

## Constitutional Liability of State under the Tort Law in India

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### **Abstract**

*Since the advent of tort law, people gave much less emphasis on the liabilities of the state as it was the governing institution but gradually there were cases in which the state was sued. This led to the formation of Constitutional Tort Law which imposed a liability on the state for the wrongful acts of its servants giving the exception of it acting within its sovereign powers. This paper goes for understanding the complexities of vicarious liability within the ambit of the state. In the present Article the author explores about the conditions when due to the wrongs committed by the servants of the state, constitutional rights of a person are violated. How far can the state be accorded liability under the tort law? How has this concept grown over the past centuries?*

**Keywords:** Tort, Constitutional Liability, The state, Servant of the state, Sovereign Function

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### **INTRODUCTION**

Under the English Common Law, the maxim was "The King can do no wrong" and therefore, the King was not liable for the wrongs of its servants. But, in England the position of old Common law maxim has been changed by the Crown Proceedings Act, 1947. Earlier, the King could not be sued in tort either for wrong actually authorized by it or committed by its servants, in the course of their employment. With the increasing functions of State, the Crown Proceedings Act had been passed, now the Crown is liable for a tort committed by its servants just like a private individual. Similarly, in America, the Federal Torts Claims Act, 1946 provides the principles, which substantially decides the question of liability of State. The question of tortious liability of State has raised many interesting debates in juridical arena.

Constitutional Tort Law is generally a concept of Vicarious Liability of the state. Here, it all lies on whether the employer, here the state, is liable for the wrongful acts of its servants during the course of employment. But the exception that arises here is of sovereign powers, if the act was done in regard to the governmental functions.

**Sovereign Functions:** The functions of the state which are not answerable before the court of law and could only be exercised by the state, police functions, taxation, law and order, legislative reforms could be covered within these.

Before the Constitution came into force, India was ruled by the East India Company, then Her Majesty, the Secretary of State Council and therefore the Supreme Court ruled that they were liable for the tortious acts of their servants during the course of employment.

In India, there is no legislation, which governs the liability of the State for the torts committed by its servants. It is article 300 of the Constitution of India, 1950, which enumerates the liability of the Union or State in tortious act of the Government.

The Article 300 of the Constitution originated from Section 176 of the Government of India Act, 1935. This could be traced back from the Section 32 of the Government of India Act, 1915, the genesis of which can be found in section 65 of the Government of India Act, 1858. Section 65 of the Government of India Act, 1858 provided "All persons and bodies politic shall and may have and take the same

suits, for India as they could have done against the said Company."

It will thus be seen that by the chain of enactment beginning with the Act of 1858, the Government of India and Government of each State are in line of succession of the East India Company. In other words, the liability of the Government is the same as that of the East India Company before, 1858.

### CONSTITUTIONAL TORTS

Tort [1] is a civil wrong which result in unliquidated damages (Damages that are not predetermined) if one person violates the legal right of the other. But if the individual is violating other's legal right is rather a government servant then the torts arising will be categorized as a constitutional tort [2]. The constitutional torts are solely based on the concept of *vicarious* [3] *liability* of the state for which the maxim stands as "*quifacit per alium facit per se*", i.e., He who acts through another does the act himself. The concept of vicarious liability postulates that if an employee commits a tort in the course of employment, then his master or employer will be vicariously liable despite the fact that he himself did not commit the tort.

So, the inherent principle of constitutional tort can be built as to whenever a tort is committed by a government servant in discharge of a non-sovereign function the state is vicariously liable for the said tort.

### HISTORICAL APPROACH TO STATE LIABILITY

In medieval Europe, the primary duty of the king was to ensure protection of people and their property and maintain a peaceful ambiance having equitable laws. In the discharge of this duty, the king was not immune to pay compensation to public in general. The instances of king paying compensation for stolen property to aggrieved party when the officials cannot recover the said stolen property make the scenario quite evident. But in English legal system the similar liability of king was completely absent as they regarded the notion that "the king can do no harm" but due to the fact that immunity enjoyed by British crown did not particularly

extend to the East India company neither of the acts dealing with State liability provided any immunity to the Company or Secretary of the state of India [4].

State liability during British period was accorded with a different definition by different Acts. Initially, it found a place in the Government of India Act 1858 which said that the secretary of state can sue and be sued for liabilities and disregarded to extend the immunity which the Crown enjoyed. Further, the concept evolved, and most refined and precise form was traced in Section 176(1) of Government of India Act 1935 [5] which also forms the basis for Article 300 which provides state liability in the present scenario.

### LIABILITY OF STATE

The doctrine of state liability was first highlighted in *P. & O. Steam Navigation Co. vs. Secretary of State for India* [6] which involved the accident of plaintiff due to the negligence of government servants. In the historical case, Sir Barnes Peacock C. J. held that the immunity which British crown enjoyed cannot be extended to East India Company and hence the state was liable to pay the compensation. This case is also significant because apart from state liability it also showcased the distinction between *sovereign* and *non-sovereign* function of state.

Take into account the Landmark case of "*Kasturilal v. State of U.P.* [7]", the facts were that Head Police Constable in exercise of his sovereign duties confiscated certain amount of gold and fled to Pakistan. The government thus failed in providing safe custody to plaintiff's gold. Two questions arose here, whether the respondent was negligent in taking care of the gold and, whether the respondent was liable to compensate the appellant. The district court passed a decree, appeal to high court was dismissed while the Supreme Court held that this was done in exercise of sovereign duties, therefore state could not be held liable for the gold confiscated since it was done in the course of employment.

But as a matter of time courts started ruling in favor of the Plaintiffs which could be seen in

the case of “**State of Rajasthan v. Vidyawati** [8]”, the facts stated Lokumal driving a police jeep back after repairs, along a public road and knocking down a man walking down the footpath and injuring him. The plaintiffs, victim’s wife and daughter sued the state for the injuries that incurred. The court said that the driver’s act was not connected with sovereign functions of the state and therefore, held the state liable for damages.

In “**Fatima Begum v. State of Jammu & Kashmir** [9]”, the High Court rejected the defense plea of sovereign immunity taken by the state when a truck belonging to the Government Transport Undertaking had knocked down a cyclist while it was engaged in transporting police personnel from the place of duty to their barracks.

During the post-independence period, **Devaki Nandan Prasad v. State of Bihar** [10] was the breakthrough case which adjudged the novel concept of Compensatory Jurisdiction and constitutional tort. In this judgment the court apart from granting the petition also provided a sum of Rs.25000 as exemplary cost.

### **CIVIL LIABILITY OF THE VIOLATION OF CONSTITUTIONAL RIGHT**

Though the concept of state liability was incorporated way back during British rule, the main concern was that whether a civil liability can arise as a consequence of the violation of constitutional right. So, the first case which dealt with this issue was **Rudul Shah v. State of Bihar** [11]. In this case, the petitioner Rudul Shah suffered an unlawful detention for about 14 years. It was in this case that the court held that it would be mere lip-service as to protection of fundamental rights if the petitioner is not awarded the optimal compensation for the gross violation of Right to life and liberty. After the aforementioned case the concept of constitutional tort was highlighted in a number of cases one such being **Bhim Singh v. State of Jammu and Kashmir** [12]. In this case, the court held that if a person complains that his/her legal right has been invaded the court has jurisdiction to provide the aggrieved party with monetary compensation.

In **Nilabati behera v. State of Orissa** [13] the court gave an important proposition that sovereign immunity from tortious acts of state officials is different from state’s liability for contravention of the fundamental right. Hence, the defense of sovereign immunity finds no place in the claim for constitutional remedies under Article 32 [14] and 226 [15] vis-à-vis the compensation for contravention of constitutional rights.

### **LIABILITY FOR FOREIGN NATIONALS**

The most celebrated judgment in regard to civil liability in consequence of the violation of the fundamental right which inter alia discussed the contours of this liability was of **Chairman, Railway Board v. Chandrima Das** [16]. In this case, a Bangladeshi woman on her way to the holy shrine in Ajmer was raped by railway officials in Kolkata. Later, a petition under Article 226 was filed by Chandrima Das a practicing advocate of Calcutta high court against railway board to seek compensation for Hanufa Khatun. It was contended that Hanufa Khatun being a foreign national is not entitled to compensation as no constitutional right were violated.

The court after considering various issues put forward by Petitioner and respondent granted a compensation of Rs. 10 lakhs. Firstly, on the grounds of Domestic jurisprudence based on constitutional provisions and the grounds of Human rights Jurisprudence based on Universal Declaration of Human Rights, 1948. Supreme Courts also contended that rape qualifies to be a gross violation of fundamental right to life and personal liberty which is available to a person in general. Hence, Court awarded a compensation claiming that the foreign tourist and visitors owe a behavior of high dignity which an obligation is resting on each citizen of the country.

The court rightly observed that allowing a complete immunity in nature of sovereign functions may result in misuse of the said powers.

### **CONCLUSION**

Law is not static but dynamic, In the modern world having a complex society the encounters

between the people and state have become frequent in number and relevant in nature. Hence these encounters often result in legal mishaps demanding redressal. Also, most of these cases fall under the ambit of tort law because of the fact that to seek redressal through civil court tort law is the one branch which appears most feasible owing to fact of its vastness. So, it's evident that tort law being still in its evolving stage owes a great importance and state liability being its part can be a genuine tool for redressal against the violations committed by the state officials. The concept of Constitutional Tort Law is based on the archaic English law but now has a modern jurisprudence which states that the state like any other ordinary individual can be sued for the acts of its servants, but also it makes a clear distinction between the sovereign and the non-sovereign functions of the state.

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6. *Peninsular and Oriental Steam Navigation Company v. Secretary of State for India* 1869 ILR 28 Bom 314
7. 1965 AIR 1039
8. 1962 AIR 933
9. 1976 ACJ 194
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Kshamaa. Constitutional Liability of State under the Tort Law in India. *Journal of Law of Torts and Consumer Protection Law*. 2018; 1(2): 14–17p.