inspired by roman antiquity through the concepts of *Princeps Legibus Solutus Est* and *Principi Placuit Legis Habet* owes much of its existence to early English jurisprudence. Although different variations exist, it is widely believed that the doctrine rose to prominence during the reign of King Edward I. The essence of the doctrine lay in the principle that the king, or the sovereign, could not be sued in and by his own court. The practical and systemic dynamics of the feudal system depended on a superior being who enjoyed absolute power, without the threat of any scrutiny on their exercise of the power. Bodin, one of the first theorists to develop a theory on sovereignty believed in this idea of sovereign absolutism and the concentration of power in the monarch[1].

With the rise of the holy roman empire and biblical notions of the sovereign, the king began to be viewed as one who was anointed by god in order to carry on his work in the human realm. Therein lay the doctrine of "*Rex Non Potest Peccare*". As Blackstone, in his commentary asserted, "*Besides the attribute of sovereignty, the law also ascribes to the king in his political capacity absolute perfection. The king can do no wrong: ... "The king, moreover, is not only incapable of doing wrong, but even of thinking wrong: he can never mean to do an improper thing: in him is no folly or weakness."*[2]. Thus, by extension, the king was also incapable of ordering for a wrong to be committed, implying that royal servants and employees also enjoyed the immunity granted to the king. This Austinian[3] sovereign with unlimited and indivisible powers worked well to neutralise any threats to the crown which may have not only destabilized the monarchy and its servants but would also negatively impact the always depleting treasury of the crown. During the rise of the notion of a nation state, the personal immunity enjoyed by the king transformed into sovereign immunity of the crown, encompassing a larger group of actions and actors.

Jurisprudential theories on sovereignty and its evolution can broadly be categorised into absolutist and restrictivist. A major proponent of the absolutist theory was Hobbes who's

[1] Edward Andrew, *Jean Bodin on Sovereignty*, 2 Republics of Letters: A Journal for the Study of Knowledge, Politics, and the Arts 2, (2011)
[2] George W Pugh, *Historical Approach to the Doctrine of Sovereign Immunity* 3 Louisiana Law Review (1953)
[3] John Dewey, *Austin's Theory of Sovereignty* 9(1) Political Science Quarterly 31-52 (1894)

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social contract[4] could be said to have existed wherein the general public required someone with absolute authority to tell them what to do. Hobbes believed that in order to prevent the re-emergence of anarchy, the sovereign has no obligations to the people[5]. Furthermore, the sovereign was also incapable of acting illegally since they were the source of law. Along the same lines, the Kanatian school of thought although, emphasised on a rational commonwealth wherein every member has rights against each other, exempted the sovereign since he was not just a mere member of the commonwealth[6]. Kant understood the idea of a sovereign as one who was responsible for creating and maintaining the commonwealth which gave him the right to compel without being compelled. If a sovereign is subject to compulsion, '*there would no longer be a supreme head, and the series of members subordinate and superordinate would go on upwards ad infinitum*'[7].

Although absolutist forms of sovereignty widely existed in most crown led states, the growth of the abolitionist view could also be attributed to the quest for colonial expansion in the nineteenth century. Subjugation of a large populace by a different country could only be maintained by a colonial ideology largely based on the absolute power of the sovereign. The sovereign eventually began controlling not just law and policy matters in the colonies but also took up matters of commercial importance. In these differing circumstances the absolutist school began to be questioned, particularly with reference novel disputes which brought the sovereign before the courts in its role as a commercial trader. As a result, a restrictive theory of sovereign immunity was developed by most states by placing limits on the immunity to the sovereign's *acta in jure imperii*, and excluding from it his *acta in jure gestionis*, into which category his trading activities, and his trading vessels fell[8].

The ideas proposed by the restrictionist school could perhaps be traced back a few centuries, to thinkers like Hugo Grotious and John Locke. Grotious was a staunch believer of the existence of limitations on the powers of the sovereign, the exercise of which ought to be reasonable[9]. Locke went further in claiming that a sovereign was bound by natural law and thus, their power was limited. In stark contrast from earlier notions of sovereignty, Locke believed that the sovereign could in fact do wrong, particularly be breaching his duties as a trustee or by acting contrary to natural law[10]. This view was aggravated by changing forms of the sovereign and the growth of democratic states. Gradually as legislatures and courts around the world realised that absolute sovereign immunity could no longer be defended in the new system of governance, its effects grew diminished.

[4]THOMAS HOBBES, LEVIATHAN (56 ed Baltimore :Penguin Books) (1968)
[5] William Harvey Reeves *Leviathan Bound. Sovereign Immunity in a Modern World* 43(4)Virginia Law 529-57 (1957)
[6] Frederick Olafson, *Immanuel Kant, "The Principles of Political Right*, in *Society, Law, and Morality* (Englewood Cliffs, NJ: Prentice-Hall, Inc. 1961), pp. 160-172.
[7] Ibid
[8] Lakshman Marasinghe, *The Modern Law of Sovereign Immunity* 54(5) The Modern Law Review 664-84 (1991)
[9] A Brett, *The subject of Sovereignty: Law, Politics and Moral Reasoning in Hugo Grotius* 17(3) Modern Intellectual History 619-645 (2020)
[10] Don Mayer, *Sovereign Immunity and the Moral Community* 2(2)Business Ethics Quarterly, 411-434 (1992)

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**Tort Law**

*The Position in Colonial and Independent India*

With the advent of colonial rule, the doctrine of Sovereign immunity got transported to India along with the common law concepts of justice, equity and good conscience, which in itself was a conundrum. Since the inception of East India Company's reign until the mid-nineteenth century, the doctrine seemed to be of immense value, however, the influence of the doctrine was on a dwindling spiral post-independence. In fact, in its very first report, the law commission of India recommended that this doctrine be struck down in its entirety.

In the pre-independence era, the doctrine found its inception in the case of *O Navigation Company v Secretary of state*[11] where C.J. Peacock, while interpreting section 65 of the Government of India act, defined the concepts of 'sovereign' and 'Non-sovereign' acts in order to determine the extent to which the East India Company was vicariously liable for various torts committed by its employees.

In stark contrast, the madras high court denied the existence of any distinction between the two functions[12]. They held that "*where an act is done under the sanction of municipal law and in the exercise of powers conferred by that law, the fact that it is done in the exercise of sovereign function and is not an act which could possibly be done by a private individual does not oust its justifiability*" [13]. This principle was further used in *Kishanchand v Secretary of state*[14] which was further reiterated in *Ross v Secretary of State*[15]. Although a slight deviation seemed to have been made in *Secretary of State v Cockraft*[16], where the making of a military road was held to be a sovereign function, however, on closer analysis the court seems to reiterate a slightly modified version in the principle established in *Hari bhan Ji vs Secretary of State*[17].

In the Post-independence era, after the establishment of the constitution, the first case to set precedent was *State of Rajasthan v. Vidyawati*[18] wherein, the court refused to admit a plea of immunity by the state and subsequently held that the state would be completely liable for the torts committed by employees who are not performing state functions. The apex court also maintained that independent India has welfare and socialistic goals in who's domain a defense which is based on feudal notions of justice cannot be enforced.

[11] Peninsular and Oriental steam Navigation Company v Secretary of state (1861) 5 Bom. H.C.R. App. I,p.1
[12] Hari Bhan Ji vs Secretary of state (1882) ILR 5 Mad 273
[13] Krishna, Ketana, *Development of the Doctrine of Sovereign Immunity in England and India*, SRNN, 2014 http://dx.doi.org/10.2139/ssrn.2402176
[14] Kishanchand v Secretary of State, (1881) ILR 2 All 829
[15] A.M. Ross vs The Secretary of State for India (1914 ILR 37 Mad 55
[16] The Secretary Of State For India In ... vs A. Cockcraft (1916) ILR 39 Mad 351
[17] Hari Bhan Ji vs Secretary of state (1882) ILR 5 Mad 273
[18] State of State of Rajasthan v. Vidyawati 1962 AIR 933

However, a few years later, in the case of *Kasturi Lal vs State of Uttar Pradesh*[19], the Supreme court seemed to take a different path. The apex court followed the precedent established in the steam navigation[20] case and thereby redefined sovereign and non-sovereign functions by stating that the performance or abuse of police work was a discharge of sovereign power and is therefore a sovereign function. Moreover, it established the problematic precedent that the state would not be responsible for any torts committed by the state or its servants in the exercise of statutory powers[21].

Finally, in the case of *N. Nagendra Rao & Co vs State of Andhra Pradesh*[22], the apex court upheld the view in the case of *Vidyawati*[23] and attempted to distinguish it from the *Katurilal*[24] case. The court held that apart from functions such as administration of justice, maintenance of law and order and repression of crime, etc. which are among the primary and inalienable functions of a constitutional government, the state cannot claim any immunity[25].

Indian Jurisprudence, thus, has severely limited the scope of the doctrine of Sovereign immunity. As of present times, trading and commercial activities conducted by the state such as running the railways are outside the scope of this doctrine[26]. Similarly, activities related to welfare relief work[27], maintenance of government vehicles[28] and running hospitals[29] are not considered sovereign functions. In accordance with the doctrine established *in State of Bombay vs Hospital Mazdoor Sabha*[30], *Nagpur Corporation vs Its Employees*[31] and the English case of *Coomber vs Justice of Berks*[32], it is clear that the scope of sovereign functions is limited to making laws, making sure justice is administered, maintain order and repressing crime, carrying out war on behalf of the state and signing and ratifying peace treatises[33]. It must also be acknowledged that where the police is regulating a procession with lathi charge and thereby cause damage to property, the state was not liable[34]. The courts also noted that even in cases where the state has been declared immune from vicarious liability due to the doctrine, the public servant who actually committed the tort is not protected[35]. Moreover, it is

[19] Kasturi Lal vs State of Uttar Pradesh 1965 AIR 1039
[20] Peninsular and Oriental steam Navigation Company v Secretary of state (1861) 5 Bom. H.C.R. App. I,p.1
[21] Kumar, Rakesh, Doctrine Of Constitutional Tort : Evolution And Evaluation, Legal Services, 2004
[22] N Nagendra Rao & Co vs State of A.P 1994 AIR 2663
[23] State of State of Rajasthan v. Vidyawati 1962 AIR 933
[24] Kasturi Lal vs State of Uttar Pradesh 1965 AIR 1039
[25] N Nagendra Rao & Co vs State of A.P 1994 AIR 2663
[26] Chairman Railway board v Chandrima Das 2000 2 SCC 465
[27] Shyam Sunder v State of Rajasthan 1974 AIR 890
[28] State of Vidyawati vs State of Rajasthan 1962 AIR 933
[29] Achutrao Haribhau Khodwa v State of Maharashtra 1996 SCC (2) 634
[30] State 0F Bombay & Others vs The Hospital Mazdoor Sabha 1960 AIR 610
[31] The Corporation Of The City ... vs Its Employees 1960 AIR 675
[32] Coomber vs Justice of Berks (1883) 9 A.C. 61
[33] Ad hoc committee, The Indian Insurance Companies Association Pool v Radhabai Babulal, State of UP vs Hindustan Unilever, Chief conservator of forests v Jagannath Maruti Kondhare
[34] State of Madhya Pradesh v Chirojilal (1981) AIR 1981 MP 65
[35] State of UP vs Tulsi Ram (1971 AIR 1971 All 162

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no defence or the public employee to claim that the wrong was committed in the course of discharging a sovereign function or while carrying out the orders of superiors[36].

*Immunity and the Motor Vehicles Act*

The applicability of Sovereign immunity in Motor accident cases have been under serious contention by courts and academics alike. The distinction between sovereign and non-sovereign functions of the state were of prime importance in these cases.

The Delhi High Court, in ***Satyawati v. Union of India***[37]**, by rejecting the argument that keeping the army in perfect shape and ensuring their physical exercise was a sovereign act , held that the driver who negligently caused an accident while carrying military personnel to a hockey match was not carrying out a sovereign function and the government was held liable. Similarly, in another case of *UoI v. Sugrabai*[38], the Bombay high court held that a military driver in a military truck who was carrying a sound ranging machine from the military base to the army school was not carrying out a sovereign function. The judgement read-**

> "***Sovereign powers are vested in the State in order that it may discharge its sovereign functions. For the discharge of that function one of the sovereign powers vested in the State is to maintain an army. Training of army personnel can be regarded as a part of the exercise of that sovereign power. The State would clearly not be liable for a tort committed by an army officer in the exercise of that sovereign power. But it cannot be said that every act which is necessary for the discharge of a sovereign function and which is undertaken by the State involves an exercise of sovereign power. Many of these acts do not require to be carried out by the State through its servants. In deciding whether a particular act was done by a Government servant in discharge of a sovereign power delegated to him, the proper test is whether it was necessary for the State for the proper discharge of its sovereign function to have the act done through its own employee rather than through a private agency***."[39]

**However, the judgement pronounced by the Punjab and Haryana High court, in *Baxi Amrik Singh v. UoI*[40] held that an army truck which was going back to its base from the front of war between India and Pakistan in 1971 and was carrying jawans and rations was exercising a sovereign function.**

[36] Palthadi Venkappa Rai vs Devamma (1956) AIR 1956 Mad 616
[37] Satyawati v Union of India (1957) AIR1957Delhi98
[38] Union of India v. Sugrabai (1969) AIR 1969 Bom 13
[39] Union of India v. Sugrabai (1969) AIR 1969 Bom 13
[40] Baxi Amrik Singh v. Union of India, (1972 Punj LR 1)

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The courts however have, in other cases also said that a truck carrying supplies to feed mules in the army were not exercising a sovereign function[41]. In the case of ***UoI v. Miss Savita Sharma***[42]**, the court claimed that carrying jawans from the railway station to unit headquarters was not a sovereign function, since the act could also be performed by any individual. Thus, the distinction between the two kinds of functions was clearly demarcated. Similarly, in another case, it was also held that a negligent accident by a government employee while he was going to impart training in driving to new recruits was also held to be outside of sovereign power.** [43]**. Subsequently, the courts also held that, a military vehicle carrying vegetables from the supply department for prisoners of war to the base was also not performing a sovereign act**[44]

It is thus clear that if a court believed that the act in question could also have been carried out by any private individual, that act would not be a sovereign function. It is evident that although the courts have kept the distinction of sovereign and non-sovereign functions alive, they have transformed the doctrine and have greatly limited its scope.

In the *Pushpa Thakur*[45] case, the Supreme court asserted that the defence of sovereign immunity would not be available to cases which fall under the motor vehicles act, this judgement was further used in cases like ***Usha Aggarwal and Ors. Vs. Union of India & Ors***[46] **which firmly established that if the accident was caused by negligent acts of a military driver, the defence of sovereign immunity would not be available to the state.**
The same principle was further adopted in ***State of Rajasthan Vs. Smt. Shekhu and ors***[47] where the court stated that

> ***"…. after the amending Act 100 of 1956, by which section 110A of the Motor Vehicles Act, 1939, was inserted, the distinction of sovereign and non-sovereign acts of the State no longer existed as all owners of vehicles were brought within the scope of that section. Sec. 166 of the new Act of 1988 reproduces Sec. 110A of the old Act. Whether the State is bound by the provisions of the Motor Vehicles Act is no longer res integra."***[48]

Thus, the dichotomy, especially in relation to motor vehicle cases was settled through a trajectory of cases. As of now, this doctrine has no applicability in motor vehicle accidents and the state is liable in the same way as any private individual or via vicarious liability.

[41] Mrs. Pushpa v. State of Jammu & Kashmir 1977 ACJ 375
[42] Union of India v. Miss Savita Sharma, 1979 ACJ
[43] Iqbal Kaur v. Chief of Army Staff (1978) AIR 1978 Ail 417
[44] Union of India v. Kumari Neelam (1980) AIR 1980 NOC 60 (MP)
[45] Pushpa Thakur vs Union Of India (1986) AIR 1986
[46] Usha Aggarwal and Ors. Vs. Union of India & Ors. (1982) AIR 1982 PH 279
[47] State of Rajasthan Vs. Smt. Shekhu and ors, 2006 ACJ 1644
[48] State of Rajasthan Vs. Smt. Shekhu and ors, 2006 ACJ 1644

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*/An International Law Perspective*

Jurisdictional state immunity precludes the judiciary of one state from exercising jurisdiction in a legal claim to which another sovereign state is a party[49].The primary rule of sovereign immunity in international law or state immunity is the concept that a state cannot be tried in the jurisdiction of foreign courts. This is founded in the idea that if a foreign court were allowed to try a state, it would imply that the court in which the state is being tried is superior to the state itself. This, in turn would violate the doctrine of sovereign equality. This is founded on the legal maxim, *par in parem non habet imperium*. Immunity in this case, however, does not eliminate liability but simply states that the court in question cannot hear the matter, however, it is possible that another court could have the ability to rule on it.

State immunity was initially an absolute barrier where the jurisdiction of one state over another was brought to question. This was firmly laid down in international jurisprudence in the case of *Schooner Exchange v McFaddon*[50] where the supreme court of United States decided that one sovereign is in no respect amenable to another[51]. The doctrine was first accepted by the United Kingdom in the case of *Parliament Belge*[52].

However, as the realm of sovereignty changed, so did this doctrine. With the advent of a representative form of government, it was widely believed that the sovereign of a state must conform to certain principles which are not only respected but well entrenched in democratic countries. Thus, considering the changes that have taken place in both international as well as municipal laws, the contentions in support of absolute sovereign immunity are non sequitur. The concern of states which engage in commercial transactions with private parties, shielding themselves behind the absolute doctrine became a growing issue. With the advent of the restrictive theory, a distinction was drawn between *acta de jure imperii* and *acta de jure gestionis*, the immunity was applicable to the former but not the latter.

The acceptance of this doctrine was established in the United Nations Convention on Jurisdictional Immunities of States and Their Property. In general, the doctrine has been ratified by countries such as United Kingdom, United states, Australia and New Zealand. In the case of Governor of Pitcairn and Associated Islands vs Sutton [53]in New Zealand, it was held that a state's commercial activities are not protected by such immunities.

There are, however two very contentious exception to this doctrine. The first is the exception of territorial torts which applies to the acts of a foreign state which causes death, personal injury or property damage in the forum state. This exception has been legislated in the European convention on state immunity as well as the UN convention mentioned above. The

[49] Fox, Hazel, *The Law of State Immunity* (2nd EdOxford University Press) Page 5 (2008)
[50] Schooner Exchange v McFaddon (1812) 11 U.S. (7 Cranch) 116
[51] Schooner Exchange v McFaddon (1812) 11 U.S. (7 Cranch) 116
[52] Parliament Belge (1879) L. R. 4 Prob. Div. 129
[53] Governor of Pitcairn and Associated Islands vs Sutton [1995] 1 NZLR 426

principle has developed to address the issue of insurable risks on the grounds that insurance companies should not benefit from state immunity[54]. This is primarily relevant in the acts of armed forces of a foreign state in the forum state during times of conflict.

The second exception is that of serious violations of *Jus cogens* norms which tends to reflect the idea that immunity cannot be granted to serious violations of international law and peremptory norms. This was established in the case of *Ferrini v Federal Republic of Germany*[55] . In 2001, the International Law Commission identified the prohibitions of genocide, torture, slavery and the basic rules of International Humanitarian Law as examples of jus cogens norms[56].

In India, according to section 86 of the CPC[57], a foreign state cannot be sued except with the consent of the central government, certified in writing by a secretary to that government. Taking into account the contemporary trend of restricted state immunity, the supreme court has said that the consent to sue should generally be granted if conditions mentioned in the section are satisfied[58].

**Contract Law**

*Government Contracts*

A State usually functions in two forms, either as a Sovereign or in a non-Sovereign capacity, much like a private individual. There are a large number of business organisations and individuals who enjoy largess in the form of government contracts, quotas, licenses, mineral rights, etc.[59] With the inception of the modern era, it is not surprising that the number of contracts a government enters into, has also greatly increased. Therefore, strict and clear laws stating the liability of the government, are absolutely mandatory. Thus, we will first analyse the law, as it stands in India regarding the contractual liability of the Indian state.

*Government Contractual Liability in India*

It was the Government of India Acts, Section 30 of the 1915 Act and Section 175 of the 1935 Act, which gave the explicit power to the Indian government to enter into contracts with private individuals. Presently, it is Article 298 of the Constitution of India which lays down the extended power of the Union of each State to carry on any trade or business and acquire, hold or dispose of property and make contracts for any purpose[60]. Article 299 of the Indian

[54] Matthew McMenamin, *STATE IMMUNITY BEFORE THE INTERNATIONAL COURT OF JUSTICE:JURISDICTIONAL IMMUNITIES OF THE STATE (GERMANY VITALY)* 44VUWLR (2013)
[55] Ferrini v Federal Republic of Germany Trib. Arezzo Nov. 3, 2000
[56] Report of the International Law Commission on the work of its fifty-third session 2(2) [2001] YILC 1,
[57] Code of Civil Procedure, 1908
[58] Harbhan Singh Dhalla v Union of India AIR 1987 SC 9
[59] Swati Rao, *Contractual Analysis of the State in India: An Analysis, MANUPATRA, 2011,* http://www.manupatrafast.in/pers/Personalized.aspx.
[60] Constitution of India, 1950, art. 298

Constitution embodies within it the formalities which have to be met for the Indian government to enter into a contract.

The mandates provided under Article 299(1) of the Constitution are absolutely necessary and are not directory in nature, and a contravention of the same leads to the contract being declared as null and void[61]. It is necessary for the contract to be an expressed one and implied government contracts are not recognised by Indian law.[62] The Supreme Court in the case of *Seth Bikhraj Jaipuria V Union of India*[63] held the reason why the Article 299 was enacted, was to safeguard the government from unauthorised contracts and on the grounds of public policy.

If we trace the trajectory of the suability, or the capacity of the Indian state to be sued, we see that even in the Colonial period, the East India Company, with its vested sovereign powers, could be held liable if it breached the terms of the contracts it had entered into in a civil capacity.[64] In the present day, the governmental contractual liability, in practicality is the same as that of a private person, subject to any contract to the contrary. Article 299(2) states that the person contracting on behalf of the government, cannot be held personally liable.[65] This is not exactly a manifestation of the doctrine of sovereign immunity, as it only exempts the President, Governor or any person executing a contract for the purposes of the Constitution or for the purposes of any enactment relating to Government of India in force from any personal liability[66]. The government can still be sued, and cannot claim immunity from liability arising out of a contract which fulfils the requirements under Article 299(1) of the Indian Constitution.[67] This immunity is purely personal and does not immunise the government, as such, from a contractual liability arising under a contract which fulfils the requirements under Article 299(1).[68]

Though the nature of liability accruing from a contract is almost the same when it comes to governmental and non-governmental contracts, some special privileges are accorded to the Government in the form of special privileges under statues of limitations.[69] The period of limitation for suits filed on, or behalf of the State are longer, upto thirty years, as provided for under in Section 112 of the Limitations Act, 1963.

[61] State of Bihar v. Abdul Majid, 1954 SCR 786
[62] K.P Chowdhary vs State of Madhya Pradesh, 1967 AIR 203
[63] Seth Bikhraj Jaipuria V Union of India, 1962 AIR 113
[64] Swati Rao, *Contractual Analysis of the State in India: An Analysis, MANUPATRA, 2011,* http://www.manupatrafast.in/pers/Personalized.aspx.
[65] Constitution of India, art. 299, cl. 2.
[66] Swati Rao, *Contractual Analysis of the State in India: An Analysis, MANUPATRA, 2011,* http://www.manupatrafast.in/pers/Personalized.aspx.
[67] Ibid.
[68] State of Bihar v. Sonabati Kumari, (1961) 1 SCR 728
[69] Nav Rattanmal v. State of Rajasthan, (1962) 2 SCR 324

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Broadly, in the arena of contracting, no sovereign immunity is available to the government of India, and rightly so. The government must be held liable for the contracts it enters into for the basic principle of justice, equity and conscionability.

Article 300 of the Constitution embodies within it, the capacity of the government of India in general to sue and be sued. Article 300 states that the State may be sued in relation to its affairs, under the name of Union of India, or sue under the name of the State, in the like case as the Dominion of India, subject to any law which may be made by Act of Parliament.[70]

**The Constitution and the Doctrine of Sovereign Immunity**

*Article 19(1)(g)*

This article of the Constitution bestows upon the citizens of India the indispensable right to practise any profession, or to carry on any occupation, trade or business.[71] In the case of *P. Gangadharan Pillai v. State of Kerala*[72], the state was denied the defence of sovereign immunity. In this case, the police failed to protect the hotel of the petitioner from getting ransacked by a mob, even though they had sufficient warning of the likelihood of attack by the rioters. The State was held liable under Article 19 (1)(g) of the Constitution, as by failing to discharge their duty to provide protection to the property of the petitioner, they infringed upon his right to carry on business and trade, as embodied in the aforementioned Article.

*Article 21*

The defence of sovereign immunity is rightly not available to the State, in the situations where it acts negligently and causes threat or deprivation to life of a person as provided under Article 21 of the Constitution. This view was upheld by the High Court and Supreme Court in the case of *State of Andhra Pradesh v. Challa Ramakrishna Reddy.*[73] In this case, the authorities were negligent in guarding the jail where the petitioner and his father was stationed , and it consequently led to the death of the petitioner's father. The case was dismissed in the trial court on the grounds that the detention of the deceased in jail was within the power of exercise of the sovereign functions of the State. The case was later overturned in the High Court, and the decision of the High Court was upheld in the Supreme Court barring the defence of Sovereign Immunity to apply in this case.

*D.K. Basu vs State of West Bengal*[74], is one of the most important cases which deals with custodial negligence and abuse of authority by the police. The petitioner in this case argued that the custodial violence and unjustified torture, which sometimes also leads to death of the arrestee, is inherently violative of the fundamental rights given to every citizen and therefore

[70] Constitution of India, 1950 art. 300.
[71] Constitution of India, 1950 art. 19,
[72] P. Gangadharan Pillai v. State of Kerala, 1967 SCC OnLine Ker 36
[73] State of Andhra Pradesh v. Challa Ramkrishna Reddy, (2000) 5 SCC 712
[74] D.K. Basu v. State of West Bengal, (1997) 1 SCC 416

is an abuse of police power. There are multiple cases where the arrestees were detained by a police officers without warrant, and then are subjected to violence and torture. It was held by the Court that even though the police have a legitimate right to arrest, the use of third degree measures by them is unwarranted and can't be sanctioned by law. The court also laid down guidelines in this case, for the police to abide to while making arrests. A violation of the same would not make Sovereign Immunity as a defence available to the authorities.

In these various ways, the courts have really limited the scope of Sovereign Immunity, and have held the doctrine of sovereign immunity cannot be used to shield the authorities, as the power in India vests with the representatives of the people of the country, who essentially form the government and not the Crown. Thus these representatives are answerable to the people of the country. This view was also upheld in the case of *Maneka Gandhi vs Union Of India.*[75]

*Article 226 and 32*

A lot of cases dealing with unlawful detention and custodial death surfaced up in the Supreme Court, post emergency period of 1975-1977. In the landmark judgement of *Nilabati Behra v. State of Orissa*[76], the court held that sovereign immunity cannot apply in this case to avoid providing compensation to the petitioner, for violation of human rights and fundamental freedom, as her son had died in the police custody. In order to further protect the rights of individuals, in the case of *Rudal Sah v. State of Bihar*[77], the Supreme Court granted damages through the process of writ petitions under the provisions of Article 32 and 226 of the Constitution. Moreover, in the case of *Bhim Singh vs State of Rajasthan*[78], unlawful detention was also incorporated within the principle.

In the case of *State of Gujarat v Memon Mohamed Haji Hasam*[79], the respondent had filed for a claim to recover the goods, or a monetary compensation for the value of it, which was wrongfully sold off by an order given by the Magistrate. The State pleaded for a defence to sovereign immunity, as they said that the goods were sold in lieu of an official order, which was rejected on the grounds that the authorities were liable to take care of the goods which were in their custody, and any damage or loss of goods because of their negligent conduct, was something that they had to compensate the owner of the goods for. A similar view was upheld in the case of *Basavva Kom Dyamangouda Patil v. The State of Mysore*[80] The court held that the goods which the police seize ought not remain in their custody for longer than what is absolutely necessary. If in this duration where the good are in the custody of the authorities, due to their negligent behaviour the goods are damaged in any away, or lost, then

[75] Maneka Gandhi v. Union Of Territory, 1994 SCC OnLine D
[76] Nilabati Behera v. State of Orissa, (1993) 2 SCC 746
[77] Rudal Sah v State of Bihar, (1983) 4 SCC 141
[78] Bhim Singh v. State Of Rajasthan, 1992 SCC OnLine Raj 326
[79] State of Gujarat v. Memon Mohamed Haji Hasam, 1967 SCR (3) 938
[80] Basavva Kom Dyamangouda Patil vs The State of Mysore, (1977) 4 SCC 358

the authorities are liable to pay compensation of the same and cannot claim the defence of sovereign immunity.

**Tracing the Pattern of Judicial Decision-Making in Modern India**

Having traced the manifestations of the doctrine in different realms of law in India, the authors would like to conclude that the courts since the very beginning have looked at the doctrine of sovereign immunity with a critical gaze. Since the very inception, doubt has been cast by the judiciary on the utility of this doctrine, and despite this the doctrine has stood the test of time although its stability has suffered immensely. The courts have unsurprisingly tried to limit the ambit of the doctrine as India on paper is a democratic state, and therefore a doctrine which grants the sovereign an immunity from being tried in their own court, could pose to be antithetical to this democratic spirit. The First ever Law Commission report to a large extent wanted to end this doctrine, but it is interesting to note that in the *Vidhyawati*[81] case, the court held the doctrine to be a binding precedent, but at the same time deemed the doctrine to be unfit for the use of a Socialist state, thus seeking to reduce the availability of the doctrine in comparison to pre-independence India.[82] In the *Kasturi Lal*[83] case the courts ruled that no damages would be given to the aggrieved in lieu of the tortious acts committed by a public servant when discharging his statutory functions. Their distrust for the utility of the doctrine of sovereign immunity came to light when they requested the legislature to invoke restrictions in this doctrine akin to what had been done in England by the Crown Proceedings Act, 1947[84]. This is because the courts were worried that granting an unfettered immunity to any sovereign would seriously impede the rights of the people in the country, and would also prevent the sovereign from functioning effectively. Despite their apprehension, the courts did not deviate from invoking sovereign immunity, and thereby in doing so, they declared it to be a binding doctrine, in both *Kasturi Lal* and *Vidhyawati*[85]. A possible reason for this could be the fact that even though the Law Commission endorsed act of state line of cases, they relied on sovereign immunity.

The distinguishing factor in *Kasturilal* and *Vidhyawati* was that of sovereign function in the former and non-sovereign function in the latter. Thus, immunity was provided and denied accordingly. Three years after the Kasturilal judgment, the courts were faced with a similar factual scenario in the *Memon Mohammed*[86] case. The courts surprisingly said that the *Kasturilal* and *Vidhyawati* judgement would not apply as the cause of action in the present

[81] State of State of Rajasthan v. Vidhyawati 1962 AIR 933
[82] State of State of Rajasthan v. Vidhyawati 1962 AIR 933
[83] Kasturi Lal vs State of Uttar Pradesh 1965 AIR 1039
[84] Neelanjan Maitra, *Chapter 54: Sovereign Immunity*. In S. Choudhry (Author), *The Oxford handbook of the Indian Constitution* (Oxford: Oxford University Press) (2016)
[85] Ibid.
[86] State of Gujarat v. Memon Mohamed Haji Hasam, 1967 SCR (3) 938

case was based on provisions of from the Junagadh Customs Act, rather than in tort law[87]. In furtherance of this argument, the court refused to delve into the question of whether sovereign immunity would apply or not as they said that in addition to the procedural question, a defense had not been raised at the first opportunity. In both *Kasturi lal* and *Memon Mohammed* the courts had a power to retain properties in accordance to the Ciminal procedure code statute, and thus the distinction made by court was false[88].

Similarly, in a lot of cases after *Kasturilal*, the Indian courts have historically denied to delve into the question of sovereign immunity by ignoring binding precedents or by making false procedural distinctions. This is because despite the court's pleas, the Legislative did not intervene and impose any restriction on the doctrine. If the court would have followed the precedent set in the *Kasturi Lal* case, they would have to provide immunity to the government in a lot of cases, and to avoid this the courts through judicial maneuvering avoided the question of sovereign immunity all together for as long as they could[89]. It was finally in 1989 in the case of *Challa Ramkonda Reddy v State of Andhra Pradesh*[90] that the high court categorically said that sovereign immunity cannot be used as a defence against fundamental rights. This decision was later affirmed by the Supreme Court of India in the case of *Nilabati Behra v. State of Orissa.*[91] Therefore, this affirmation restricted sovereign immunity's usage even further and in the *Nilabati* case it was explicitly held by the court that a defence of sovereign immunity is available against tortious claims, but if there exists an element of violation of fundamental rights in the case in question, such a defence would not be available[92]. But by deeming sovereign immunity as a defence to be outside the purview of fundamental rights, the courts agreed that it could be used as a defence to a private law claim founded in tort, contract or statute.

In *Nagendra Rao*[93], the courts finally said that sovereign immunity as a defence was never available where the state was involved in commercial or private undertaking; and said that "*sovereign immunity was only available when the state interferes with life or liberty in a manner warranted by law"*[94]. Thus, the state had to act legally, and in accordance to the governing statutes to claim a defence of sovereign immunity. It made *Kasturilal* applicable insofar as there was an exercise of State's inalienable powers which were harmonious with the law[95]. Nagendra Rao, can be hailed as the case which provided momentary clarity with

[87] Ibid.
[88] Neelanjan Maitra, *Chapter 54: Sovereign Immunity*. In S. Choudhry (Author), *The Oxford handbook of the Indian Constitution* (Oxford: Oxford University Press) (2016)
[89] Neelanjan Maitra, *Chapter 54: Sovereign Immunity*. In S. Choudhry (Author), *The Oxford handbook of the Indian Constitution* (Oxford: Oxford University Press) (2016)
[90] State of Andhra Pradesh v. Challa Ramkrishna Reddy, (2000) 5 SCC 712
[91] Nilabati Behera v. State of Orissa, (1993) 2 SCC 746
[92] Ibid.
[93] N Nagendra Rao & Co vs State of A.P 1994 AIR 2663
[94] Ibid.
[95] Neelanjan Maitra, *Chapter 54: Sovereign Immunity*. In S. Choudhry (Author), *The Oxford handbook of the Indian Constitution* (Oxford: Oxford University Press) (2016)

respect to the doctrine of sovereign immunity in India. This is because in Nagendra Rao the courts clearly said that sovereign functions doctrine was not the sole approach to understand and restrict the doctrine of sovereign immunity in private law cases, but other approaches and judicial precedents could be used as well[96]. This meant that the courts wanted an approach similar to the doctrine of act of state doctrine. However, many scholars have argued that this development has been undone by *The Chairman, Railway Board v Chandrima Das*[97] and the *Common Cause*[98] case. In the *Chandrima* case a writ was filed in the High Court of Kolkata on behalf of a foreigner who was raped by government employees in West Bengal government's premises. Even though the Union of India did not make a claim on the grounds of sovereign immunity, the court went on to give a judgement based on the theory of sovereign functions[99]. The courts stated that a welfare government takes on many roles in a modern state but not all of it can be deemed to be an exercise of its sovereign function[100]. The courts use of both sovereign function theory and its justification undid what the court in Naegndra Rao had done, in terms of providing some clarity to the doctrine[101]. In fact, in *Common Cause, A registered society v union of india*[102] the court held that an Act of State is indistinguishable from the category of traditional sovereign functions. Both of these decisions went against the Nagendra judgement, and has thus, once again struck the doctrine with copious amounts of instability. It becomes clear from observing the judicial decisions of sovereign immunity that much effort and work is needed to make the doctrine stable and to fulfil the true purpose of having such a doctrine in the Indian legal system.

## Conclusion

In this paper, we have tried to analyse the trajectory of the doctrine of sovereign immunity in India and its application in the domains of tort law, contract law, constitutional law and international law. The shift from monarchical and authoritarian forms or government to growingly democratic ones have negatively impacted the existence of this doctrine both in local municipal laws as well as in the international forum. It seems to be evident that with the change in the conceptions of sovereignty, the doctrine of Sovereign Immunity has accordingly evolved. Despite the apparent evolution of this doctrine, the courts in India have been riddled with uncertainties when it comes to determining the true ambit and scope of it. The courts have tried to evolve this doctrine to be in line with the Act of State doctrine, so as to clearly limit the use of this doctrine to cases where it is truly needed. It is indeed sad that despite this, the very judgements given by the judiciary have proven to be antithetical to this long-sought objective. It is truly time to re-visit, accept and implement the well-reasoned and

[96] N Nagendra Rao & Co vs State of A.P 1994 AIR 2663
[97] The Chairman, Railway Board v Chandrima Das AIR 2000 SC 988
[98] Common Cause 'A' Registered Society vs Union of India AIR 1996 SC 929
[99] The Chairman, Railway Board v Chandrima Das AIR 2000 SC 988
[100] Ibid.
[101] Neelanjan Maitra, *Chapter 54: Sovereign Immunity*. In S. Choudhry (Author), *The Oxford handbook of the Indian Constitution* (Oxford: Oxford University Press) (2016)
[102] Common Cause 'A' Registered Society vs Union of India AIR 1996 SC 929

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widely ignored suggestions provided in the Law Commission report to strike the much-needed stability in this doctrine which has suffered for a long time at the hands of the judiciary.