**AN ODE TO ACCOUNTABILITY: DEVELOPING A RESPONSIVE PUBLIC DUTY REGIME BEYOND TRADITIONAL PUBLIC AND PRIVATE LAW MEASURES**

***Abstract***

*Adopting a parochial outlook, the Indian public responsibility regime on public officials’ liability is outdated, rigid, and subjective. While public, private and criminal law categorization as an exception to the traditional notions of sovereign immunity exists, constitutional courts have failed to discharge their obligations in full when we compare the Indian accountability regime to international instruments like ICCPR and the practices from other jurisdictions. Today, the challenge emanating from public offices against the public expectations is manifold. Ranging from administrative inaction to suppression of legal rights, the spectrum includes widely debated issues of Indian constitutional parlance like incarceration, malicious prosecution, inhumanly treatment in custody and illegal detention among others. Even when the remedy against omission to preserve fundamental rights might be available under the public law domain, the private and criminal law domains look incompetent to tackle the present challenge. The author through this essay, outlining the Indian legal stance on the theme explores implementable solutions that may bring a change in the status quo. Such change would not only serve social needs but also conform to the constitutional ideals of liberty and justice for the Indian society.*

**Introduction**

It would be prudent to start the discussion on the topic by citing two peculiar cases. First, of increasing encounters in India[[1]](#footnote-1) and second, the increase in the number of custodial violence by policy including custodial deaths under mysterious circumstances.[[2]](#footnote-2) While official accountability is a global concern as the George Floyd incident from the US demonstrated,[[3]](#footnote-3) in India accountability is touching new lows. In addition to positive act encroachment on individual liberty, the public authorities omit their obligations; going against their duty of protecting fundamental and human rights i.e., inaction or inactivity. Doing all this removes humanistic touch from the legal process and rights’ enforcement appears a redundant idea.

Inactivity and negligence are not restricted to criminal law. Rather, they transgress events of delays in public work, harming the rights of an individual or just delaying decisions which in turn limit the benefits an individual could have received. The public duty doctrine is traditional and static and does not conform to the present demands. In light of this rights-based demand, this essay has been written. The essay starts with outlining the public duty doctrine, its elements and the existing law. The essay then discusses the issues grappling with the present regime. The essay then concludes after suggesting implementable solutions.

1. **Public Duty Doctrine: The Fundamentals**

The traditional public duty doctrine (as it is widely understood) is restricted to malicious prosecutions, harms done by public servants and custodial violence et cetera. That in turn makes it clear that the public duty doctrine has been more inclined to cure illegal actions than illegal omissions.

While the European law stands on a different footing altogether with detailed theoretical principles to guide the judiciary in course of adjudication, the Indian public duty doctrine as a judiciary-driven development was never concretized with time as we will see. From tort of misfeasance[[4]](#footnote-4) (‘TOM’) to public duty doctrine envisaged under letters of the constitution, the European legal regime includes constitution and statutory backing to effectuate accountability.

The fundamental element of TOM is the mental requirement of the officer to i) either engage in targeted malice knowing that the act is illegal or a crime in itself[[5]](#footnote-5) or ii) to engage in untargeted malice, an offence against which is made out when the officer “acts in the knowledge that if he exceeds his powers, the act would probably injure the claimant”.[[6]](#footnote-6)

Multiple standards for culpability emanate. The public official may be charged for different stages of act or omissions resulting in subjectivity. For instance, due to the availability of sovereign immunity to a certain level, the completion of the judicial process might be fixed as a requirement to start litigation against the officer whose conduct harmed the claimant. Thus, if a person who has been falsely charged with an offence is forced by the police to admit to the crime, the person can only start litigation against the officer concerned all appeals are exhausted to the claimant’s detriment. Sadly, in absence of any special law on the point, this has been the general route in India.

Under Article 14(6) of the ICCPR, State has to compensate a person convicted wrongfully (miscarriage of justice). The signatory States were supposed to effectuate this by passing adequate legislation. India, however, has not done so to date. The Indian public duty doctrine, thus, hovers around the traditional writ jurisdiction mechanism with some ingredients of private and criminal law embedded therein.

1. **The Existing Law**

There are three kinds of remedies available against an officer not fulfilling his obligations under the statutory law or the constitution. They are i) Public Law Remedy, ii) Private Law Remedy, and iii) Criminal Law Remedy. Public law remedy is distinct and special; guaranteed under the constitution itself. Suing the government does not remain an issue while article 300 mandates the same. Now under articles 32 and 226 of the Indian constitutions, Supreme and High courts are obligated respectively to preserve the guarantees under Part III of the constitution. Thus, if State or State officials encroach upon the fundamental rights, a remedy lies under the domain of public law. As enforcement of fundamental right is itself a fundamental right,[[7]](#footnote-7) the public law remedy stands concretized and well-developed.

The private law remedy on the other hand is an area of concern. Used as a compensatory measure for the errant acts of the public officials, the remedy is available on the adjudication of a civil suit. The private law remedy can be claimed in addition to the public law remedy.[[8]](#footnote-8) As per leading precedents, the tortious acts of public officials which cannot be remedied under public law setup can be claimed through private law channels, especially the cases of negligence.[[9]](#footnote-9) A further distinction between public[[10]](#footnote-10) and private law remedies is that in the former the sovereign immunity exception cannot be imported at all.[[11]](#footnote-11)

The Criminal law remedy is a statutory construct flowing mainly from the provisions of IPC[[12]](#footnote-12) and CrPC.[[13]](#footnote-13) Under chapters, IX and XI of the IPC, offences related to public servants are defined which include offences ranging from false evidencing, maintaining incorrect records to wilful disobedience of legal duty. Under section 166 of the Penal Code, ‘wilful departure from the direction of the law by a public servant with an intent to cause injury to any person’ stands criminalised.[[14]](#footnote-14) Proving all these offences under the ambit of criminal law warrants proving mental elements (mens rea) which is a hard task considering public awareness and initiative and criminal procedure to do the same.

1. **The Problematic Elements**

The problems with the existing doctrine are dynamic. What if ‘balance of probabilities’ does not point towards the officer’s wrong? What if an individual suffers due to a procedural flaw that could have been corrected through due care? What if the civil suits filed against the official are thrown out of court citing sovereign immunity exception? The last instance has been a common incident in the Indian judicial system as in “plethora of civil suits where the function of maintaining law and order was held to be a sovereign function, rendering the State to not be liable for consequences ensuing therefrom”[[15]](#footnote-15), restricted to several exceptions.[[16]](#footnote-16)

Dismissing civil suits not only discourages expounding of remedy against government officials, but it also reinforces the belief of the citizenry that such remedy does not exist at all i.e., public servants are inherently immune, especially from cases of negligence and inaction.[[17]](#footnote-17) Even when the courts have ordered compensation for some interesting cases of negligence and inaction which resulted in the violation of claimants’ legal rights, such cases are very limited and they serve the only purpose of teaching the newly admitted law students the scope of jurisdiction of the constitutional courts.[[18]](#footnote-18)

The problem with criminal remedies is obvious. The mental element is not only difficult to prove but it might not even exist in cases of wrongful convictions where there lies a possibility of tainted investigation or prosecutorial misconduct. This might be offender-less harm on lines of the notions of victimless crimes. Further, additional procedural safeguards envisaged under criminal laws (like section 197, CrPC) that lay down the requirement of government sanction come into the picture and discourage the victims to proceed with new suits and litigations while they have already wasted many years handling frivolous suits and delayed benefits.

The whole scheme makes it evident that while judicial precedents enable the victims to approach constitutional courts under writ jurisdiction, there exists no statutory right entitling the victims of such compensation.[[19]](#footnote-19) These problems are big and require assertive legislative intervention.

1. **Redressal and Reformulation**

For redressal of public duty liability, three questions need to be addressed. They are proximity, recovery of economic loss, and exemplary damages.[[20]](#footnote-20) The victims would be required to prove how the act or omission of the office resulted in harm i.e., the proximity of the act with the harm done. Then comes the interlinked issue of recovery and damages. Indian jurisprudence has witnessed how victims have lost their possessions in police custody to never recover them with the court agreeing to the government’s submission on sovereign immunity from acts done by their servants.[[21]](#footnote-21) Exemplary damages would help in discouraging the laxity observed on part of public officials while discharging their duty.

To solve all of this, the German constitution leads the procession by making the officials liable for the violation of their official duty and can be imitated. The question is: is the constitutional route practical and the only available recourse? Certainly not. The constitution under article 300 makes it clear that the government can be sued under any law in force. The requirement can thus be met through reformulations and amendments. LCI’s 277th report recommends that rather than adopting ‘wrongful conviction’ and ‘wrongful incarceration’ as the standard for miscarriage of justice, the legislature should adopt the standard of ‘wrongful prosecution’.[[22]](#footnote-22) The author supports this recommendation in light of the detailed reasoning provided by LCI.[[23]](#footnote-23) As the right to recover appropriate damages from the State has been recognized by the Apex court in multiple cases,[[24]](#footnote-24) the initial reservations to the adoption of ICCPR’s mandate of such suits by India do not hold good now.

Both substantive and procedural aspects underlying proximity, recovery, and compensation need to be formulated through enacting a statute. Setting up special courts adjudicating claims through summary hearings can be very effective.[[25]](#footnote-25) In addition to not contributing to the large backlog of cases in the Indian judiciary, special jurisdictions will prove helpful also save time and resources for the claimant who must have already wasted both of them during the recent past. The question of compensation could be adjusted with inflation and the facts of the case, the new framework must provide. In addition to pecuniary damages, rehabilitation and mental health services as options to social welfare ought to be explored. All of these can be easily done through the insertion of a new chapter under the penal code.

1. **Concluding Thoughts**

A robust public duty doctrine can be a harbinger of socio-legal change. For doing so, legislative and judicial intervention is imperative. This essay navigated through the theoretical and practical contours of the doctrine. The problems of the existing regime; be it proximity, recovery, or compensation can be all handled well if there is an awareness that public intervention against public officials can effectuate into something meaningful and substantial that can in an exemplary manner change the ethical standards at which the public servants operate The acts as well as omissions when are incongruent to the legal obligations should be made justiciable not only under public law domain but the criminal and private law domains; so that complete justice can be ensured.

1. ‘5,178 encounters since 2017: UP Police boasts of killing 103, injuring 1,859’, The Week, December 6, 2019 <<https://www.theweek.in/news/india/2019/12/06/5-1-encounters-since-2017-up-police-boasts-of-killing-103-injuring-1-8.html>>. [↑](#footnote-ref-1)
2. Stuti Mishra, ‘Death of Muslim man in custody sparks outrage in India’, Independent, November 11, 2021 <<https://www.independent.co.uk/asia/india/kasganj-muslim-boy-death-police-custody-b1955823.html>>. [↑](#footnote-ref-2)
3. ‘George Floyd Death Drives Police Accountability Laws Nationwide’, Bloomberg Law, March 18, 2021, <<https://news.bloomberglaw.com/social-justice/george-floyd-death-drives-police-accountability-laws-nationwide>>. [↑](#footnote-ref-3)
4. Mads Andenas & Duncan Fairgrieve, ‘Misfeasance in Public Office, Governmental Liability, and European Influences’, 51 Int’l & Comp. L.Q. 757, 761 (2002). [↑](#footnote-ref-4)
5. Bourgoin SA v. MAFF, [1986] QB 716, 776. See also Dunlop v. Woollahra Municipal Council, [1982] AC 158, 172. [↑](#footnote-ref-5)
6. Three Rivers District Council v. Bank of England, [2000] 2 WLR 1220 and [2001] UKHL 16. [↑](#footnote-ref-6)
7. The Constitution of India, art. 32 (1950). [↑](#footnote-ref-7)
8. Rudal Sah v. State of Bihar, AIR 1983 SC 1086; Nilabati Behera v. State of Orissa, AIR 1993 SC 1960. [↑](#footnote-ref-8)
9. State of Bihar v. Abdul Majid, AIR 1954 SC 245. [↑](#footnote-ref-9)
10. See, generally, Joginder Kaur v. State of Punjab, 1969 L.A.B. IC 501; State of Rajasthan v. Mst. Vidhyawati, AIR 1962 SC 933. [↑](#footnote-ref-10)
11. State of Maharashtra v. Ravi Kant Patil, AIR 1991 SC 871. [↑](#footnote-ref-11)
12. Indian Penal Code (1860). [↑](#footnote-ref-12)
13. Code of Criminal Procedure (1973). [↑](#footnote-ref-13)
14. Indian Penal Code, s. 166 (1860). [↑](#footnote-ref-14)
15. State of Madhya Pradesh v. Saheb Dattamal, AIR 1967 MP 246; State of Orissa v. Padmalochan Panda, AIR 1975 Ori 41; State of Madhya Pradesh v. Chironji Lal, AIR 1981 MP 65; Roop Lal Abrol v. Union of India, AIR 1972 J&K 22; State of Madhya Pradesh v. Premabai, AIR 1979 MP 85. [↑](#footnote-ref-15)
16. State of Bihar v. Rameshwar Prasad Baidya, AIR 1980 Pat 267. [↑](#footnote-ref-16)
17. ‘Wrongful Prosecution (Miscarriage of Justice): Legal Remedies’, LCI, 2018 <<https://lawcommissionofindia.nic.in/reports/Report277.pdf>> (‘LCI Report’). [↑](#footnote-ref-17)
18. Such cases include Khatri v. State of Bihar, AIR 1981 SC 1068 and Bhim Singh v. State of Jammu and Kashmir (1985) 4 SCC 677. [↑](#footnote-ref-18)
19. See, generally, LCI Report pg. 83. [↑](#footnote-ref-19)
20. Mads Andenas & Duncan, ‘Fairgrieve, Misfeasance in Public Office, Governmental Liability, and European Influences’, 51 Int’l & Comp. L.Q. 757, 777 (2002). [↑](#footnote-ref-20)
21. Kasturi Lal Ralia Ram Jain v. State of U.P., AIR 1964 SC 1039; [↑](#footnote-ref-21)
22. LCI Report, pg. 80. [↑](#footnote-ref-22)
23. LCI Report, chapter V. [↑](#footnote-ref-23)
24. Rudal Sah v. State of Bihar, AIR 1983 SC 1086; Nilabati Behera v. State of Orissa, AIR 1993 SC 1960; D. K. Basu v. State of West Bengal, AIR 1997 SC 610; Dr. Rini Johar v. State of M. P., Criminal Writ Petition No. 30 of 2015, decided on 3 June 2016. [↑](#footnote-ref-24)
25. LCI Report, pg. 85. [↑](#footnote-ref-25)