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Judicial Interpretations and Expansion of Constitutional Torts

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*The etymology of the French term 'Tort' finds its roots in the Latin word 'Tortum', conveying the notion of distortion or wrongdoing in the English language. One of the many luminaries of law, Winfield has understood torts as "Tortious liability arises from the breach of a duty primarily fixed by law. This duty is towards persons generally and its breach is redressable by an action for unliquidated damages."¹ Vicarious liability, which lays its roots in the Maxim '**Respondent Superior**,' is the liability that a person bears for the actions of another person. It is frequently seen in master-servant (or even principle-agent) relations. In a similar context, a Constitutional Tort is a judicial means that allows the State to be held vicariously liable for the actions of its agents. One of the many reasons for the origin concept of law is the need to maintain the status of the **Welfare State**². Once the State itself has the liability to ensure they don't infringe on the civil rights of any citizen, governing and judging the same set of citizens tends to be efficient and cohesive. It is mentioned in codified law and interpreted in uncodified law as well. Damages for these torts can be both compensatory and nominal. When the essential human rights guaranteed by the Constitution are violated, the state is legally liable. This article talks about these aspects of law and the implementation of this right in India and at the global level and their evolution and enforcement.*

¹ W.V.H. Rogers, *Winfield and Jolowicz on Tort* (12th edn, Sweet & Maxwell 1984) 3

² David Howarth, 'Three Forms of Responsibility: On the Relationship between Tort Law and the Welfare State' (2001) 60 *Cambridge Law Journal* 553

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INTRODUCTION

The development of legal frameworks regarding state accountability and individual rights stands as a fundamental aspect of modern jurisprudence. Originating from the ancient concept of 'Rex Non-Potest Peccare' that asserts the infallibility of the monarch, contemporary legal systems have undergone significant changes, particularly concerning constitutional torts. This article explores the complex realm of judicial interpretations and the expansion of constitutional torts, examining their implications in India and worldwide.

Torts, as defined by Winfield, are liabilities arising from breaches of legally established duties, encompassing the essence of legal wrongs. Constitutional torts, in particular, offer a distinctive avenue for addressing state liability. These torts, vicarious in nature, hold the state responsible for actions carried out by its agents, marking a shift towards ensuring justice for affected individuals.

In India, discussions surrounding state tort liability have been nuanced, with landmark cases such as the State of Rajasthan v Mst. Vidyawati shaping legal precedents. Judicial interventions, exemplified by cases like Rudul Shah v State of Bihar³ and Nilabati Behera v State of Orissa⁴, highlight the importance of state accountability in safeguarding fundamental rights.

On an international scale, constitutional torts have resonated across various legal systems, as seen in pivotal rulings like Francovich v Italy⁵ and Bivens v Six Unknown Named Agents⁶. These cases underscore the expanding scope of state responsibility and the necessity of addressing violations of constitutional rights.

³ *Rudul Shah v State of Bihar* (1983) 4 SCC 141

⁴ *Nilabati Behera v State of Orissa* (1993) 2 SCC 746

⁵ *Francovich v Italy* [1991] ECR I-5357

⁶ *Bivens v Six Unknown Named Agents* [1971] US 403

Despite advancements in legal jurisprudence, challenges persist, particularly concerning the differentiation between sovereign and non-sovereign functions of the state. Hence, there is an urgent need for legislative clarity and nuanced comprehension of state immunity within contemporary legal frameworks. Through critical analysis and examination of international best practices, this article advocates for a robust legal framework that balances state immunity with individual rights, thereby promoting accountability and ensuring justice in an ever-evolving legal landscape.

CONSTITUTIONAL TORTS - VICARIOUS LIABILITY OF THE STATE

The genesis of Constitutional Law can be traced to a historical juncture marked by the waning acceptance of the medieval notion encapsulated in the phrase '*Rex Non-Potest Peccare*,' signifying the glorious reign and infallibility of the king. This decline in civic adherence hastened against the backdrop of increasing democracies and industrial advancements from the 18th century onward. Consequently, there emerged a compelling need to subject acts exercised under official authority to judicial scrutiny, thereby ensuring recourse to justice for individuals adversely affected by such actions and the restoration of their rights within a timely framework.

The concept of a 'Constitutional Tort' denotes a distinct legal recourse separate from conventional state tort remedies. This construct primarily emanates from judicial interpretation, notably underlined in the landmark Supreme Court ruling of **Monroe v Pape (1961)**.⁷ This decision established the provision of individual judicial remedies for aggrieved parties suing the State or public officials for violations of their constitutional, particularly fundamental rights.⁸ In instances where constitutional rights are transgressed, legal recourse is sought to obtain reparation typically in the form of compensatory damages. Given that government officials act as state agents, such transgressions are construed as being perpetrated under the auspices of state law. These civil transgressions are commonly termed '**Constitutional Torts**' or '**State Liability**'.

⁷ *Monroe v Pape* [1961] 365 US 167

⁸ John C Jeffries Jr, 'The Liability Rule for Constitutional Torts' (2013) 99 Virginia Law Review 207

CONSTITUTIONAL TORTS IN INDIA

The issue of state tort liability has ignited considerable legal discourse and will always be a heated subject of discussion. While there is no explicit legislation in India addressing the accountability of the State for torts committed by its representatives, Article 300 of the Indian Constitution of 1950⁹ outlines the liability of both the Union and individual States for the wrongful conduct of governmental entities.

It was first mentioned in Section 65 of the Government of India Act of 1858.¹⁰ This was inherited further in section 176 of the Government of India Act of 1935.¹¹ As a result, section 176¹² served as the foundation for Article 300 of the Indian Constitution.¹³ Article 300 of the constitution authorizes lawsuits and actions against the state in the name of the Union of India. The first case that addressed the issue of sovereign immunity was a pre-constitutional case, *Peninsular and Oriental Navigation Company v Secretary of State for India*.¹⁴ It made mention of sovereign and non-sovereign functions and about what constitutes sovereign functions.

One of the landmark judgments in post-Constitutional case laws on constitutional tort includes the *State of Rajasthan v Mst. Vidyawati*¹⁵, where the Rajasthan High Court declared that the matter was competent to be heard by the Supreme Court since the State of Rajasthan was found responsible for the tort committed. The Court rejected the defendant's appeal based on Sovereign Immunity, ruling that the State is accountable for the torts or wrongs committed by its officers. The difference between sovereign and non-sovereign powers was ignored in this instance, as the court faced a situation where whether the State shall be held liable for the 'Act of State' under Article 300 of the Constitution¹⁶ or not. In this decision, the Supreme Court

⁹ Constitution of India 1950, art 300

¹⁰ Government of India Act 1858, s 65

¹¹ Government of India Act 1935, s 176

¹² *Ibid*

¹³ Constitution of India 1950, art 300

¹⁴ *Peninsular and Oriental Navigation Company v Secretary of State for India* (1861) 5 Bom HCR App I, 1

¹⁵ *State of Rajasthan v Mst. Vidyawati* (1962) AIR 933

¹⁶ Constitution of India 1950, art 300

emphasized that the State has welfare and socialistic functions in modern times, and the defense of State immunity based on ancient feudalistic concepts of justice cannot be supported.

Further clarifications on what institutes a sovereign function were given in *Satyawati Devi v Union of India*¹⁷, where the State argued that it was one of its tasks to keep the army in the right form and tune and that the hockey team was transported by truck for the physical activity of Air Force troops, hence the Government was not liable. The Court rejected this argument, holding that transporting the hockey team to a match could not be considered a manifestation of sovereign authority, thereby making the Union of India responsible for the damages incurred by the plaintiff.¹⁸

The foundational concept of holding the State accountable for the wrongs perpetrated by its agents and representatives was firmly established in *Rudul Shah v State of Bihar*.¹⁹ In a resounding victory, the Supreme Court delivered a landmark judgment siding with the petitioner, Rudal Shah, who endured a distressing ordeal of wrongful imprisonment at the hands of the Bihar government. Despite being acquitted by the Sessions Court in June 1968, Rudal Shah languished unjustly in Muzaffarpur jail for a staggering 14 years.²⁰ The Court's ruling not only rectified this grave injustice but also held the State accountable for its egregious actions. Consequently, Rudal Shah and his family were awarded a substantial sum of Rs 30,000 as compensation, underscoring the Court's unwavering commitment to justice and reparation f

*Nilabati Behera v State of Orissa (1993)*²¹ was the case that established the principle of 'absolute liability of the state' for the violation of fundamental rights guaranteed under Article 21 of the Indian Constitution. The Supreme Court awarded compensation to the family of a deceased person who died in police custody or the victims of state overreach. In contrast to its application in private law contexts, wherein sovereign immunity may serve as a protective shield against tort claims, the principle of sovereign immunity does not extend to public law compensation

¹⁷ *Satyawati Devi v Union of India* AIR 1967 Del 98

¹⁸ K Anusha, 'State Liability Under the Indian Constitution' (2018) 5(4) IJRAR 666-673 <http://ijrar.com/upload_issue/ijrar_issue_20542257.pdf> accessed 10 February 2024

¹⁹ *Rudul Shah v State of Bihar* (1983) 4 SCC 141

²⁰ Surendra Yadav, 'STATE LIABILITY: A NEW DIMENSION FROM "RUDUL SAH"' (2001) 43(4) Journal of the Indian Law Institute 559 <<https://www.jstor.org/stable/43953400>> accessed 10 February 2024

²¹ *Nilabati Behera v State of Orissa* (1993) 2 SCC 746

cases. This differentiation between the two categories of legal remedies necessitates careful consideration, as it also elucidates the underlying rationale for the granting of compensation in such proceedings.

In *People's Union for Democratic Rights v Union of India* (1982)²² it was recognized that the principle of state liability for the violation of human rights, particularly in the context of labour laws and employment of labour through contractors. The Apex Court cleared the doubt of whether the State should've been liable in a matter where the violations were made by a private contractor. The Court established a liability that laid upon the State to ensure that the Fundamental Rights of the labourers are not violated, along with abiding by the existing labour laws. Thereon, the Supreme Court emphasized the need for compensation to victims of human rights violations by state agents.

We can observe how the Indian Courts have made efforts to expand not only on the principles of Constitutional torts but also the ambit of Article 12 of the Constitution²³ paving the way for not just tortious remedies but fundamental remedies as well. This is one of the interventions of Judicial Creativity that avails at large justice to all its citizens.

INTERNATIONAL SCENARIO OF CONSTITUTIONAL TORTS

Laws and Statutes

Constitutional torts are mentioned in codified laws in many countries, like:

In the United States of America, *28 US Code § 2674*²⁴ states, "*The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner, and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.*"

²² *People's Union for Democratic Rights v Union of India* [1982] 3 SCR 235.

²³ Constitution of India, 1950, art 12.

²⁴ 28 US Code, s 2674 (USC, Title 28, Judiciary and Judicial Procedure 1966)

After many years of ambiguity, England approved the *Crown Proceeding Act of 1947*²⁵, subjecting the crown to responsibility to the same degree as a private individual of full age and capacity. Previously, in England, the crown was not held accountable for the actions of its employees.

LANDMARK JUDGEMENTS

In a seminal ruling rendered by the European Court of Justice in *Francovich v Italy (1991) C-6/90*²⁶, it was determined that European Union Member States bear responsibility for providing compensation to individuals who incur losses due to the Member State's failure to transpose an EU regulation into domestic legislation. This landmark decision underscores the expanded accountability of national governments, mandating them to offer redress for their shortcomings in transcribing a directive into national law within the designated timeframe.

Likewise, *Brasserie du Pêcheur v Germany C-46/93*²⁷ is recognized as a seminal case concerning state liability for legal transgressions within the European Union. It set forth principles delineating state responsibility for actions and inactions of the national legislature contravening Community law. The Court of Justice of the European Union (CJEU) asserted that it falls within the purview of the state to provide restitution for particular damages arising from a failure to implement a directive and a breach of Community law.

*Dollis Hill Action Group v London Borough of Brent (2011)*²⁸ established the liability of public authorities for failing to consider environmental impacts adequately in planning decisions. This case demonstrated the intersection of state liability and constitutional torts, emphasizing the role of tort law as a means to enforce constitutional principles and safeguard the rights and interests of individuals, communities, and the environment too against governmental wrongdoing or negligence.

²⁵ Crown Proceedings Act 1947 (UK), c 44

²⁶ *Francovich v Italy* [1991] ECR I-5357

²⁷ *European Court of Justice, Brasserie du Pêcheur v Germany* [1996] ECR I-1029

²⁸ *Dollis Hill Action Group v London Borough of Brent* [2011] EWHC 1663

*Bivens v Six Unknown Named Agents (1971)*²⁹ also established a principle for constitutional torts. In the realm of state liability, *Bivens* signifies the extension of liability to federal officers for constitutional violations, thereby contributing to the broader framework of governmental accountability for wrongdoing³⁰. The case exemplifies the recognition of constitutional torts as a distinct legal cause of action, allowing individuals to seek damages for violations of their constitutional rights by government officials. By establishing the right to sue federal officers for constitutional violations, *Bivens* reinforces the notion that individuals have recourse to legal remedies when their constitutional rights are infringed, thereby shaping the landscape of constitutional tort law.

CRITICAL ANALYSIS

According to the First Report of the Law Commission of India in 1956³¹, as the role of the State has risen, so has the culpability of the State. In 1967, following the *Kasturi Lal* case and at the suggestion of the Supreme Court, the Parliament undertook the task of drafting legislation to address the issue of state liability for wrongful acts or omissions committed by its agents. This initiative led to the introduction of the Government (Liability in Tort) Bill aimed at defining the scope of the state's liability in tort. However, despite its introduction, the Bill failed to pass through Parliament, resulting in a missed opportunity to codify the law governing tort liability attributable to the state. It died with the dissolution of Lok Sabha in 1971.³²

As the State's powers expanded, the court developed the notion of compensating jurisprudence under Article 21 of the Constitution.³³ This had a significant impact on the State's liabilities. The

²⁹ *Bivens v Six Unknown Named Agents* [1971] US 403

³⁰ Koen Lenaerts and Kathleen Gutman, 'Federal Common Law" in the European Union: A Comparative Perspective from the United States' (2006) 54(1) *The American Journal of Comparative Law* <<https://www.jstor.org/stable/20454486>> accessed 10 February 2024

³¹ Law Commission, *Limitation Act 1908* (Law Com No 4, 1956)

³² Shreya Singh, 'Critical Analysis of State Liability apropos Sovereign and Non-Sovereign Functions' (2022) 5(2) *International Journal of Law Management & Humanities* 1481 <<https://doi.org/10.1000/IJLMH.112918>> accessed 10 February 2024

³³ Constitution of India 1950, art 21

court ruled that the writ petitions brought under Articles 32³⁴ and 226³⁵ against State culpability were maintainable and awarded relief.

Needless to say, the notion that the 'King can do no wrong' was never fully recognized as lawful in India. While it may have been intermittently invoked in the past, its legitimacy waned following the enactment of the Constitution. In a 2017 ruling, the High Court of Gujarat emphasized that the doctrine of sovereign immunity embodied by the maxim 'King can do no wrong' is obsolete in India. This is due to the constitutional framework wherein ultimate authority resides with the populace who elect their representatives, rather than vesting in a monarchical figurehead.

Similarly, the United States of America got its immunity from the United Kingdom. However, this changed with the passage of the Federal Tort Claims Act in 1946.³⁶ Citizens might launch a lawsuit against the state, and a remedy would be awarded if the state's obligation was executed carelessly.

Initially, the Crown held sovereign immunity in the United Kingdom. Because the Crown was not personally answerable to anybody, it could not be held culpable for any wrongful act or omission perpetrated by its servant. However, according to the Crown Proceedings Act, the Crown can now be sued for the conduct or omissions of servants, but this has restrictions.

From the given extract, we can observe how the world's biggest and most advanced countries have been making progress toward adding constitutional torts and state liability, providing further tools for accountability of the state and its subsidiary authorities.

However, the ultimate conclusion remains that Article 300 of the Constitution³⁷ lacks clarity regarding the scope of the State's immunity, and there is a notable absence of distinction between 'Sovereign Functions' and 'Acts of State'. It is imperative to develop legislation that upholds principles of equality and ensures public confidence. However, this legislation need

³⁴ Constitution of India 1950, art 32

³⁵ Constitution of India 1950, art 226

³⁶ Federal Tort Claims Act 1946

³⁷ Constitution of India 1950, art 300

not mirror statutes from the UK and USA, as their frameworks may not be directly applicable due to contextual disparities, such as differing political landscapes in India. Consequently, there is a need for a tailored approach to address the complexities of state immunity, considering India's unique legal and political environment.

CONCLUSION

Although the State has immunity from a lot of circumstances, based on the foregoing explanation and case laws, it is reasonable to conclude that the state can be held accountable for the tortious conduct of its workers if they are committed when the state is exercising non-sovereign powers. However, the divide between sovereign and non-sovereign activities has lost relevance in current times. It will now be determined by the nature of power and how it was used. This, in a fast-developing nation that progressively works for the State and under the State as well, is a moment of legal growth.

In the current situation, it is more than a necessity the repeal state immunity from tort liabilities and creates an urgent need for a vigorous process for evaluating state liability and compensating individuals, which must be implemented. The distinction between the Sovereign and Non-Sovereign duties of the state is critical in the modern world, and the prior separation must be abandoned. In addition to that, Article 300 of the Constitution³⁸ must be appropriately broadened to describe the functions and limitations of the State.

³⁸ *Ibid*