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## The Principle of Constitutional Tort in Light of Article 126 of the Constitution: A Voyage from *Saman v Leeladasa* to the *Easter Sunday Tragedy* Case

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### Abstract

The Supreme Court's ruling on the Easter Sunday tragedy in Sri Lanka has brought the issue of 'Constitutional tort/delict' liability to the forefront. The Court's proactive approach in providing remedies for omissions by public officials, grounded in the 'strict liability' principle, and its integration of private law principles into public law remedies, signify a shift towards a civilian approach in protecting fundamental rights. However, this shift raises concerns about its impact on civil cases related to fundamental rights violations. This article explores the potential effects of the compensation awarded in fundamental rights cases on these civil proceedings, addressing concerns about fairness, due process, and potential double jeopardy for defendants. By analysing legal principles and proposing strategies to address these issues, this article suggests a nuanced and flexible approach to determining liability in constitutional torts, ensuring fairness for all parties involved.

**Keywords:** Constitutional tort; Compensation; Fundamental rights; Fault; Strict liability

### 1 Introduction

The judicial tendency in cases involving torts or delicts<sup>1</sup> committed by State officials to increase the accountability of the State and its organs for harms caused to an individual or the public at large has gained much importance in recent times. This attitude involves imposing positive duties (derived from any statute or

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<sup>1</sup> 'Tort' and 'delict' are terms employed in distinct legal systems, namely the Common Law System (English law) and the Civil Law System (Roman-Dutch law), to denote civil wrongs leading to harm or injury and subsequently incurring legal liability for the wrongdoer.

common law) on the State and identifying special relationships that support those duties in cases that would not have traditionally supported liability.

When individuals are harmed by official misconduct, they may seek redress by invoking forms of action available at common law, including actions against governmental officials under ordinary tort law. However, when such official misconduct concerns any fundamental right (or human right) provided in the constitution, many jurisdictions cautiously take cognisance of such tortious actions and proceed to hold the government vicariously liable for the acts of its agencies or employees.

Therefore, it is often argued that “a claim in public law for compensation for contravention of human rights, the protection of which is guaranteed in the constitution, is an acknowledged remedy for enforcement and protection of such rights, and such a claim based on strict liability made by resorting to a constitutional remedy provided for the enforcement of a fundamental right is distinct from, and in addition to, the remedy in private law for damages for the tort resulting from the contravention of the fundamental right.”<sup>2</sup>

## 2 Constitutional Tort

The term ‘constitutional tort’ gained prominence in the aftermath of the United States (US) Supreme Court’s decision in *Monroe v Pape* (*Monroe*),<sup>3</sup> which held that 42 US Code Section 1983<sup>4</sup> provides a separate federal remedy for individuals suing the State or its agencies when their constitutional rights are violated. In this case, several police officers, including Pape, arrived at Monroe’s apartment. The police officers broke down the door without any warrant, forced Monroe and his wife to stand naked in their living room, and raided the apartment. Subsequently, Monroe was taken to police quarters and held for ten hours on an open charge while being interrogated about an alleged murder.

In *Monroe*, the Court rejected the prior system where individuals primarily brought actions against government officials in State court pursuant to State law. Instead, the Court acknowledged that the common law could not adequately regulate the government’s unique powers to inflict injury upon individuals. In *Bivens v Six Unknown Named Federal Narcotics Agents* (*Bivens*)<sup>5</sup>, the US Supreme Court created a similar remedy against federal officials by recognising an implied

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<sup>2</sup> Per Rao, J. in *Janaki Amma v Union of India*, 2004 (1) ALD 19.

<sup>3</sup> 365 U.S. 167 (1961).

<sup>4</sup> In the US, constitutional tort liability of public employees at the State and local government levels derives from the Civil Rights Act of 1871, also known as the Ku Klux Klan Act. This provision is now codified in 42 U.S. Code section 1983.

<sup>5</sup> 403 U.S. 388 (1971).

right of action for damages arising directly from certain constitutional provisions (i.e., violation of Fourth Amendment protection against unreasonable search and seizure). Accordingly, “the Court established a system where the constitution rather than state common law governs the prerogative of federal and state officials to inflict injury upon individuals.”<sup>6</sup>

Before *Bivens*, the US Supreme Court, in *Barr v Matteo*<sup>7</sup> and *Stump v Sparkman*,<sup>8</sup> observed that those working in the public sector generally had ‘absolute immunity’ (or ‘sovereign immunity’) from civil suits seeking pecuniary damages for injurious acts committed within the framework of their official authority or the outer perimeter of their official authority (unconstitutional acts). However, a shift from ‘absolute immunity’ to the less encompassing ‘qualified immunity’ began in earnest with the *Bivens* decision. This sentiment was further reinforced in *Monell v Department of Social Services of the City of New York*.<sup>9</sup>

Later, in the 1990s, the Court extended constitutional tort accountability for violations of individual rights to private entities, including government contractors and their employees, engaged in ‘State action’ at the State and local governmental levels.<sup>10</sup>

### 3 Sovereign Immunity and Qualified Immunity

The application of constitutional tort principles raises issues of official and governmental immunities from such suits. Historically, fundamental rights litigation in many jurisdictions has been seriously undermined by ‘absolute immunities’ granted to public authorities and their agencies. This immunity can shield State actors from any liability for conduct undertaken within the scope of their official functions. However, the US Supreme Court recognised the need for such discretion through the doctrine of ‘qualified immunity’. Qualified immunity requires that “government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”<sup>11</sup> It protects “all but the plainly incompetent or those who knowingly violate the law”<sup>12</sup> and even defendants meeting those criteria may

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<sup>6</sup> James J. Park, ‘The Constitutional Tort Action as Individual Remedy’ (2003) 38 *Harvard Civil Rights-Civil Liberties Law Review*, p. 413.

<sup>7</sup> 360 U.S. 564 (1959).

<sup>8</sup> 435 U.S. 349 (1978).

<sup>9</sup> 436 U.S. 658 (1978).

<sup>10</sup> See, *Lugar v Edmondson Oil Co., Inc.* 457 U.S. 922 (1982); *Wyatt v Cole* 504 U.S. 158 (1992) and *Richardson v McKnight* 521 U.S. 399 (1997).

<sup>11</sup> *Harlow v Fitzgerald* 457 U.S. 800, 818 (1982). Also see, John C. Jeffries, ‘The liability rule for Constitutional Torts’ (2013) *Virginia Law Review*, Vol. 99, No. 2, 207.

<sup>12</sup> *Ziglar v Abbasi*, 137 S. Ct. 1843, 1867 (2017) (quoting *Malley v Briggs*, 475 U.S. 335, 341 (1986)).

escape liability “unless the right’s contours were sufficiently definite that any reasonable official in the defendant’s shoes would have understood that he was violating it.”<sup>13</sup>

In English common law, public authorities are generally subject to the same liabilities in tort as private individuals and bodies.<sup>14</sup> However, an important exception at common law was the Crown, as illustrated by section 2 of the Crown Proceedings Act, 1947.<sup>15</sup> Consequently, public authorities are generally under a duty of care to avoid causing actionable harm in situations where a duty of care would arise under ordinary principles of the law of negligence, unless the law provides otherwise.<sup>16</sup>

In *Hill v Chief Constable of West Yorkshire (‘Hill’)*,<sup>17</sup> the House of Lords, citing lack of proximity and public policy grounds, denied a duty of care owed by the police to a victim of a serial murderer. This decision was interpreted as immunity from negligence actions for the police when involved in the ‘suppression and investigation of crime’.<sup>18</sup> The House of Lords observed that it is necessary to protect the police from tortious claims, considering that the interests of the community as a whole are best served by a police force that is not diverted and prejudiced by being exposed to such liability.<sup>19</sup>

In *Robinson v Chief Constable of West Yorkshire Police (‘Robinson’)*, however, the UK Supreme Court clarified that “the case of *Hill* is not [an] authority for the proposition that the police enjoy a general immunity from suit in respect of

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<sup>13</sup> *Kisela v Hughes*, 138 S. Ct. 1148, 1153 (2018) (*per curiam*) (emphasis added) (quoting *Plumbhoff v Rickard*, 572 U.S. 765, 778-79 (2014)).

<sup>14</sup> See, for example, *Entick v Carrington* (1765) 2 Wils KB 275 and *Mersey Docks and Harbour Board v Gibbs* (1866) LR 1 HL 93 and *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004

<sup>15</sup> The section provides: “where the Crown is bound by a statutory duty which is binding also upon persons other than the Crown and its officers, then, subject to the provisions of this Act, the Crown shall, in respect of a failure to comply with that duty, be subject to all those liabilities in tort (if any) to which it would be so subject if it were a private person of full age and capacity.”

<sup>16</sup> See, *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004 and *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4, para 33.

<sup>17</sup> [1989] AC 53 (HL).

<sup>18</sup> *Hughes v National Union of Mineworkers* [1991] 4 All ER 278 and *Elguzouli-Daf v Commissioner of Police of the Metropolis* [1995] QB 335.

<sup>19</sup> *Per* Lord Keith of Kinkel at para 63G noted that, “the result would be a significant diversion of police manpower and attention from their most important function, that of the suppression of crime”. Similar considerations led the House of Lords to deny claims against local authorities for negligence in respect of the discharge of their functions concerning the welfare of children in *X and Others v Bedfordshire County Council* [1995] 2 AC 633 (HL) *per* Staughton LJ at para 674H-75G, and *per* Peter Gibson LJ at para 681G-H. See further *Brooks v Commissioner of Police for the Metropolis* [2005] UKHL 24: the *Hill* decision was applied in *Brooks* to deny a right of action in negligence to a victim of a litany of derelictions of duty and failure in police investigation.

anything done by them in the course of investigating or preventing crime. On the contrary, the liability of the police for negligence or other tortious conduct resulting in personal injury, where liability would arise under ordinary principles of the law of tort, was expressly confirmed.”<sup>20</sup> As such, after *Robinson*, public officials, including the police, will no longer enjoy ‘blanket immunity’ from being sued for negligent acts committed in the course of operational duties. As Cees van Dam has noted, in the UK, “the link with public law is the most obvious complicated factor, combined with the role of discretion when assessing public authorities’ liability. The tendency is towards limiting the discretion of public authorities and this is particularly due to the influence of human rights.”<sup>21</sup>

#### 4 Parallels between Common Law and Constitutional Torts

##### 4.1 United States (US)

Since constitutional and common law often provide protections covering very similar interests,<sup>22</sup> it is difficult to precisely determine the difference between constitutional and common law torts. In the US context, as noted by James Park, “while there may not be a corresponding common law tort for every constitutional tort, the two actions share fundamental characteristics.”<sup>23</sup> In *Monroe*, the US Supreme Court made it apparent that such actions “should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.”<sup>24</sup> Furthermore, as the common law tort was established first, there is a propensity to view the constitutional tort as merely a hybrid derivative of the common law tort. As such, Marshall Shapo defined constitutional tort (as an action that) “is not quite a private tort, yet contains tort elements; it is not quite ‘constitutional law,’ but employs a constitutional test.”<sup>25</sup>

As Salmond and Heuston state, “a tort is a species of civil injury or wrong”<sup>26</sup> and it is a type of civil wrong which differs from breach of contract and breach of

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<sup>20</sup> [2018] UKSC 4, para 55.

<sup>21</sup> Cees van Dam, *European Tort Law* (Oxford University Press, 2013, 2<sup>nd</sup> edn). Public Authorities are now made liable in damages in the UK, under the Human Rights Act of 1998. Section 6 of the Act makes a Public Authority liable for damages if it is found to have committed a breach of human rights. The Court of Appeal, in *Anufijeva v London Borough Southwark* 2004 (2) WLR 603, attempted to answer certain important questions as to how the damages should be awarded for breach of human rights and how damages should be assessed.

<sup>22</sup> *Clappier v Flynn*, 605 F.2d 519 (10<sup>th</sup> Cir. 1979).

<sup>23</sup> Note 6 above, 398.

<sup>24</sup> Note 3 above, 187.

<sup>25</sup> Marshall S. Shapo, ‘Constitutional Tort: *Monroe v Pape*, and the Frontiers Beyond’ (1965) 60 Nw. U. L. REV. 277, 324.

<sup>26</sup> The Law of Torts (20<sup>th</sup> ed., 1992), p. 1-2. See further, W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* (5<sup>th</sup> ed., 1984).

trust, which are also civil wrongs. Common law torts typically involve four elements: (i) a common law duty from the defendant; (ii) that is breached through action or inaction; (iii) that causes; (iv) injury to the plaintiff. Similarly, US constitutional tort law follows the same four elements except that the duty originates from the constitution instead of the common law.<sup>27</sup> The key difference, however, is that a common law tort occurs between two private individuals, whereas a constitutional tort runs between the State or its agency and the private individual. While the defendant in a common law tort action may sometimes be a State official, the defendant in a constitutional tort action is always a State official. Moreover, due to the general similarities between constitutional and common law torts, it is inevitable to conceive of the function of the constitutional tort action in common law terms.<sup>28</sup>

#### 4.2 South Africa

According to Neethling and Potgieter, the potential development of 'constitutional delict' should be recognised with the understanding that a clear distinction should be made between a constitutional wrong and a delict, even though these two concepts may overlap.<sup>29</sup> They argue that:

*The requirements for a delict and those for a constitutional wrong differ materially. As a result, not every delict is necessarily also a constitutional wrong, and vice versa. Besides, unlike a delictual remedy which is aimed at compensation, a constitutional remedy (even in the form of damages) is directed at affirming, enforcing, protecting and vindicating fundamental rights and at preventing.*<sup>30</sup>

They further argue that a constitutional wrong and a delict (or their remedies) should not be treated alike. For conceptual clarity, the term 'constitutional delict' should be avoided.<sup>31</sup> This position was affirmed by the Constitutional Court of South Africa in *Steenkamp NO v Provincial Tender Board, Eastern Cape*, wherein the Court engaged in a complex debate on the proper interface between private law and public law remedies in South African constitutional dispensation.<sup>32</sup> Moseneke DCJ stated that:

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<sup>27</sup> Note 6 above, 398.

<sup>28</sup> John C. Jeffries, 'Damages for Constitutional Violations: The Relation of Risk to Injury in Constitutional Torts' (1989) 75 *Virginia Law Review*, p. 1462.

<sup>29</sup> Johann Neethling, J.M. Potgieter and P.J. Visser, *Law of Delict* (LexisNexis, 2010, 7<sup>th</sup> edn, - e-book), p. 34.

<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.*

<sup>32</sup> 2007 (3) SA 121; 2007 (3) BCLR 300. See, further *Thubakgale and Others v Ekurhuleni Metropolitan Municipality and Others* [2021] ZACC 45 and Van der Walt and Midgley *Delict: Principles and Cases*, (Butterworths, 1997, 2<sup>nd</sup> edn) Vol. 1 at p. 2-3.

*In our constitutional dispensation, every failure of administrative justice amounts to a breach of a constitutional duty. But the breach is not an equivalent of unlawfulness in a delictual liability sense. Therefore, an administrative act which constitutes a breach of a statutory duty is not for that reason alone wrongful.*<sup>33</sup>

Hence, in the South African context, the infringement of a constitutional (fundamental) right does not equate to a delict. The fact that damages may be awarded for the breach does not make it a delict. As noted above, instances where the South African law on delict has been used to protect fundamental rights are certainly encouraged, but that is not the primary function, aim, or prerogative of delict.<sup>34</sup>

#### 4.3 India

The Indian courts have recognised the public law remedies to the realm of tort for the infringement of constitutional rights. The Supreme Court of India, in *Kausbal Kishor v State of U.P.*,<sup>35</sup> pertinently noted that “a constitutional tort is a violation of one’s constitutional rights, particularly fundamental rights, by an agent of the government, acting in his/her official capacity.”<sup>36</sup> The Court further observed that a constitutional violation creates a cause of action that is distinct from any other available state tort remedy. However, it carries with it the essential element of tort law, which seeks to redress a harm or injury by awarding monetary compensation by a competent court of law.<sup>37</sup>

The Supreme Court, on many occasions, has entertained petitions under Article 32 of the Constitution<sup>38</sup> and has awarded compensation to the petitioners who suffered personal injuries at the hands of the State officials. The causing of injuries, which amounted to tortious acts, was compensated by the Supreme Court in many of its decisions, beginning from *Rudul Sah v State of Bihar*.<sup>39</sup>

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<sup>33</sup> Ibid (*Steenkamp*), para 37.

<sup>34</sup> *Ntandazeli Fose v The Minister of Safety and Security* [1997] ZACC 6; 1997 (7) BCLR 851; (*per Ackermann J*, at para 17).

<sup>35</sup> Writ (Criminal) Petition No. 113/2016 decided on 03.01.2023.

<sup>36</sup> Ibid, para 47.

<sup>37</sup> Ibid.

<sup>38</sup> Subsection (2) of which reads: “The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.” Also see, Article 226 (similar powers of the High Court).

<sup>39</sup> AIR 1983 SC 1086. See further, *Bhim Singh v State of Jammu and Kashmir*, AIR 1986 SC 494; *People’s Union for Democratic Rights v State of Bihar*, AIR 1987 SC 355; *Arrinder Singh Bagga v State of U.P.*, AIR 1995 SC 117; *Mrs. Manju Bhatia v N.D.M.C.* (1997) 6 SCC 370 and *Chairman, Railway Board v Chandrima Das* (2000) 2 SCC 465.



In *Nilabati Behera v State of Orissa* ('*Nilabati Behera*'),<sup>40</sup> the Supreme Court held that the defence of 'sovereign immunity' was inapplicable and strange to the concept of guaranteeing fundamental rights, and that there could be 'no question of such a defence being available in the constitutional remedy.' Justice Verma observed that for this public law remedy to serve its proper function, the Court was obliged to forge new tools in order to do complete justice.<sup>41</sup> The Court went on to state that the claim raised for compensation in such a case is not a private law claim for damages, under which the damages recoverable are large. A claim made for compensation in public law is for compensating the claimants for deprivation of life and personal liberty, which has nothing to do with a claim in a private law claim in tort in an ordinary civil court.

Although earlier cases of constitutional tort actions involved deliberate or intentional State action, such as in cases of unlawful detention<sup>42</sup> and torture of prisoners,<sup>43</sup> the Supreme Court has also extended liability to situations where the State has omitted to take any action.<sup>44</sup> Furthermore, conventionally, as a general rule, constitutional rights have regulated the relationship between an individual and the State and are enforceable vertically against the State. However, in many instances, the Indian judiciary has horizontally interpreted its fundamental rights to make them enforceable against private parties.<sup>45</sup> Hence, it is argued that one of the key expansions in fundamental rights litigation in India has been in the development of the horizontal application of fundamental rights under the Constitution.<sup>46</sup>

The above survey on constitutional tort in other jurisdictions indicates that the endeavour to differentiate constitutional tort from ordinary tort has led to the requirement that the wrong be somehow more egregious than the ordinary tort in suits against individual defendants. Most cases in which courts have exercised

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<sup>40</sup> [1993] AIR 1960 (SC) 1969.

<sup>41</sup> Ibid, para 19.

<sup>42</sup> *Bhim Singh v State of Jammu & Kashmir* (1984) Supp SCC 504; *Sebastian M. Hongray v Union of India* (1984) 1 SCC 339.

<sup>43</sup> *Nilabati Behera v State of Orissa* (1993) 2 SCC 746; *Khatri v State of Bihar* 1981 SCC 1 627.

<sup>44</sup> *Paschim Banga Khet Mazdoor Samity v State of West Bengal* (1996) 4 SCC 37.

<sup>45</sup> Instances where the Supreme Court has enforced a horizontal application of fundamental rights include: (i) cases against private parties where the private act was classified as an act of the State: *Pradeep Kumar Biswas v Indian Institute of Chemical Engineering* (2002) 5 SCC 111; (ii) cases against the State to require the State to regulate private parties to enforce a fundamental right: *Vishakha v State of Rajasthan* (1997) 6 SCC 241 and (iii) cases against private parties where the private act is challenged on constitutional grounds: *People's Union for Democratic Rights v Union of India* AIR 1982 SC 1473.

<sup>46</sup> Stephen Gardbaum, 'Horizontal Effect' in Sujit Choudhry, Madhav Khosla, and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution* (Oxford University Press, 2016). Also see, Gautam Bhatia, 'Horizontality under the Indian Constitution: A Schema' (Indian Constitutional Law and Philosophy Blog, 24 May 2015).



their constitutional powers involve intense and serious violation of personal liberty and right to life.

In US jurisprudence, both the Section 1983 relief (under the 42 U.S. Code) and the award of constitutional damages based directly on the constitution should be seen as legislative and judicial responses to the perceived inadequacies of common law tort remedies. These inadequacies arise from the limitations placed on relief in tort by various manifestations of the principle of sovereign immunity and vicarious liability and by the inconsistencies of tort law, falling within the jurisdiction of state courts. In the US, the Section 1983 response is basically a statutory extension of a remedy which still is fundamentally a common law tort remedy. On the other hand, the remedy developed in the *Bivens*, and similar cases discussed above, appears to have a marked 'public law' character. The plaintiff is not limited to a remedy under ordinary tort law; the remedy is a completely independent remedy. It differs from that granted between two private citizens and is particularly intended to 'vindicate the interests of the individual in the face of the popular will as expressed in legislative majorities.'<sup>47</sup>

In India, the relief under Article 32 of the Constitution by the Supreme Court<sup>48</sup> for established infringement of the fundamental rights guaranteed under the Constitution (i.e. tortious act) is a remedy available in 'public law'. It is based on strict liability for contravention of the guaranteed basic rights of the citizen. The application of the strict liability principle finds easy grounding in the Indian legal system due to the English common law's status as one of the main sources in India.<sup>49</sup> The principles and rules of tort law were largely imported from the United Kingdom and adapted to the Indian legal system. Over time, Indian courts have developed and expanded upon these principles through judgments and interpretations.

In South Africa, constitutional delicts stand apart from ordinary delicts. They focus on affirming rights rather than just compensating for harm. The term 'constitutional delict' is discouraged to prevent confusion. Merely violating a constitutional right does not always amount to a delict, even if damages are paid. While using the law of delict to safeguard fundamental rights is encouraged, it is not its primary function.

## 5 Constitutional Tort in Sri Lanka

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<sup>47</sup> *Bivens v Six Unknown Named Federal Narcotics Agents* 403 U.S. 388 (1971), p. 407 (*per* Harlan, J.).

<sup>48</sup> Also see Article 226 of the Indian Constitution.

<sup>49</sup> R. Ramamoorthy, 'Difficulties of Tort Litigants in India' (1970) 12 *Journal of the Indian Law Institute*, p. 313-321.

The jurisdiction of the Supreme Court over fundamental rights in Sri Lanka has emerged as a prominent means of holding public officers accountable for their tortious conduct. Article 126 of the 1978 Constitution grants the Supreme Court ‘sole and exclusive jurisdiction’ over fundamental rights claims, allowing the Court to “grant such relief or make such directions as it may deem just and equitable in the circumstances” in respect of any such claims.<sup>50</sup>

In the case of *Saman v Leeladasa and Another* (*‘Saman’*),<sup>51</sup> the Supreme Court, through its majority judgment, unequivocally acknowledged that the redress provided for the violation of a fundamental right, as outlined in Article 126 of the Constitution, constitutes a new public law remedy directly mandated on the State by the Constitution. This remedy is not rooted in delict and vicarious liability principles.<sup>52</sup>

However, Justice Mark Fernando took a different stance by establishing a connection between the constitutional remedy and the delict remedy. His Lordship stated that the delictual liability forms the basis for awarding compensation against the State, relying on ordinary common law principles of vicarious liability in delict. He further integrated the concept of vicarious liability in delict to determine the State’s responsibility under the Constitution to compensate victims of a violation.<sup>53</sup>

In the recent case of *Janath S. Vidanage v Pujith Jayasundara and Others* (referred to herein as the ‘Easter Sunday Tragedy case’, along with other connected matters),<sup>54</sup> the Supreme Court had the opportunity to consider tortious or delictual

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<sup>50</sup> See, Article 126(4).

<sup>51</sup> [1989] 1 Sri L.R., 1.

<sup>52</sup> Ibid, 35.

<sup>53</sup> S.W.E. Goonesekere, ‘Fundamental Rights and the Law of Delict’ in A.R.B. Amerasinghe and S.S. Wijeratne (ed.), *Human Rights, Human Values and The Rule of Law: Essays in Honour of Deshamanya H.L. De Silva, P.C.* (Legal Aid Foundation, 2003) p. 64. Also see, U.S. Liyanage, ‘Delictual Liability against Local Authorities; A Sri Lankan Perspective’, (2008) 10 *Colombo Law Review*, p. 279.

<sup>54</sup> *Janath S. Vidanage v Pujith Jayasundara and Others* (SC FR 163/2019); *Nagananda Kodithuwakku v Hon. Maithripala Sirisena and Others* (SC FR 165/2019); *Saman Nandana Sirimanne v Pujith Jayasundara and Others* (SC FR 166/2019); *Jude Dinuke Lakenath Perera and Others v. Maithreepala Sirisena and Others* (SCFR 184/2019); *P.K.A.D. Sunil Perera v Attorney General and Others* (SCFR 188/2019); *Rev. Fr. Galgana Mestrige Don Henry Marian Ashok Stephen and Others v Hemasiri Fernando and Others* (SCFR 191/2019); *Hilmy Ahamed v The Attorney General and Others* (SCFR 193/2019); *Kalinga N. Indatissa and Others v. Gen. S.H.S. Kottegoda (Retd.) and Others* (SC.FR 195/2019); *Seerangan Sumithra v. Hon. Ranil Wickremesinghe and Others* (SCFR 196/2019); *Dr. Visakesa Chandrasekaram v. Hon. Ranil Wickramasinghe and Others* (SC FR Application No. 197/19); *Pussewela Kankanamge Kasun Amila Pussewela v Hon. Ranil Wickramasinghe and Others* (SC FR 198/2019) and *Moditha Tikiri Bandara Ekanayake v Hemasiri Fernando and Others* (SCFR 293/2019), decided on 12.01.2023.

principles in adjudicating fundamental rights applications against various government officials, including former President Maithripala Sirisena. The Supreme Court, in a unanimous decision, ruled that these officials had violated the fundamental rights of the victims by failing to prevent the 2019 Easter Sunday attacks. The Court observed that the respondents' inaction in preventing the attacks infringed upon the fundamental right to life of the victims, causing harm or loss to individuals or citizens. Consequently, the Court deemed it as an "actionable constitutional tort".<sup>55</sup>

Addressing the respondents' objection regarding 'sovereign immunity' for public officials, the Court clearly stated:

*The defence of sovereign immunity being inapplicable, and alien to the concept of guarantee of fundamental rights, there can be no question of such a defence being available in the constitutional remedy. It is this principle which justifies award of monetary compensation for contravention of fundamental rights made by the State or its servants in the purported exercise of their powers, and enforcement of the fundamental rights is claimed by resort to the remedy in public law under the Constitution by recourse to Article 126 of the Constitution.*<sup>56</sup>

A careful examination of the sentiments expressed by Justice Mark Fernando in the *Saman* case and the full bench in the *Easter Sunday Tragedy* case is necessary at this juncture. In *Saman*, Justice Mark Fernando aimed to establish a conceptual harmony between Common Law (i.e., Roman-Dutch law) and the adjudication of fundamental rights. His key viewpoint was that there should be no conceptual difference when the infringement is committed by a State official or a private person. According to him, the principles of vicarious liability should be applied in both cases, whether the infringement occurs through executive or administrative action or by a private individual.

Justice Mark Fernando proposed an innovative approach to make fundamental rights adjudication more meaningful and fully aligned with the principles of the law of delict. In his view, the Supreme Court possesses a broad scope of power to employ innovative mechanisms based on "just and equitable" principles when assessing compensation for a proven violation of fundamental rights under its jurisdiction as outlined in Article 126(4) of the Constitution.

On the other hand, in the *Easter Sunday Tragedy* case, the Supreme Court unequivocally observed that "constitutional tort is a violation of the fundamental

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<sup>55</sup> *Janath S. Vidanage v Pujith Jayasundara and Others* (SC FR 163/2019), decided on 12.01.2023, p. 118.

<sup>56</sup> *Ibid*, p. 116-117.

rights of a person or citizen by the State ... as distinct from tortious injuries caused by private person or entity ... One of the ways in which a constitutional tort action differs from a tort action is that the former is a public law remedy for violation of fundamental rights in which the Supreme Court awards compensation.”<sup>57</sup>

Therefore, it is evident that by incorporating private law principles into the public law domain, the Supreme Court has acknowledged tortious principles in the adjudication of fundamental rights violations. This perspective is reinforced by the Court’s explicit statement: “Justice Mark Fernando had in mind constitutional delicts, and this Court agrees that such principles (statutory or common law) could be engrafted onto public law remedies to determine liability.”<sup>58</sup>

According to the Court, the award of compensation in a proceeding under Article 126 of the Constitution constitutes a public law remedy grounded in strict liability for the contravention of fundamental rights. Importantly, this principle is asserted to be exempt from the application of sovereign immunity, even though sovereign immunity may be a viable defence in private law actions based on tort.

## **6 Benefits of the Public Law Model**

As discussed above, the jurisprudential evolution of constitutional tort in many countries, including Sri Lanka, reflects an interaction between public law and private law. However, it is well observed in these jurisdictions that the award of compensation in a fundamental rights proceeding is a remedy available in public law based on ‘strict liability’ for contravention of fundamental rights, to which the principle of ‘sovereign immunity’ does not apply, even though it may be available as a defence in private law actions based on tort.

The key benefit of this public law model lies in its capacity to address the shortcomings in private law torts. Critics frequently argue that the remedies available under private law, particularly in torts, often impose significant challenges for plaintiffs attempting to prove an alleged tort.<sup>59</sup> One significant shortcoming is the requirement for plaintiff to establish fault or negligence on the part of the defendant, a process that can be both complex and burdensome. This evidentiary burden may effectively exclude cases where harm arises from systemic failures, institutional neglect, or omissions that do not directly point to individual culpability. Consequently, private law remedies can fall short in

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<sup>57</sup> Note 55 above, p. 108.

<sup>58</sup> Ibid.

<sup>59</sup> Michael Wells, ‘Civil Recourse, Damages-As-Redress, and Constitutional Torts Civil Recourse, Damages-As-Redress, and Constitutional Torts’ (2012) 46 *Georgia Law Review*, p. 1028-1029. Also see, note 80 below, p. 221-222.

addressing the broader dimensions of harm, leaving victims without adequate avenues for justice or redress. Accordingly, when compared to the traditional tort law route for civil remedies, the advantages of constitutional tort claims become apparent:

- Expedited litigation: Constitutional tort claims generally undergo relatively swift litigation.
- Less formal procedures: Claims are less formal, with accessible institutional rules for initiating the claim.
- Efficiency: when a constitutional court's jurisdiction is invoked,<sup>60</sup> extensive factual records and lengthy trials are often unnecessary. In many instances, claims can be disposed of based on the evidence presented in the petition, affidavit, and exhibits, without the need for additional testimonies.<sup>61</sup>

Moreover, constitutional tort actions have the potential to bring to light the most egregious State misconduct and negligence. The *Easter Sunday Tragedy* case in Sri Lanka serves as a notable example.<sup>62</sup> In this case, the petitioners alleged reckless failures and illegal omissions by the Executive branch of the government.

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<sup>60</sup> For example, the Supreme Court of Sri Lanka; High Courts and Supreme Courts in India.

<sup>61</sup> See, *Velmurugu v AG and Another* [1981] 1 Sri L.R., 406. In Sri Lanka, in Article 126(2) of the Constitution, a person who invokes the jurisdiction of the Court can do so by way of a petition. The rules require the parties to tender, in support of the petition, affidavits and documents available to the petitioner. There is no requirement that a petition should be supported by an affidavit. The question that arises is whether an affidavit is a mandatory requirement or not. According to the rules, under certain circumstances, a person could invoke the jurisdiction of the Court by submitting a statement or a complaint. Rule 44(7) of the Supreme Court Rules of 1990 states that by way of writing, a person could bring to the notice of the court an alleged infringement or imminent infringement of a fundamental right by executive or administrative action, and that the court could treat the statement/complaint as a petition and initiate action – see, *Fernando v Police Sergeant Dayaratbna, Welipenna Police Station*, SC (FR) Application No. 514/2010 [SC Minutes of 15.12.2014]. Also see, *Association of Victims of Uphaar Tragedy v Union of India* (2003) 2 ACC 114 (Delhi High Court).

<sup>62</sup> Also see in India, (i) *Chairman, Railway Board v Chandrima Das*, AIR 2000 SC 988 (Supreme Court hold that rape is a violation of human dignity); (ii) *Kamla Devi v Government of NCT of Delhi and Another*, 114 (2004) DLT 57 – in this case, the deceased Uday Singh died in a terrorist related incident. The widow (Kamla Devi) moved the Delhi High Court which observed that “apart from the general inability to tackle the volatile situation, in this case, the State agencies failed in their duty to prevent terrorists from entering Delhi ... There was failure of intelligences they did not pick up the movement of this known and dangerous terrorist.” The Court went on to state: “a crime has been committed. A wrong has been done and a citizen has lost his life because the State was not vigilant enough. A fundamental right has been violated. But mere declarations such as these will not provide any succour to the petitioner.” (iii) *Ashwini Gupta v Government of India*, ILR/(2005) 1 DELHI 7.

According to them, these actions betrayed the public trust, as they claimed the government negligently handled intelligence information related to the premeditation of the attacks. The Petitioners further claimed that relevant officials failed to implement structures to prevent the Easter Sunday Attack. The Supreme Court held:

*The Secretary to the Defence or the heads of department such as Director, SIS and the IGP were only alter egos of the President and the Director, SIS, the IGP and the Secretary, Defence are really liable for their omissions and in addition to their non-performance which impacts on the Minister who had undertaken such enormous powers under the Ministry of Defence, the Minister is also liable for serious omissions to have put in place mechanisms and structures which could have easily averted the disaster the country faced.*<sup>63</sup>

## 7 Rules of Liability for Constitutional Tort

### 7.1 United States

In the US, damages for violations of constitutional torts have, with few exceptions, been determined with reference to traditional ‘fault’ theories. Compensation granted under 42 US Code Section 1983 or actions followed by *Bivens* usually has been limited to the amount of consequential injury to person or property proven under common law tort principles. As evidenced in *Carey v Piphus*,<sup>64</sup> the US Supreme Court endorsed the common law paradigm for measuring damages in cases of constitutional violations. The common law paradigm does not permit damages to be recovered solely for the loss of a right, even one protected by the Constitution, without consequential injury.<sup>65</sup>

However, the common law has recognised exceptions in which no evidence of actual injury is required to justify a substantial compensatory award.<sup>66</sup> According to ‘voting rights’ approach enunciated in *Wayne v Venable*,<sup>67</sup> even if the plaintiff’s vote would not have affected election results, the right to vote is deemed “so valuable that damages are presumed from the wrongful deprivation of it without

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<sup>63</sup> Note 55 above, 113.

<sup>64</sup> 435 U.S. 247 (1978)

<sup>65</sup> Note 25 above.

<sup>66</sup> Ibid. See, for example: (a) the defamation cases: e.g. *Gertz v Robert Wech. Inc.*, 418 U.S. 323 (1974); (b) voting rights cases: e.g. *Gertz v Robert Wech. Inc.*, 418 U.S. 323 (1974).

<sup>67</sup> 260 F 64 (8<sup>th</sup> Cir. 1919). Also see, *Vargas v Calabrese*, 634 F. Supp. 910 (D.N.J. 1986)

evidence of actual loss.” This principle, initially recognised in voting rights cases, has occasionally found application in the context of other constitutional rights.<sup>68</sup>

## 7.2 India

The issue of the State’s liability to award compensation for the violation of fundamental rights by its instrumentalities was initially raised before the Supreme Court of India in *Khatri v State of Bihar*<sup>69</sup> and later in *Veena Sethi v State of Bihar*.<sup>70</sup> However, it is contended that the Court did not provide a definitive answer to this question in both these cases but addressed it in *Rudul Sah v State of Bihar* (*Rudul Sah*).<sup>71</sup> In *Rudul Sah*, the Court expressed the view that a two-track approach was necessary: while it aimed to provide some relief to the petitioner in the form of a ‘right to compensation’, it also sought to penalise “those instrumentalities which act in the name of public interest and which present for their protection, the powers of the State as a shield” for their unlawful acts.<sup>72</sup> The Court awarded compensation for ‘gross violation’ of the right under Article 21.<sup>73</sup>

In *Devaki Nanadan Prasad v State of Bihar*,<sup>74</sup> the Court granted costs for the “deliberate, motivated and intentional harassment” of the petitioner by State officers. Subsequently, the Court introduced the doctrine of ‘appropriate cases’ in *Sebastian Hongray v Union of India*<sup>75</sup> and *Shri Bhim Singh v State of Jammu & Kashmir*.<sup>76</sup> Finally, in *M.C. Mehta and Another v Union of India and Others* (*M.C. Mehta*),<sup>77</sup> the Court explained that an ‘appropriate case’ is one where the infringement of fundamental rights is gross, patent, incontrovertible, *ex facie*

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<sup>68</sup> In *Tatum v Morton* [562 F.2d, 1279 (D.C. Cir. 1977)], the Court of Appeals for the District of Columbia Circuit reversed the district courts’ limitation of damages to \$100 per plaintiff or violation of the first amendment right to demonstrate peacefully outside the White House.

<sup>69</sup> AIR 1981 SC 928.

<sup>70</sup> AIR 1983 SC 339.

<sup>71</sup> AIR 1983 SC 1086.

<sup>72</sup> See, Krishnan Venugopal, ‘A New Dimension to the Liability of the State Under Article 32’ (1984) 11 *Indian Bar Review*, p. 374.

<sup>73</sup> Protection of life and personal liberty: No person shall be deprived of his life or personal liberty except according to procedure established by law.

<sup>74</sup> AIR 1983 SC 1134. In this case, the Supreme Court awarded exemplary damages in light of the failure of the writ of *habeas corpus* to produce the bodies of two persons who were unlawfully detained by army personnel in Manipur. Damages of INR 100,000 each (USD 1,229) were awarded to the victims’ families.

<sup>75</sup> AIR 1984 SC 1026.

<sup>76</sup> AIR 1986 SC 494. The Court observed that “when a person comes to us with the complaint that he has been arrested and imprisoned with mischievous or malicious intent and that his constitutional and legal rights were invaded, the mischief or malice and the invasion may not be washed away or wished away by his being set free. In appropriate cases we have the jurisdiction to compensate the victim by awarding suitable monetary compensation. We consider this an appropriate case” (emphasis added).

<sup>77</sup> 1987 SCR (1) 819.



glaring, and of a magnitude that must “shock the conscience” of the Court. This definition of appropriate cases is not conclusive but rather inclusive, allowing the court to assess each case on its merits to determine whether it is appropriate to award monetary compensation to victims of State violence.<sup>78</sup>

### 7.3 Sri Lanka

In the *Easter Sunday Tragedy* case, the Sri Lankan Supreme Court unequivocally recognised that constitutional tort is a claim in public law seeking compensation for contravention of fundamental rights, the protection of which is guaranteed in the Constitution. The Court further noted that the constitutional tort principle justifies the award of monetary compensation for the contravention of fundamental rights by the State or its servants purportedly exercising their powers. The enforcement of fundamental rights is claimed through the remedy in public law under the Constitution, using Article 126 of the Constitution.

In reaching this conclusion, the Court attached significant importance to various Indian judgments, including *Nilabati Behera*, and stated that constitutional tort claims, based on strict liability, are made by resorting to a constitutional remedy provided for the enforcement of fundamental rights. The Court emphasised that the defence of sovereign immunity is inapplicable and alien to the concept of guaranteeing fundamental rights.<sup>79</sup>

## 8 The Judicial Approach in *Nilabati Behera* and its Application in Sri Lanka

A closer examination of *Nilabati Behera* decision reveals that the awarding of compensation as a public law remedy is based on ‘strict liability.’ Strict liability arises in situations where there is “no-fault” on the part of the respondents. It is further observed that if the fundamental rights of a citizen are infringed by the State, its officials, and instrumentalities, they are considered strictly liable. However, in *Nilabati Behera*, it becomes apparent that “the Government servants committed the wrong, and hence, the law applicable is not that of no fault or strict liability.”<sup>80</sup> Further, it is recognised as an accepted defence to the strict

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<sup>78</sup> Ibid. Also see, *Sube Singh v State of Haryana*, 2006 (3) SCC 178; *Municipal Corporation of Delhi v Association of Victims of Upbaar Tragedy & Others*, Civil Appeals Nos. 7114-15/2003, decided on 13.10.2011.

<sup>79</sup> Note 55 above, p. 116.

<sup>80</sup> Chidananda Reddy S. Patil, ‘Liability of the State for the Torts Committed by its Servants’ (PhD thesis, Karnatak University-Dharwad, 2002), available at: <https://shodhganga.inflibnet.ac.in/handle/10603/95152> (visited 24 Nov. 2024), p. 206.

liability doctrine that the act is one authorised by statute. Therefore, it can be argued that the strict liability doctrine is not tenable in this case.

Furthermore, in *Nilabati Behera*, the Court observed that the award of compensation under Articles 32 and 226 of the Indian Constitution was a remedy available under public law, and the principle of sovereign immunity did not apply to it, even though it might be available as a defence in private law in an action based on tort. However, this distinction may not be appropriate. The question of the applicability or non-applicability of the doctrine of sovereign immunity should be considered with reference to the nature of rights violated and not the form of remedy.<sup>81</sup> Hence, as argued by Patil in its quest to evolve concrete principles of compensation jurisprudence, the Supreme Court of India ultimately brought in the public law and private law remedy distinction in *Nilabati Behera* and awarded compensation on the basis of ‘strict liability’<sup>82</sup> for constitutional torts, holding that the defence of sovereign immunity is not available in the public law domain. However, as noted earlier, in *Nilabati Behera*, the State was not made liable on a ‘no-fault basis’. An opportunity was given to the State to explain, and ‘fault’ was found with the State’s blatant disregard of law.

Similarly, having fortified the perspectives articulated in *Nilabati Behera*, the Supreme Court of Sri Lanka, in the *Easter Sunday Tragedy case*, did not hold the respondents liable on a ‘no fault basis’. Instead, the Supreme Court identified various faults with the respondents. The petitioners brought to light numerous reckless failures on the part of the respondents, alleging that these illegal omissions effectively betrayed the people and public trust by negligently failing to take cognisance of and prioritise intelligence information received regarding the premeditation of the attacks and massacres that occurred on the 21<sup>st</sup> of April 2019.<sup>83</sup>

Moreover, the Court observed that:

*The allegation of executive inaction springs from security warnings, intelligence messages, concept papers and correspondence that took place among some principal protagonists of the executive branch...The Petitioners make the pinpointed allegation of executive inertia against the then President Maithripala Sirisena for not taking steps to avert the bizarre mayhem and destruction and they contend that it was within*

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<sup>81</sup> G.I.S. Sandhu, “Monetary Compensation for violation of Human Rights Its Developments and Prospects in India” in B.P. Singh Sehgal (ed), *Human Right in India: Problems and Perspectives*, (New Delhi: Deep & Deep Pub. 1995), p. 414.

<sup>82</sup> Note 80 above, p, 253-254.

<sup>83</sup> Note 55 above, p. 65-66.

*his powers to have ensured the personal liberty and security of the people and prevented the precarious slide into anarchy.*<sup>84</sup>

Accordingly, the Court held that:

*It is quite clear that the enormity of the risk was so great and the potential injury was so serious that a reasonable man placed in the position of the respondents whose omissions we have referred to above would have acted but the respondents did not (...) when either executive action or inaction infringes the fundamental right of right to life resulting in harm or loss to a person or citizen, it is actionable as a constitutional tort.*<sup>85</sup>

As previously noted, the application of the strict liability principle, as seen in *Nilabati Behera*, finds easy grounding in the Indian legal system due to the English common law's status as one of the main sources in India.<sup>86</sup> The law of tort in India originates from the English common law system, introduced during British colonial rule. The principles and rules of tort law were largely imported from the United Kingdom and adapted to the Indian legal system. However, in Sri Lanka, there is sometimes confusion regarding whether English law principles can be imported into a legal system where Roman-Dutch Law is accepted as the general law of the country, especially when dealing with constitutional delict stemming from fundamental rights violations, as seen after the *Easter Sunday Tragedy* cases.

Nevertheless, it is interesting to note that this is not the first time our Supreme Court has fortified English law principles of tort in addressing specific civil wrongs. For instance, in *Lily De Costa v Bank of Ceylon*,<sup>87</sup> the Supreme Court considered whether the 'tort of conversion', which is part of English law but not Roman-Dutch law, could be applied in Sri Lanka. The plaintiff-appellant argued that the defendant-respondent could be held liable for conversion even without negligence. Justice Wijayatilake concurred with the argument, stating that the view of adhering strictly to Roman-Dutch law without incorporating English law was outdated and contrary to the progress of Sri Lankan law.<sup>88</sup>

Similarly, in *Nilmini Dhammika Perera v Nalinda Priyadarshana and Two Others*,<sup>89</sup> the Supreme Court stated that English law principles of vicarious liability are similar to the Roman-Dutch law principles of vicarious liability in Sri Lanka. The Court

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<sup>84</sup> Ibid, p. 70.

<sup>85</sup> Ibid, p. 109 and 118.

<sup>86</sup> Thanvi, 'Law of Torts', (Indian Legal System, NAS College), available at: <https://www.nascollege.org/e%20cotent%2010-4-20/dr%20chandan%20uadhyay/Law%20of%20Torts.pdf> (accessed 24 Nov. 2024).

<sup>87</sup> (1969) 72 NLR 457.

<sup>88</sup> Ibid 547.

<sup>89</sup> [2013] 1 Sri LR 155.

further noted that the English law principles have been invariably accepted and adopted into Sri Lankan law over the years due to this similarity and the historical influence of English law during British colonial rule.

In the same vein, it can be argued that in the *Easter Sunday Tragedy* cases, too, the ‘strict liability’ approach, wherein the ‘fault’ element is not necessarily required, has been applied. To justify this application, the Supreme Court appropriately considered the severity of the alleged omission or inaction of the respondents, as well as situations where the infringement of fundamental rights is gross, patent, incontrovertible, glaring, and of a magnitude that must shock the conscience of the Court.<sup>90</sup>

## 9 Judicial Trends in the Evolving Legal Landscape of the Common Law of Sri Lanka

One more observation is necessary, for the sake of completeness, regarding the issue of the application of English law and Roman-Dutch law principles of tort/delict. In Sri Lanka, two distinct judicial trends are underway, contributing to some uncertainty in the legal landscape. One prevailing trend suggests that the Roman-Dutch law, which governs the law of delict, should be further developed to address modern social needs and developments.<sup>91</sup> This perspective advocates for the enhancement of the existing legal framework based on Roman-Dutch law principles to ensure its relevance and effectiveness in contemporary society.

Conversely, there is a growing inclination within the Sri Lankan courts to forge a distinct common law system. This alternative approach entails integrating practices from both English common law and Roman-Dutch law into an “indigenous common law,” seeking to derive benefits from each tradition.<sup>92</sup> However, the divergence between these approaches creates a degree of inconsistency and ambiguity in the legal system. Resolving this divergence is crucial, as it would ensure consistency and coherence in legal interpretations, thereby contributing to the overall stability and effectiveness of Sri Lanka’s legal framework.

## 10 The Supreme Court’s Ruling and Its Impact on Civil Proceedings

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<sup>90</sup> Note 55 above, p. 78, 99-100 and 111.

<sup>91</sup> *C. Karunanayake and Others v Mannapperuma Mobotti Appuhamilage Thushari Ranga Mannapperuma* (SC Appeal No. 130/15), decided on 21.02.2022.

<sup>92</sup> *Timex Garments (Private) Limited v The Commissioner General of Labour and Others* (CA/WRIT/486/2021), decided on 08.02.2024. See further *Kodeeswaran v The Attorney General* 72 NLR 337.

It is true that the Supreme Court's ruling on the *Easter Sunday Tragedy case* marked a significant milestone in the development of constitutional tort liability in Sri Lanka. By providing remedies for illegal omissions and inaction by public officials and integrating private law principles into public law remedies, the Court signalled a shift towards a civilian approach to protecting fundamental rights. However, this has raised important questions about the impact on the civil cases filed,<sup>93</sup> or going to be filed, against the respondents involved in the fundamental rights cases.

Since the Supreme Court has granted a remedy distinguished from, and in addition to, the civil remedy for negligence or inaction, the petitioners in the *Easter Sunday Tragedy case*, any victims of the attack, their dependants, or any other interested parties, may file civil cases claiming damages for, *inter alia*, any loss or suffering.<sup>94</sup> If such cases are filed, the plaintiffs in those cases may plead the outcomes of the *Easter Sunday Tragedy* judgment to substantiate their claim.

While a judicial verdict from a court in the same cause of action or circumstances does not automatically bind the civil court, there are possibilities for adapting the observations of the Supreme Court ruling that shape the trajectory of these civil cases significantly against the defendants.<sup>95</sup> Therefore, questions regarding the fairness of these civil proceedings may come to the forefront, given the Supreme Court's decisive stance in the fundamental rights case. Concerns may also arise

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<sup>93</sup> *Ada Derana*, 'Ex-President seeks nullification of cases seeking compensation over Easter attacks', available at: <https://www.adaderana.lk/news/78820/ex-president-seeks-nullification-of-cases-seeking-compensation-over-easter-attacks> (visited 24 Nov. 2024). It was reported in 2021 that more than 200 cases have been filed by various parties, including the dependents of the Easter Sunday attack victims, before the District Courts of Colombo and Negombo, seeking damages from the defendants, including the former President Maithripala Sirisena.

<sup>94</sup> Under Sri Lankan law, damages for physical injury resulting from assault or wrongful death may be claimed under the Roman-Dutch law Aquilian Action (*lex aquilia*). To succeed in an Aquilian Action, a claimant must prove pecuniary loss caused by harm to person or property due to the wilful (*dolus*) or negligent (*culpa*) conduct of the defendant. In cases where death is caused by a wrongful act, omission, negligence, or default, the spouse, a relative, or guardian of the deceased person may seek damages under the Recovery of Damages for the Death of a Person Act, No. 2 of 2019. Further, under the *actio injuriarum*, remedies are available for harm to the person (*corpus*), reputation (*fama*), or dignity (*dignitas*). This action requires proof of actual intention to harm (*animus injuriandi*) and is available to the person who suffers indignity against the person who caused it.

<sup>95</sup> Section 41A(2) of the Evidence Ordinance (as amended by Act No. 33 of 1998) provides that a conviction in a criminal court is a relevant fact in a civil court. Further, it is trite law that a conviction in a criminal case is no evidence of the facts on which that conviction was based in a civil case in which those facts are in issue or form the subject-matter of the suit – *North Colombo Regional Transport Board v. Perea* (CA 977/98 (F), decided on 27.05.2016). Even a presumption of guilt could be disproved by evidence to the contrary in the civil case – see, *Balapatabendige Piyadasa v. B. A. Don Jayantha Hemakumara* (C.A 286/1998 (F), decided on 31.01.2013).

about whether the defendants will receive a fair hearing, especially when liability has already been established by the Apex Court in the country.

Consequently, the defendants in the civil cases may face challenges in defending themselves against allegations of wrongdoing, particularly in light of the Supreme Court's ruling. The burden of proof may become more difficult for them to refute damage claims made against them.

Moreover, in compliance with the directives of the Supreme Court, certain respondents have been ordered to pay high amounts of compensation.<sup>96</sup> Should additional damages be awarded in civil proceedings for the same underlying actions, it could further exacerbate the financial burden and emotional toll already borne by the defendants.

## 11 Some Strategies for Harmonization

Considering the aforementioned impacts and challenges, it is important for the civil courts to adopt a nuanced approach in determining civil liability in torts stemming from the *Easter Sunday Tragedy* cases. This entails moving away from a one-size-fits-all approach and embracing a more flexible and context-specific framework. One such potential strategy for harmonization is to advocate for a broader approach that takes into account the specific circumstances of each case. The rationale behind this approach is that not all cases warrant the same level of scrutiny, and that 'fault' may vary depending on the circumstances. By adopting this more flexible approach, the civil courts can exercise discretion in determining liability, considering factors such as the severity of the alleged wrongdoing, the level of intent involved, the impact on the rights of the aggrieved parties, and the available defences and mitigations for each individual defendant.

## 12 Conclusion

The voyage of remedies for constitutional torts in Sri Lanka has been long and complex, marked by the proactive role of the Supreme Court in shaping the legal landscape. The landmark *Easter Sunday Tragedy* judgment demonstrates this evolution, establishing principles of liability and compensation. However, this

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<sup>96</sup> Note 55 above, p. 113-114. The former President Maithripala Sirisena who held the office of the Minister of Defence was ordered to pay a sum of Rs 100 million as compensation. The former IGP, Pujith Jayasundera and Director, SIS, Nilantha Jayawardena were each ordered to pay a sum of Rs.75 million as compensation. The former Secretary to the Ministry of Defence, Hemasiri Fernando, was ordered to pay Rs 50 million as compensation and Sisira Mendis, former Director, Chief of National Intelligence, was ordered to pay Rs 10 million.

ruling has raised concerns about its impact on civil cases related to fundamental rights violations. While the judgment may influence these civil proceedings, significant questions about fairness and the right to a fair hearing for defendants remain. Nevertheless, there is an opportunity for civil courts to adopt a more nuanced and flexible approach to determining civil liability arising from constitutional torts, considering the specific circumstances of each case and ensuring fairness for all parties involved.

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