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Some Problems in Government Tort Liability in India

By

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Of all the problems of Justice between man and the state, that of the immunity of government from tortious liability is one of the most difficult. Particularly in India, the fact that a trading company was our sovereign for nearly a century before the British Crown assumed direct administration of the country, has contributed to the complexity. It is proposed to briefly refer to some problems in this area. Does the P & O case lead to a conclusion that the East India Company enjoyed immunity only in respect of acts of state? Is 'act of state' a definite concept for the purpose of immunity. How to distinguish between sovereign and non-sovereign functions for the purpose of the existing law? Could there be complete state liability? These, in brief, are the problems raised in this paper.

I

It is well known that the liability of state in India for the tortious acts of its servants and agents is based on a distinction between sovereign and non-sovereign functions. Tracing back from Art. 300I of the Constitution of India to Section 176 of Government of India Act, 1935 and S. 32 of Government of India Act, 1915 we reach S 65² of the GOI Act, 1858 which laid down that, on the assumption of the Government of India by the Crown, the liability of the Secretary of State for India would be to the same extent as that of the East India Company. The judgment of the Supreme Court at Calcutta in P & O Steam Navigation Company v. The Secretary of State for India³ applying s-65 the GOI Act 1858 has given rise to a controversy as to the scope of tort liability of governments in India.

There is agreement that the P & O case correctly laid down that the East India Company and hence the Secretary

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State for India did not enjoy the immunity of the crown of England. But there is disagreement with regard to the scope of the immunity of the East India Company in the performance of "sovereign functions" stated to be available in this case. "Peacock C.J. said:

"There is a great and clear distinction between acts done in the exercise of what are usually termed sovereign powers, and acts done in the conduct of undertakings which might be carried on by private individuals without having such power delegated to them."⁴

Then he proceeded to cite instances where such immunity had been allowed in the case of the East India Company. It is said that all these instances are what is usually called "acts of state." Further, the real issue for determination before the court was whether the company enjoyed immunity in respect of trading or non-sovereign activities, hence the courts' dicta about the immunity in respect of activities in exercise of sovereign powers cannot form part of the ratio of the case. This part of the decision is therefore not useful as a precedent. Thus, in Secretary of State for India in Council v. Hari Bhanji⁵, the Madras High Court held that the true meaning of the P&O holding was that only in respect of "acts of state"⁶ municipal courts had no jurisdiction, but when an act was done under colour of municipal law, whether in exercise of sovereign powers or not, municipal courts had jurisdiction. Some cases have followed the above line⁷ and the Law Commission of India has accepted it as correct.⁸ On the other hand, commencing with Nobin Chunder Dey v. Secretary of State for India⁹ and ending with the much criticized Kasturilal v. State of U.P.¹⁰ there is a large number of cases which have accepted the P & O case as authority for granting immunity in respect of "sovereign functions", though these might not come under the category of act of state.¹¹

There are dicta in the P & O case to show clearly that the court had in mind not merely the immunity enjoyed by the East India Company in respect of acts of state, but also the immunity in the case of sovereign functions which did not amount to act of state. While finally finding the Secretary of State liable to pay damages the court said: "... the business on which they (workmen) were employed being an act of a private nature, and not in the exercise of powers usually called sovereign powers, or in the performance of an act of state".¹² Earlier in the judgment it is said: "It is clear that the East India Company would not have been liable for any act done by any of its officers or soldiers in carrying on hostilities, or for the act of any of its naval officers in seizing as prize property of a subject, under the supposition that it was property of an enemy, nor for any act done by a military or naval officer, or by any soldier or sailor, whilst engaged in military or naval duty, nor for any acts of any officers as servants in the exercise of judicial function."¹³

Though most of the activities referred to in the above sentence pertain to "act of state", the exercise of judicial functions does not come under that category. It is therefore submitted with respect that the restricted interpretation of the ratio of the P & O case in Haribhanji case and subsequently, as applying only to acts of State, is wrong. The principle laid down in the P & O case was that in respect of the performance of sovereign functions (which of course includes act of state) there was immunity for the Secretary of State for India, while there was no such immunity in the case of non-sovereign functions.

It was seen in the previous section that Governments in India have immunity from tortious liability both in respect of acts of state as well as for acts in the exercise of sovereign powers. It is now proposed to examine briefly how to identify these acts for purposes of giving effect to the immunity.

To take up act of state first. Act of state is a term with no settled meaning. It is usual to say that this is something done by arbitrary power to those outside the allegiance, and that there cannot be an act of state against a citizen. Thus Seervai has said:

"It is elementary learning and settled law that there can be no act of state between a sovereign and his subjects."¹⁴

The above statement is based on the dicta in Walker v. Baird¹⁵ where the plea of act of state failed to justify the seizure of a lobster factory of a British subject in Newfoundland. Professor H.W.R. Wade has pointed out that this case is no authority for the proposition that act of state cannot be pleaded against a British subject.¹⁶ The lobster factory was within the territory "where government must show legal warrant for its acts", and where the subject could claim full legal protection. If the subject chooses to live outside the jurisdiction, it is doubtful if the plea of allegiance would fetter the Crown's freedom of action in foreign affairs.¹⁷

An act of state would therefore seem to be one performed outside the ordinary jurisdiction. But even this stand is not free from difficulty. What about something done against any enemy alien within the jurisdiction? Or, if a state is formed to wage a defensive war within its territory resulting in damage to its citizen, will the plea of act of state be not available? Therefore, neither the 'allegiance' test nor the 'jurisdictional' test would seem to be conclusive.

will not be a problem while considering Government immunity. Torts if any committed by the corporations will be dealt with separately and damages if any paid out of their own funds, unless the respective statutes creating the corporations, allows immunity.

IV.

Can there be liability in respect of all tortious actions of Government?

Those who deny Governmental immunity do so partly on the ground that if immunity is conceded there will be no equality between government and a private employer. Peacock C.J. gave expression to this feeling when he said in the P.O. case, "If by reason of their (East India Company's) having been interested with the powers of government they were exempted from the ordinary liability of individuals in matters of business, exercised either for their own benefit, as it was at one time, or for purposes of government, as it was at another, private individuals would have had to compete with them upon very disadvantageous terms".²⁷ In State of W.B. v. Corporation of Calcutta, ²⁸ Subba Rao C.J. referred to "the rule of law based on the doctrine of equality",²⁹ and "the philosophy of equality enshrined in our constitution"³⁰ to lay down the new rule that, as in the case of private individuals, state is bound by a statute unless specifically exempted. In the same case, Shah J, however asked in his dissenting judgment why a new rule of interpretation should be established on the supposition that the constitution has sought to impose equality between the state and the citizen, when the state could select itself for special treatment when making laws.³¹ The powers and functions of the state and of the individual are so different that any claim for complete equality of treatment in the matter of tortious liability can hardly be accepted.

Apart from the difficulty of equality of treatment between the State and citizen these are others which cannot be ignored while considering government tort liability. As pointed out by Professor Davis, one aspect of the problem involves intricate issues about proper distribution of governmental powers.³² The purpose of a law of government tort liability is to compensate for the harm done to individuals over and above the risk incidental to living in civilized communities. Even so, all types of damage caused by governmental action can never be paid for, and that too by the method of suits in courts. Certain activities of government should remain beyond judicial scrutiny. This is not to say that damage caused by such activities, say by war for example, should not at all be

paid. Ideal principles of justice would require an innocent victim to be compensated. But such payments may be made as was done by Britain and U.S.A. after the second world war through 'legislative grace', rather than by judicial verdicts.³³ Therefore for the purpose of giving immunity to government from tort liability "the line must be located on the basis of a judgment about the propriety of making adjustments through the medium of damage suits."³⁴

It is not proposed to suggest any criteria for classifying the functions of government for tort liability in India, nor to deal with the question whether the liability deal with the question whether the liability should be based on fault or risk, or on the principle of enterprise liability, or equitable loss spreading.³⁵ In this difficult area, justice can be achieved only by proper legislative and judicial exertions. Perhaps a large part of the area can be ideally covered only by judicially developed rules in case to case adjudication. A word may be said (or rather repeated) about the role of the Indian judiciary. The doctrine of Governmental immunity is a judgemade doctrine in India as it is in many other countries. But the judiciary has shown no willingness, except to recommend legislative reform,³⁶ to play an active role in the development of this branch of law. If such a rule had been played the need for Parliament to consider an ill-conveived bill³⁷ would not have arisen.

F O O T N O T E S

1. Art 300:

(1) The Government of India may sue or be sued by the name of the Union of India and the Government of a State may sue or be sued by the name of the State and may, subject to any provisions legislature of such State enacted by virtue of power conferred by this Constitution, sue or be sued i relation to their respective affairs in the like cases as the Dominion of India and the corresponding Provinces or the corresponding India States might have sued or been sued if this Constitution had not been enacted.

(2) If at the commencement of this Constitution;-

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

2. S-65.

The Secretary of State in Council shall and may sue and be used as well in India as in England by then name of the Secretary of state in council as a body corporate; and all persons and bodies politic shall and may have and take the suits, remedies and proceedings, legal and equitable, against the Secretary of State in Council India as they could have done against the said company; and the property and effect hereby vested in Her Majesty for the purposes of the Government of India or acquired for the said purpose shall be subject and liable to the same judgment and execution as they would while vested in the said Company have been liable to in respect of debts and liabilities lawfully contracted and incurred by the said Company.

3. Bombay High Court Reports Vol.V. Appendix A (Secretary of State for India was held liable for damage caused to a horse of the P & O Company by the negligent carrying of an funnel across the road in the Kidderpore Dock Yards owned and operated by the East India Company).

4. Ibid page 13.
5. (1882) I.L.R. 5 Madras 273; Indian decisions Vol.2.(1882-84) page 190.
6. "Acts done in the exercise of sovereign powers but which do not profess to be justified by municipal law are what we understand to be acts of state of which municipal courts are not authorised to take cognisance" ibid.P.195.
7. See M.P. Jain, Indian Constitutional Law p.567.
8. See First Report of the Law Commission - Liability of State in tort.
9. (1875) I.L.R. Cal. Vol.I P.11.
10. A.I.R. 1965 S.C. 1039.
11. For a list of such cases, see the Law Commission Report, and Basu, 4th Edn.Vol.4, page 399.
12. (8161) 5 Bom. H.C.A. Appendix page 16. This reference to act of state distinct from the exercise of sovereign powers has been noticed by Blackshield in his learned jurisprudential case note on Kasturilal case, see 8 J.I.L.I. (1966) Page 643 at page 657 where it is asked whether 'or' have means "alternatively" or, "in other words".
13. (1861) 5 Bom. H.C.R. Appendix Pages 14-15.
14. (1892) A.C. 491.
15. H.W.R. Wade Administrative Law(Second Edition) P.271.
16. See Cook v. Sprigg(1899) A.C. 572 and Nissan v. A.G. (1967) 3 W.L.R. 109, where British subjects lost property in South Africa and Cyprus respectively and where the plea of act of state was upheld. Wade, p.272.
17. See clause 11 (a) of the Government (liability in Tort) Bill (Reintroduced) in the Lok Sabha on 22.8.67 Clause 11 is as follows:
 11. Nothing contained in this Act shall render the Government liable in respect of-
 - (a) any act of State;

(b) any act done by the Government in the discharge of its functions in relation to any of the matters enumerated in entries 10,11,12,13,14,15 and 16 of List I in the Seventh Schedule to the Constitution;

(c) any act done by the President of India in the exercise and performance of the powers and duties of his office in relation to the summoning and prorogation of the House of Parliament, the dissolution of the House of the People, the assent to, or the withholding of assent from, any Bill, the return of any bill to the House for reconsideration of the Bill or any specified provisions thereof or the issue of any Proclamation under the Constitution;

(d) any act done by the Governor of a State in the exercise and performance of the powers and duties of his office in relation to the summoning and prorogation of the House of Houses of the Legislature of the State, the dissolution of the Legislative Assembly, the assent to, or the withholding of assent from any bill, the reservation of any Bill for the consideration of the President or the return of any Bill to the House or Houses for reconsideration of the Bill or any specified provisions thereof;

(e) any act done under a Proclamation issued under the Constitution

(f) any act authorised by or under the Trading with the Enemy (Continuance of Emergency Provisions) Act, 1947;

(g) any act done in the exercise of the powers vested in the Union for the purpose of training, or maintaining the efficiency of, the armed forces;

(h) any act done by a member of the armed forces of the Union while on active service;

(i) any act done by

(i) a member of police force; or /a

(ii) a public servant whose duty it is to preserve peace and order in any area or place or who is engaged on guard sentry, patrol, watch and ward, or other similar duty in relation to any area or place,

for the prevention or suppression of a breach of the peace, or disturbance of the public tranquillity, or a riot, or an affray, or for the prevention of any offences against public property;

(j) any act done or ordered to be done by a judge magistrate, or any other person while discharging or purporting to discharge any responsibilities of a judicial nature vested in him;

(k) any act in connection with the execution of lawful warrants or orders of a judge, magistrate, or any other person discharging or purporting to discharge any responsibilities of a judicial nature vested in him, done by any person bound to execute the warrants or others;

(l) any act for which immunity is granted under the Indian Telegraph Act, 1885, the Indian Post Office Act, 1898, or under any other enactment for the time being in force;

(m) any act in respect of which a remedy is provided under the Indian Railways Act, 1890 or under any other enactment for the time being in force;

(n) any personal injury or any damage to property caused by an act which by its nature is likely in the ordinary course of events to cause such injury or damage, if the doing of the act is authorised by any enactment for the time being in force;

(o) any claim arising out of defamation, malicious prosecution or malicious arrest;

(p) any claim arising out of the operation of any quarantine law;

(q) any claim arising in a foreign country.

19. See sub clauses (b) (f) (g), (h) and (q) of clause 11 of the bill.

20. A.I.R. 1965 S.C. 1039.

21. Per justice N. Rajagopala Ayyangar in Narayanaswamy v. Krishnamurthi, A.I.R. 1958 Madras 1,343 at p.350.

22. A.I.R. 1954 S.C. 728.

23. *Ibid* at page 741.

24. Alf Ross. On the concepts of "statè" and "state organs" in Scandiravian studies in Law, Vol.5. (1961) page 113, at page 117-18.
25. (1950) 1 K.B. 19.
26. A.I.R. 1958 Madras 343.
27. (1961) 5 Bom. H.C.R. Appendix at page 12.
28. A.I.R. 1967 S.C. 997.
29. Ibid. p. 1007.
30. Ibid. p. 1008.
31. Ibid. p.1014.
32. Davis Administrative Law ext. p.463.
33. Ibid. page 467.
34. Ibid page 464.
35. For a very useful discussion of these problems with regard to American law see, Davis. Chapter 25.
36. See the dicta in Kasturilal case.
37. See the strictures of Seervai, that if the Bill under consideration is passed it would make the citizen's position much worse, Seervai - page 816.
