

Relevance Of Distinction Between Sovereign And Non-Sovereign Functions In Governmental Liability In The Field Of Cyber Torts: Indian Perspective

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ABSTRACT

A 'tort' is different from a 'crime' in the sense that in the case of the former, the commission would entail a liability to pay damages, whereas, in the case of the latter, the commission would incur prosecution and punishment according to the law defining the crime. Commission of the latter by a person who is under the employment of the government, shall entail prosecution followed by punishment for his act in his individual capacity. On the other hand, if a tort is committed by such a person during the course of his employment, in addition to the person being liable in his individual capacity, the government, in its capacity as the employer becomes vicariously liable. The Constitution of India recognises that both the Government of India as well as the State Governments may be sued subject to appropriate legislation. In the matters not covered by legislation, the liability of the respective governments to be sued will have to be determined in accordance with pre-Constitutional position. That the distinction between sovereign and non-sovereign functions has relevance in the matter of determining the vicarious liability of the government has been established by the Supreme Court in *Kasturilal's case* with recommendation for legislation abrogating the distinction. Tort can take place not only in the physical space but cyber space also. Such torts are referable as cyber torts. This research paper is a humble attempt to explore relevance of the archaic distinction while determining the liability of the Government for cyber torts in the light of the Information Technology Act, 2000 and the Personal Data Protection Bill, 2018.

Keywords: cyber tort, sovereign function, non-sovereign function, vicarious liability

Introduction

Under the Constitution of India, three basic organs of governance, i.e., the Executive, the Legislature and the Judiciary, have been recognised and their relationship inter se and with the people has been defined. The scheme of distribution of powers is federal in nature¹ envisaging two levels of government, i.e., one at the National level and the other at the level of the States. The Constitution² not only enables the respective governments to sue but also makes them liable to be sued. The subject matters with respect to which an action can be brought by and against the governments is left to be regulated by legislation. Till the time legislation encompassing the field is made, the pre-Constitutional state of affairs will prevail³. Liability in tort has its genesis in the breach of a duty that has been laid down by law. The duty that has been breached is towards persons, in general, entailing redress by an action for unliquidated damages⁴. Under the principle of vicarious liability, relying on the distinction between 'sovereign' and 'non-sovereign' functions being performed by the government, It has been held by the Constitution Bench⁵ of the Supreme Court that in the matter of tort committed by persons under the employment of the government, the liability of the Government will arise only in respect of the performance of non-sovereign functions, i.e., functions which are capable of being performed by private individuals and not in the case of sovereign functions, which can be performed only by virtue of being a servant or agent of the

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¹ See 'State of West Bengal v Union of India, A.I.R. 1963 S.C. 1241' (India).

² INDIA CONST. art 300, cl. 1.

³ S.P. Singh, "The Development of Public Tort Liability in France and India: A Comparative Study", 13 J.I.L.I. 98, 99 (1971).

⁴ See 'W.V.H. ROGERS, WINFIELD AND JOLOWICZ ON TORT', (16th ed. 2002).

⁵ See 'Kasturilal v State of U.P., A.I.R. 1965 S.C. 1039' (India).

Sovereign⁶. Thus, the principle of sovereign immunity got grounded in the Indian legal system. A recommendation was also made to the Parliament to set right the precarious position by making appropriate legislation to do away with the said principle. Legislative attempts to bring in suitable legislation implementing the recommendation have not been fructified and the matter is left to interpretation by the Courts. Even though the law relating to tort is mostly uncodified, 'the Information Technology Act, 2000' and 'the Personal Data Protection Bill, 2018' cover some of the wrongs which are committed in cyber space. This paper is a humble attempt to analyse the relevance of the archaic distinction categorising the functions as sovereign on the one hand and non-sovereign on the other, while fixing the liability of the Government in the matter of cyber tort. The author has proceeded on the basis of the hypothesis that since the activity of an individual in cyber space is amenable to obstruction from both the State as well as non-State actors, there is no scope for categorising the functions as 'sovereign' and 'non-sovereign', particularly in the light of the recommendation in "Kasturilal's case"⁷ reiterated in subsequent judgments that have been passed by the Supreme Court. The approach which the author has adopted in the compilation of the research paper is comparative in nature. The author has reviewed the various decisions of the Apex Court covering the liability of the government under general tort law, the provisions of 'the Information Technology Act, 2000' and the scheme that has been envisaged for affording protection to data under 'the Personal Data Protection Bill, 2018'.

Governmental Liability in General Tort

The determination of the present day liability of the government to be sued, in accordance with the phraseology adopted by the Constitution, sans legislation, mandates the Court to ascertain whether an action was maintainable in respect of the erstwhile 'East India Company'. In the matter of ascertaining the liability of the Government when it comes to the tortious act committed by its servants, on the line of the decided English cases⁸, the Apex Court has laid down that what has to be looked into is nature of the initial act of the employee so as to ascertain whether it was expressly authorised and lawful. The responsibility of the Government shall arise in respect of the way of execution of the authority by the employee⁹. A five judges bench¹⁰, has held that the question of determination of the liability of the State as far as the payment of compensation in respect of tort committed by its servants is concerned when the same has happened in the course of employment, it is essential to determine whether an action for a similar cause was maintainable in respect of the 'East India Company'. The Court relied on the decision of the Calcutta High Court¹¹ to categorically hold that in order to ascertain the liability of the government in tort, an exercise has to be gone into, namely, to find out the nature of activity the servant of the government was involved in. If the activity that the servant or agent of the Government has been involved in is akin to the performance of sovereign functions, no action will lie. As to which functions will come within the ambit of sovereign functions, it has been laid down that where by its very nature the function can be performed only by the servants or agents of the Sovereign in consequence of delegation of the power of the Sovereign, the same shall be characterised as sovereign function. Conversely, if the activity that the servant or agent is involved in does not entail delegation of the power of the Sovereign, there is no escape from an action for damages. Even though the ratio of the decision in Kasturilal's case has been diluted in subsequent judgments¹² rendered by the Apex Court observing that with the transformation of the Indian State as a Welfare oriented one, the archaic distinction has lost its relevance, the law declared in the former still holds ground as later decisions are rendered by smaller benches. Attempts at legislation doing away with immunity of the Sovereign based on the archaic distinction have also not fructified. In the matter of Constitutional torts, referable to cases which involve action for enforcement of fundamental rights, where infringement of the precious 'right

⁶ I.P. Massey, "*Dialectics of Sovereign Immunity and Dynamics of Welfare Society: Need for an Independent Public Law of Tort*", 26 J.I.L.I. 146 (1984).

⁷ *Supra* note 5.

⁸ See 'London County Council v Cattermole (Garages) Ltd., (1953) All E.R. 582' (U.K.); 'Ilkiw v Samuels, 1963 (1) W.L.R. 991' (U.K.).

⁹ See 'State of Maharashtra v Kanchanmala Vijaysing Shirke, A.I.R. 1995 S.C. 2499' (India); 'Achutrao Haribhau Khodwa v State of Maharashtra, A.I.R. 1996 S.C. 2377' (India); 'State of Haryana v Santra, A.I.R. 2000 S.C. 1888' (India).

¹⁰ *Id.*

¹¹ See 'Peninsular and Oriental Steam Navigation Co. v Secretary of State for India, 1869 5 Bom H.C.R. App 1' (India).

¹² See 'State of Bombay (Now Gujarat) v Memon Mahomed Haji Hasam, A.I.R. 1967 S.C. 1985' (India); 'N. Nagendra Rao & Co. v State of A.P., A.I.R. 1994 S.C. 2663' (India); 'Union of India v Sancheti Food Products Ltd., MANU/SC/0990/2015' (India); 'United Air Travel Services v Union of India, MANU/SC/056/2018' (India).

to life' or that to 'personal liberty' has been an issue¹³, the Supreme Court has, in a series of cases¹⁴, however, declined to look into the archaic distinction while determining the liability of the government to pay compensation¹⁵.

Cyber Tort

Cyber tort is simply a tort done over cyberspace. It can also be termed as actions that come within the meaning of tort when the same are performed on the internet¹⁶. In India, the legislative provisions covering the field are to be found in 'the IT Act, 2000'¹⁷ and 'the Personal Data Protection Bill of 2018'¹⁸, but neither defines the term 'cyber tort'. The Act of 2000 came into force on 17 Oct 2000 whereas, the Bill of 2018 is still pending before the Parliament. The IT Act¹⁹ specifies the liability of any person to compensate another individual by way of damages who is affected by any of the specified acts performed by the former in relation to 'computer', 'computer system' or 'computer network' belonging to or under the charge of the latter. The Bill of 2018²⁰ specifies the right of a 'data principal'²¹, to whom harm²² is caused in consequence of contravention of any provision of the proposed Act including the rules that may be framed under the proposed Act or regulations that can be made under it, to claim damages from a 'data fiduciary'²³ or a 'data processor'²⁴. The liability of any person to pay compensation on account of contravention of any of the provisions of the IT Act which incur payment of compensation or penalty is to be determined by the authority²⁵ to be appointed under the Act. The decision rendered by the said authority shall be appealable to the Tribunal²⁶. Offences which incur imprisonment or fine under the IT Act have been separately provided for²⁷ and unlike the determination of contraventions for which a separate mechanism has been provided debarring the ordinary Courts from taking cognizance, the offences shall be dealt with by the ordinary criminal Courts.

Governmental Liability in Cyber Tort

¹³ INDIA CONST. art 21.

¹⁴ See 'Rudal Sah v State of Bihar, A.I.R. 1983 S.C. 1086' (India); 'Sebastian M. Hongray v Union of India, A.I.R. 1984 S.C.' (India); 'SAHELI a Women's Resources Centre v Commr. of Police Delhi, A.I.R. 1990 S.C. 513' (India); 'Nilabati Behera v State of Orissa, A.I.R. 1993 S.C. 1960' (India); 'Chairman, Railway Board v Chandrima Das, A.I.R. 2000 S.C. 988' (India); 'Nambi Narayanan v Siby Mathews, (2018) 10 S.C.C. 804' (India).

¹⁵ Alice Jacob, "Vicarious Liability of Government in Torts", 7 J.I.L.I. 247 (1965); Also see Blackshield, "Tortious Liability of Government: A Jurisprudential Case Note", 8 J.I.L.I. 693 (1966).

¹⁶ Natalie Joubert, "Cyber-Torts and Personal Jurisdiction: The Paris Court of Appeal Makes a Stand", 58 I.C.L.Q. 476 (2009).

¹⁷ The Information Technology Act, 2000, No. 21, Acts of Parliament, 2000 (India).

¹⁸ The Personal Data Protection Bill, 2018 (India).

¹⁹ *Supra* note 18, 'Section 43'.

²⁰ *Supra* note 19, 'Section 75'.

²¹ *Supra* note 19, 'Section 3(14)', "'Data Principal' means the natural person to whom the personal data referred to in sub-clause (29) relates."

²² *Supra* note 19, 'Section 3(21)', "'Harm' includes – (i) bodily or mental injury; (ii) loss, distortion or theft of identity; (iii) financial loss or loss of property; (iv) loss of reputation, or humiliation; (v) loss of employment; (vi) any discriminatory treatment; (vii) any subjection to blackmail or extortion; (viii) any denial or withdrawal of a service, benefit or good resulting from an evaluative decision about the data principal; (ix) any restriction placed or suffered directly or indirectly on speech, movement or any other action arising out of a fear of being observed or surveilled; or (x) any observation or surveillance that is not reasonably expected by the data principal."

²³ *Supra* note 19, 'Section 3(13)', "'Data fiduciary' means any person, including the State, a company, any juristic entity or any individual who alone or in conjunction with others determines the means and purpose of processing of personal data."

²⁴ *Supra* note 19, 'Section 3(15)', "'Data processor' means any person, including the State, a company, any juristic entity or any individual who processes personal data on behalf of a data fiduciary, but does not include the employee of a data fiduciary."

²⁵ *Supra* note 18, 'Section 46'.

²⁶ *Supra* note 18, 'Section 48'.

²⁷ *Supra* note 18, 'Chapter XI', 'Sections 65-78'.

Causing damage to ‘computer’, ‘computer system’ or ‘computer network’ shall incur liability to pay compensation under ‘Section 43’ of the IT Act.²⁸ But the said provision does not specifically make the government liable for the harm caused by persons, during their course of employment under it, to the devices owned by or under the charge of any other person. However, the provision relating to ‘residuary penalty’²⁹ contained in ‘Section 45’ is broader in its phraseology as it uses the word ‘whoever’ and is capable of being interpreted to take within its ambit even the government. ‘The Personal Data Protection Bill’, on the other hand, specifically makes the State liable for any harm that is caused to the ‘data principal’ since both ‘data fiduciary’ and ‘data processor’ include the State along with other entities. As an abundant caution, the word ‘person’³⁰ has been defined to mean ‘the State’ also. Hence, the State has been brought at par with a company, juristic entity or individual as far as the liability under the proposed Act is concerned. Even though the IT Act provides for a separate mechanism to determine the liability to pay compensation for the contraventions, thereby, excluding the jurisdiction of the ordinary Civil Courts, there is nothing in the Act to suggest that the principles devised by the Court in general to determine the liability of the Government for tortious acts committed by its servants in relation to their employment, shall not be applicable. Such a question, to the limited understanding of the author, has not yet been presented before the Judiciary in India.

Conclusion and Suggestions

Three sets of facts emerge from the above discussion. In the matter of general tort, the liability of the government is to be ascertained on the basis of the principle that has been enunciated in “Kasturilal’s case” for three reasons. Firstly, being a decision of Constitution bench, it is a binding precedent. Secondly, even though its binding efficacy has been diluted by subsequent decisions of smaller bench strength, it has not been specifically overruled. Lastly, its clarion call made to the Legislature to set right the situation by doing away with the immunity as has been done by U.K and U.S.A. through ‘the Crown Proceedings Act, 1947’ and ‘the Federal Tort Claims Act, 1946’, respectively, has not yet been acted upon. So far as the cyber torts having a bearing upon the right to ‘life’ and ‘personal liberty’ of the person is concerned, the archaic distinction has no relevance. But relief in such matters may only be provided by the Apex Court under ‘Article 32’ and the various High Courts under ‘Article 226’ of the Constitution. The ordinary Civil Court, while dealing with ‘cyber torts’ other than those affecting the right to ‘life’ and ‘personal liberty’, perpetrated by the servants of the Government, shall still have to grope with the archaic distinction as and when the defence is taken by the Government. When the IT Act was being framed, the Parliament had the benefit of the recommendation of “Kasturilal’s” decision and a golden opportunity to bring the liability of the government at par with that of a private individual when it comes to damage caused to any ‘computer’, ‘computer system’ or ‘computer network’. But, in the eventuality of definition of ‘person’ not encompassing the State within its ambit, the word has to be given its natural meaning, thus excluding the State. The ‘Personal Data Protection Bill, 2018’ takes a positive step in bringing the State at par with a private individual in the matter of liability for harm caused to a ‘data principal’ because of violation of any provision of the Bill by ‘data fiduciary’ or ‘data processor’, by bringing the State within the ambit of their definition as well as that of ‘person’. The use of the phrase “natural person” in relation to “data principal” and ‘person’ in relation to “data fiduciary” and “data processor” is of utmost significance in establishing that in the matter of liability, the Bill does not distinguish between the ‘State’ and a ‘private individual’. The provision made for recovery of amounts contemplates, among other things, attachment of the person’s bank accounts which casts its net on the State also, since it is included within the definition of ‘person’. Whether ‘the Personal Data Protection Bill, 2018’, which marks a paradigm shift as far as the liability of the Government in tort is concerned, by setting aside the distinction between ‘sovereign’ and ‘non-sovereign’ functions will see the light of the day is an open question. In the light of the fact that the demarcating line between ‘sovereign’ and ‘non-sovereign’ functions has only been blurred and not obliterated, it is suggested that the Supreme Court of India may consider re-look of the ratio in “Kasturilal’s” case keeping in view the divergent views of the subsequent Benches instead of passing the buck to the Parliament. The Parliament on its part, may bring in legislation obliterating the archaic distinction between ‘sovereign’ and ‘non-sovereign’ functions, as well as amend the particular provisions of ‘the IT Act’ to bring the liability of ‘the State’ at par with that of a ‘private individual’.

²⁸ *Supra* note 18, ‘Section 43’, “Penalty and Compensation for damage to computer, computer system, etc.”

²⁹ *Supra* note 18, ‘Section 45’, “Residuary penalty.”

³⁰ *Supra* note 19, ‘Section 3(28)’, “‘Person’ means- (i) an individual, (ii) a Hindu undivided family, (iii) a company, (iv) a firm, (v) an association of persons or a body of individuals, whether incorporated or not, (vi) the State, and (vii) every artificial juridical person, not falling within any of the preceding sub-clauses.”

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