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The Constitutionalization of Indian Private Law

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INTRODUCTION

It may appear a little out of place to find a discussion of private law embedded into a handbook on Indian constitutional law. Constitutional law is after all at the core of public law, against the backdrop of which private law is commonly understood. Private law is routinely conceptualized as the body of law that applies to horizontal interactions between individuals in their capacities as private actors.[1] This is in contrast to public law, which focuses primarily on the vertical relationship between the state and the individual, or between different state actors.[2] Constitutional law, administrative law, and criminal law are taken to be paradigmatic of the latter, while the common law areas of tort law, contract law, property law, and other advanced regimes that build on these common law subjects (e.g., intellectual property law, or the law of commercial arbitration) form the mainstay of the former.[3]

The interaction between public law and private law has generated a good deal of scholarly attention over the years.[4] While public law and private law are often treated as analytically distinct in theory, in actual practice the divide between the two often breaks down. When this occurs, ideas, concepts and devices from one move into or influence the other. The most common situation where this occurs is in relation to the doctrine of "horizontal effects," wherein a constitutional directive or norm is interpreted by courts to apply horizontally, i.e., as between individuals.[5] The South African Constitution, for instance, expressly renders its Bill of Rights applicable to the horizontal context.[6] Another common way in which public law and private law interact is when courts either explicitly or implicitly employ ideas and concepts from constitutional law in interpreting and applying private law concepts.[7] Additionally, in some

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[1] Michael Rosenfeld, *Rethinking the Boundaries between Public Law and Private Law for the Twenty-First Century: An Introduction*, 11 INT'L J. CON. L. 125, 126 (2013); Alon Harel, *Public Law and Private Law*, *in* THE OXFORD HANDBOOK OF CRIMINAL LAW (Markus D Dubber & Tatjana Hörnle eds., forthcoming 2014).

[2] Rosenfeld, *supra* note __, at 125.

[3] Ralf Michaels & Nils Jansen, *Private Law Beyond the State? Europeanization, Globalization, Privatization*, 54 AM. J. COMP. L. 843, 847 (2006) (discussing the traditional coverage of the term "private law"); *id.* at 125; Harel, *supra* note __, at __ (adding tax law to the substantive areas covered by public law).

[4] For early important work see: Roscoe Pound, *Public Law and Private Law*, 24 CORNELL L. QUART. 469 (1939); John Henry Merryman, *The Public Law-Private Law Distinction in European and American Law*, 17 J. PUB. L. 3 (1968). For more recent work, see: HUMAN RIGHTS IN PRIVATE LAW (Daniel Friedmann & Daphne Barak-Erez eds. 2001); GLOBALIZATION AND PRIVATE LAW (Michael Faure & Andre van der Walt eds. 2010); Aharon Barak, *Constitutional Human Rights and Private Law*, 3 REV. CONST. STUDS. 218 (1996); Peter Goodrich, *The Political Theology of Private Law*, 11 INT'L J. CON. L. 146 (2013).

[5] *See* Stephen Gardbaum, *The "Horizontal Effect" of Constitutional Rights*, 102 MICH. L. REV. 387 (2003)

[6] S.A. CONST., s. 12(2) ("[T]he Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.").

[7] Barak describes this as the "application to the judiciary model" of having public law ideals influence private law. *See* Barak, *supra* note __, at 226, 238-43.

jurisdictions public law ideals and elements come to influence private law by imposing constraints on what the judiciary, understood as a "state actor" can and cannot do in applying a substantive common law rule.[8] The U.S. Supreme Court adopted this approach in its landmark decision on racially restrictive covenants in *Shelley v. Kraemer*, where it found that a court's enforcement of a substantive private law rule to produce a discriminatory result was itself a violation of the equal protection guarantee.[9] What is interesting about these analytical spillovers—all of which have the effect of transcending the public law/private law divide—is the reality that they are almost always seen by scholars as palpably beneficial, and as producing functional synergies that the rigidity of the traditional distinction fails to enable.

While the interaction between public law and private law might indeed produce important benefits in individual cases, less commonly acknowledged among courts and scholars is the reality that such an interaction might also generate several undesirable systemic results: both structural and substantive. It is this hitherto underappreciated phenomenon that I explore in this Chapter, focusing on the interaction between Indian constitutional law and Indian tort law. Using the context of the Indian Supreme Court's dramatic expansion of its fundamental rights jurisprudence over the last three decades, I argue that while the Court's conscious and systematic effort to transcend the public law/private law divide and incorporate concepts and mechanisms from the latter into the former might have produced a few immediate and highly salient benefits for the public law side of the system, its long terms effects on India's private law edifice have been devastating. The Court's fusion of constitutional law and tort law has successfully cabined the independent efficacy, normativity, and analytical basis of equivalent private law claims in Indian lower courts. Coupled with the unique history of India's various basic private law regimes, and the legal system's concerted failure to strengthen these regimes after independence, the Court's efforts have only served to undermine the overall legitimacy of India's private law mechanisms. While this phenomenon is most apparent in relation to tort law in India, it persists to a lesser degree in other areas of private law as well, such as contract law and property law. Yet, in all the discussions of India's progressive fundamental rights jurisprudence, one finds no mention whatsoever of its effects on Indian private law.[10]

This Essay unfolds in three parts. Part I provides a brief analytical discussion of the public law/private law distinction, and situates it within the unique contingencies of the Indian legal system and the historical processes through which the bulk of its private law and public law regimes came into existence. Part II analyzes the Indian Supreme Court's jurisprudence—beginning in the mid-1980s—that recognized the analytics of the public law/private law divide, but nonetheless chose to collapse it. This Part shows that the Court's fusion of the two bodies was neither incidental nor unintended but was instead a direct effort to expand India's public law (i.e., fundamental rights) jurisprudence to new domains, in the interests of justice. Finally, Part III takes a step back and critically examines the hitherto unappreciated effects of the merger identified in Part II: analytical, doctrinal, and expressive.

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[8] *See* Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503 (1985).

[9] 334 U.S. 1, 17-19 (1948). For an excellent discussion of the case and its connection to equality, see: Mark Tushnet, *Shelley v. Kraemer and Theories of Equality*, 33 N.Y.L.S. L. REV. 383 (1988).

[10] Even accounts that are critical of the rights revolution tend to ignore the effects on India's private law system. *See, e.g.*, S.K. DAS, INDIA'S RIGHTS REVOLUTION: HAS IT WORKED FOR THE POOR? (2013).

I. PUBLIC LAW AND PRIVATE LAW IN THE INDIAN LEGAL SYSTEM

While the modern distinction between private law and public law is usually traced back to Roman law,[11] few if any would claim that it can be understood and operationalized with conceptual clarity. As noted previously, the distinction is ordinarily described as lying in the difference between the vertical and horizontal operation of legal rules. Constitutional law, criminal law, and administrative law represent bodies of law that govern the interactions between the various branches of government or between the government and individual subjects, and are taken to form the staple of public law.[12] By contrast, areas that focus on the interaction between subjects in their private capacities, most prominently the common law subjects of tort, contract, property, and unjust enrichment, are paradigmatic of private law.[13] Other more specialized areas tend to draw a little from both categories in so far as they rely on basic common law principles (e.g., ownership, agreements), but superimpose on that basic framework additional regulatory and public policy goals.

Very importantly, the public law/private law distinction is less about the character of the actors involved and more about the structural nature of the legal directives that govern and influence the relationship in question. Government actors thus routinely enter into agreements and contracts with private individuals (or other government actors) and in so doing enter the domain of private law in so far as their relationship—as contracting parties—is predominantly horizontal. Similarly, when an essential government function is delegated to a private corporation, its relationship to the individuals that it provides its services to starts to partake of public law, since its directives now operate vertically despite the formal nature of the corporation as a private entity. The distinction is therefore hardly wedded to the character of the entities involved even though there remains a strong correlation to that effect.

All the same, it certainly isn't the case that the state plays no role whatsoever in private law. In private law settings, recourse to the state's coercive machinery is left to the discretion of private actors; or, specifically, the private actor who is vested with a legally cognizable claim. The law defines the relationship between parties through its traditional normative apparatus, but then takes a step back to allow parties to play out the consequences—positive or negative—of the relationship in question. The state plays a background role, of a safety net, in private law dealings unlike in the public law context where the state is a direct participant.[14] The state's "background" role in private law settings imbues private law with a rather distinctive claim to legal normativity, in turn constructed through the language of rights and duties that the state-created (private law) doctrine sets up before stepping out of the relationship.[15] Scholars continue to disagree over whether private law can indeed exist without the state altogether; an issue that while interesting, need not detain us here.[16]

In most of the English-speaking world, the basic areas of private law—i.e, property, torts, and contracts—are primarily common law subjects. They were historically created and

[11] *See, e.g.*, W.W. BUCKLAND, A MANUAL OF ROMAN PRIVATE LAW (1939).

[12] *See supra* note 3 and sources therein.

[13] John C.P. Goldberg, *Introduction: Pragmatism and Private Law*, 125 HARV. L. REV. 1640, 1640 (2012).

[14] This idea is best captured by the civil recourse theory of private law. As one scholar aptly puts it, in tort law (and all of private law) "[t]he state does not impose liability on its own initiative…[i]t does so in response to a plaintiff's suit demanding that the defendant be so required." Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695, 699 (2003).

[15] *See* Stephen A. Smith, *The Normativity of Private Law*, 31 OXFORD J. LEGAL STUD. 215, 221-29 (2011).

[16] *See, e.g.*, Michaels & Jansen, *supra* note __ (providing an overview of this disagreement).

developed by courts from within the contexts of individual disputes, and despite their piecemeal codification, courts continue to retain a fairly significant role in their continuing growth and evolution. This is especially true in both the U.S. and in England, where private law remains strongly associated with the common law. The story of Indian private law and of its modern day eclipse by Indian constitutional law is fairly different, and must begin with its somewhat spurious origins.

In the last half of the nineteenth century, the colonial government in India embarked on a rather extensive project of codifying the common law for all of British India.[17] Following the failure of the "codification movement" in England and the U.S., India emerged as a prime candidate for testing the fruitfulness of the codification exercise.[18] Between 1860 and 1910, the British government in India enacted fifteen laws into effect, and among them were several areas of private law, most notably the laws of contract and unjust enrichment, property law, and the law of private remedies.[19] While Indian tort law was initially on the list of areas intended for legislative intervention, it eventually escaped being codified despite a draft Bill being commissioned by the Indian government from Sir Frederick Pollock.[20] In each of the areas that did come to be codified, the (British) codifiers began with the basic rules of English common law and modified them as they deemed most appropriate for Indian society. In so doing, they routinely employed the use of clear, bright-line rules, and precisely drafted definitions and illustrations, all with the conscious design of minimizing judicial discretion and unpredictable legal change.[21] The direct result of this codification exercise was that it effectively distanced Indian private law from the common law and its intrinsic generativity.

Following the codification, Indian courts came to treat private law disputes as entailing little more than the interpretation and application of legislative directives. At Indian independence, the Indian constitution drafters thought it wise to keep all pre-independence legislation in place until the Indian Parliament saw it necessary to replace them with newer versions, and expressly afforded such legislation continuing validity under the new constitutional system.[22] In the six decades after Indian independence this replacement has only rarely occurred, even though the codes themselves have been amended on the margins. As a result, much of Indian private law is today contained in late nineteenth century colonial legislation, consciously enacted (at the time) with the idea of minimizing judicial lawmaking and creativity. Indian private law is therefore "common law" in content though not in process, approach and style. Indian courts are relegated to an unequivocally subservient position vis-à-vis the legislature in formulating the directives and content of private law.

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[17] *See generally* 1 WHITLEY STOKES, THE ANGLO-INDIAN CODES (1887).

[18] Mathias Reimann, *The Historical School Against Codification: Savigny, Carter, and the Defeat of the New York Civil Code*, 37 AM. J. COMP. L. 95, 96 (1989); Wienczyslaw J. Wagner, *Codification of Law in Europe and the Codification Movement in the Middle of the Nineteenth Century in the United States*, 2 ST. LOUIS U.L.J. 335 (1952).

[19] STOKES, *supra* note __, at ix.

[20] *See* FREDERICK POLLOCK, THE LAW OF TORTS: A TREATISE ON THE PRINCIPLES OF OBLIGATIONS ARISING FROM CIVIL WRONGS IN THE COMMON LAW 556-58 (1887) (detailing the idea behind the Bill, and expressing frustration at its failure to be enacted).

[21] For an account of how this worked in the context of Indian property law, see Shyamkrishna Balganesh, *Codifying the Common Law of Property in India: Crystallization and Standardization as Strategies of Constraint*, 63 AM. J. COMP. L. (forthcoming 2015).

[22] CONST. OF INDIA, Art. 372(1) ("[A]ll the laws in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority.").

As noted earlier, Indian tort law managed to avoid the early codification exercise, though for political reasons. All the same, in the early twentieth century, the British enacted a series of specialized enactments each of which provided for civil redress (i.e., compensation) mechanisms within the context of particular activities that were believed to commonly produce accidental harm to life and property. Following independence, Parliament systematically updated and in some instances even replaced these specialized codes with newer ones. For instance, compensation for motor vehicle accidents is today covered by the Motor Vehicles Act of 1989, which replaced the Motor Vehicles Act of 1939; compensation for workplace injuries continues to be governed by the Workmen's Compensation Act of 1923; and injuries relating to the Indian railways are governed by the liability provisions of the Railways Act of 1989, which replaced the prior Act of 1890. In a few instances, Parliament intervened decades after independence to introduce an altogether new enactment dealing with an area. The Consumer Protection Act of 1986 is one such example, and today deals with products (and services) liability. Indian tort law is for the most part today comprised of a set of specialized liability regimes, each dealing with a unique area of activity. Each of these enactments contains a detailed set of provisions allowing defendants to claim compensation from a wrongdoer, by approaching either a lower court or a specialized tribunal or authority. Courts treat these enactments as having exhausted the field in question and generally restrict themselves to interpreting and applying the law. They interpret and apply these specialized enactments in essentially the same way that they do other areas of general private law. Judicial lawmaking in all of Indian private law is as a result for the most part, simply non-existent.

In stark contrast to this, modern Indian public law especially constitution law, is almost entirely the product of far-reaching changes introduced by the country's higher judiciary. As is well known, these changes have involved both substantive and procedural components. Ever since the 1980s, the Indian Supreme Court has expanded the constitution's protections for various fundamental rights to encompass progressive socio-economic rights.[23] Simultaneously, it has also loosened the restrictions on when and how an aggrieved party can approach the court for relief. Most of these changes are captured in what is commonly described as India's "Public Interest Litigation" revolution.[24]

The disparate institutional bases of change in the two areas—i.e., public law and private law—may seem somewhat anomalous at first. What prevented the Indian higher judiciary from playing a more active role in reforming Indian private law, just as it had done for Indian constitutional law? A good part of the answer lies in the unique synthesis of substantive and structural change that the courts' public law changes entailed, and which were infeasible in the private law context. The most far-reaching changes introduced by the Indian Supreme Court (i.e., the PIL reforms) came about in the exercise of the court's original writ jurisdiction, contained in Article 32 of the Indian constitution. Article 32, somewhat uniquely, is both a jurisdiction-enabling provision and a substantive fundamental right, the "right to move the Supreme Court" for the enforcement of fundamental rights.[25] This dual jurisdiction/right provision allowed the Court to both make far reaching substantive changes to the rights themselves and simultaneously see to their implementation on its own, without having to remand matters back to lower courts

[23] *See, e.g.*, P.P. Craig & S.L. Deshpande, *Rights, Autonomy and Process: Public Interest Litigation in India*, 9 OXFORD J. LEG. STUD. 356 (1989); Jamie Cassels, *Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?*, 37 AM. J. COMP. L. 495 (1989).

[24] *Id.*

[25] CONST. OF INDIA, Art. 32.

for this task. The Court's expansion of parties' standing was thus as much about expanding it own jurisdiction as it was about furthering litigants' access to justice.[26] Personal (institutional) oversight over implementation fueled both the willingness of the Court to introduce substantive changes and legitimized it, by ensuring that such changes didn't remain without effect. While this trend was begun by the Supreme Court, High Courts soon followed suit, vested with their analogous but less far-reaching writ jurisdiction for fundamental rights under Article 226 of the constitution.[27]

Most private law actions under Indian law are to be commenced in the lower judiciary, at the district court level. The higher judiciary (the Supreme Court and the several High Courts) retains no more than appellate jurisdiction in this area. Consequently, even if the higher courts were to introduce far-reaching changes to the substantive content of the law—much as they did in the constitutional context—the primary responsibility to implement these changes in individual cases would fall to lower courts. Not only would there be no way of guaranteeing that this would be successful, but India's lower judiciary has long been characterized by extended delays and a host of additional structural issues, all of which would have masked the salience and utility of any substantive reform.[28] This explains the Indian higher judiciary's disparate approach to common law style substantive lawmaking in the public law and private law arenas ever since Indian independence. Perhaps more importantly though, it also explains why the Indian higher judiciary has felt the recurrent urge to address private law questions *through* its public law apparatus whenever possible, an issue to which we next turn.

II. PRIVATE (TORT) LAW AS CONSTITUTIONAL LAW IN INDIA

Public interest litigation began in India in the early 1980s, primarily in cases where state actors such as prison officials had mistreated prisoners, usually through physical abuse. In exercising its plenary jurisdiction under Article 32 to protect and enforce the constitution's fundamental rights, the Supreme Court's first move was to relax the requirement of *locus standi* to allow third parties to petition the Court in any way or form for relief.[29] In later cases, the Court interpreted its powers to allow it to consider a matter on its own motion (*suo moto*), effectively eliminating both the standing requirement and the need for an actual case or controversy to arise as preconditions for the exercise of its jurisdiction.[30]

These early public interest litigation cases were in essence constitutional tort actions, where the petitioner was assailing a state actor for its action or omission, and alleging that such act or omission had violated a protected fundamental right (contained in Part III of the constitution). In its genesis, the Supreme Court's merger of constitutional law and tort law under the rubric of public interest litigation was less than deliberate, but instead the direct result of its liberal allowance for compensatory awards during such actions. Fairly early on in the development of public interest litigation, the Court began allowing successful petitioners to recover monetary damages. In *Rudul Shah v. State of Bihar*,[31] Chief Justice Chandrachud

[26] Craig & Deshpande, *supra* note __, at 359-64.

[27] CONST. OF INDIA, Art. 226(1).

[28] *See, e.g.*, Robert Moog, *Delays in the Indian Courts: Why the Judges Don't Take Control*, 16 JUS. SYS. J. 19 (1992).

[29] Gupta v. Union of India, A.I.R. 1982 S.C. 149.

[30] Bandhua Mukti Morcha v. Union of India, A.I.R. 1984 S.C. 802, 813.

[31] (1983) 3 S.C.R. 508.

endorsed this practice, but recognized an obvious dilemma. Allowing a litigant to seek damages in a writ petition (i.e., a public interest litigation action) rather than through an ordinary civil suit could result in the ordinary judicial process coming to be circumvented. At the same time, failing to make such awards might undermine the very efficacy—and not to mention legitimacy—of public interest litigation. The Court in *Rudul Shah* eventually chose to award the petitioner monetary damages and noted than in doing so it was both "mulct[ing]" violators and offering a "palliative" for victims. The Court was in essence then explicitly imbuing such recovery with both compensatory and punitive/exemplary elements.[32]

With *Rudul Shah* the Court cemented its practice of issuing damage awards in successful public interest litigation petitions. The dual-purpose argument also gave the Court significant discretion in fixing the quantum of these awards. In due course, the Court began to expand the subject matter of claims brought under the rubric of public interest litigation, while continuing to award petitioners monetary compensation.[33] Whereas the early cases had involved deliberate or intentional governmental action (e.g., unlawful detention, torture of prisoners, etc.), in later cases the Court became far more willing to extend liability to situations where the state actor had omitted to take any action. In so collapsing the act/omission distinction, public interest litigation thus came to be extended to situations where governmental inaction had been *a* factor in harm suffered by a victim.

With this expansion in subject matter, the Court's approach in public interest litigation cases started bearing a stark resemblance to traditional private law based tort claims. This was most obvious in medical negligence cases involving government-run hospitals.[34] A government hospital's failure to provide treatment or in negligently providing treatment could now be the subject of a writ petition against the government, rather than the subject of a simple negligence action against the doctors or hospital staff, and a court could award the petitioner compensation under either approach. The petitioner had "rights" against both sets of parties: a fundamental right against the government, and a private law right against the private party. From a petitioner's (i.e., victim's) perspective, bringing the action as a writ petition however held innumerable advantages. Most important among these were the expedited nature of the process, and the reality that a court's decision in its writ jurisdiction did not require an elaborate factual record but could instead be disposed off on affidavit evidence without further testimony. This practice was hardly unique to the Supreme Court, and was soon followed in equal measure by the various High Courts in the exercise of their own writ jurisdiction under Article 226.[35] This expansion of scope, coverage, and remedial framework in constitutional jurisdiction brought the Indian higher judiciary's public law jurisprudence into direct conflict with private law, i.e., tort law, a reality that litigants themselves (especially defendants) began to recognize.

It wasn't until the year 2000 that the Court directly confronted the question of whether its practice of awarding petitioners compensation under its writ jurisdiction—and for a variety of subject areas—amounted to a usurpation of private law, i.e., tort law. In *Chairman, Railway Board v. Chandrima Das*,[36] the Court was presented with a case where a petition was brought by

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[32] *Id.* at 514.

[33] *See, e.g.*, Bhim Singh v. State of Jammu & Kashmir, A.I.R. 1986 S.C. 494; Hongray v. Union of India, A.I.R. 1984 S.C. 571; Behera v. State of Orissa, A.I.R. 1993 S.C. 1960.

[34] *See* Paschim Banga Khet Mazdoor Samity v. State of West Bengal, (1996) 4 S.C.C. 37.

[35] *See, e.g.*, Raza v. Superintendent, Central Jail, 1985 Crim. L.J. 642 (M.P.); Thressia v. Kerala State Elec. Bd., A.I.R. 1988 Kerala 206 (Kerala); Kalawati v. State of Himachal Pradesh, (1988) 2 A.C.C. 192 (H.P.); Gandhi v. Union of India, (1988) 2 M.L.J. 493 (Madras); Sharma v. State of Rajasthan, (1991) 2 W.L.N. 507 (Rajasthan).

[36] A.I.R. 2000 S.C. 988.

a civil rights lawyer on behalf of a foreign national who had been brutally gang raped by railway employees at a government-owned railway station. The events in question happened when the employees were off-duty, but on premises owned and run by the government. The petition specifically sought monetary compensation for the victim from the government alleging that its failure to protect the victim and prevent the crime violated the victim's fundamental rights. As a procedural matter, the petition was brought before the Calcutta High Court under Article 226, and the High Court's award was then appealed to the Supreme Court. In the Supreme Court, the defendant (the government entity) openly objected to the award of any compensation in the case, and argued that doing so amounted to a usurpation of private law by the higher courts in the exercise of their writ jurisdiction. Areas of private law such as tort law, the defendant argued, required an elaborate factual record before compensation could be granted; and the writ process was ill-equipped to do this, since witnesses were never examined and evidence was only ever presented on affidavit. While these arguments found little favor with the Court,[37] it nonetheless forced the Court to confront the private law/public law distinction and the argument that its writ jurisdiction had run roughshod over it.

Not surprisingly, upon examining the issue the Court merely reaffirmed its past practice and that of the several High Courts, but now purported to find a logical basis for the overlap. Using conclusory language, the Court observed that "[w]here public functionaries are involved and the matter relates to the violation of Fundamental Rights or the enforcement of public duties the remedy would still be available under the Public Law notwithstanding that a suit could be filed for damages under Private Law.[38]" Since the crime of rape amounted to a violation of the victim's right to life under Article 21 of the constitution, the Court concluded that a public law remedy was wholly appropriate, since it was "not a mere violation of an ordinary right.[39]" What is important to note here is that the Court was directly responding to the usurpation argument by expressly preserving the parallel nature of public law and private claims for the same set of facts, since they trigger two different types of rights (i.e., fundamental and ordinary). The Court's reasoning now expressly recognized a parallel jurisdiction, which to its mind alleviated the concern with usurpation. This parallelism also liberated the Court in another important way—at the substantive level. By recognizing that its public law jurisprudence was relying on private law but was nonetheless distinct from it, the Court was now in a position to modify (or abandon) any substantive private law constraints that it saw as impediments to the protection of constitutional rights in the exercise of its writ jurisdiction. The private law requirement of causation, central to all tort claims, was one such impediment. In fact, the Court in *Chandrima Das*, even went so far as to eliminate the "course of employment" requirement for vicarious liability in public law-based tort claims, since the actors in the case were unambiguously acting beyond the scope of their employment when they sexually assaulted the victim.[40] Their—wholly private—actions were now causally imputed to their employers in order to award the petitioner damages.

The decision in *Chandrima Das* marked an important turning point in the merger of public law and private law in India. Not only did the Court formally validate all of what had been going on before but it now equipped the higher judiciary with a superficial analytical basis with which to render the merger functionally complete. First, it told High Courts around the country that they were free to continue awarding petitioners compensation in the exercise of their writ

[37] *Id.* at 993.

[38] *Id.* at 994.

[39] *Id.*

[40] *Id.* at 999-1000.

jurisdiction and on the basis of lower evidentiary standards, since the petitioners were always at liberty to commence an independent private law action. The public law action was in other words, no longer to be seen as being in lieu of a private law claim, but as serving an independent (and more important) purpose. Second, it now authorized courts to freely modify the substance of private law actions when brought as public law claims, since the public law dimension of the claim now imbued it with a different purpose, which in turn could override certain private law constraints. This could be at the level of the claim (e.g., causation) or at the level of remedy (e.g., computation of damages).

Following *Chandrima Das*, High Courts around the country began exercising their writ jurisdiction more freely to award petitioners monetary compensation in a variety of substantive settings. The absence of a developed factual record was no longer seen as an impediment, and many courts took this to suggest the absence of a genuine dispute about the events in question. Thus for instance, in one prominent case involving loss of life from a large fire in a movie theatre, the Delhi High Court readily exercised its writ jurisdiction against the theatre owner and the municipal authorities to award the petitioners compensatory and punitive damages.[41] In so doing, it expressly noted how liberated it was from the traditional constraints of private law adjudication:

> [I]n the exercise of our jurisdiction under Article 226 of the Constitution, we are not required to go into the factual details of the matter nor without sufficient material before us we are in a position to hold as to what extent each of the parties involved were negligent. However, on the basis of the admitted facts on record about which there cannot be any controversy between the parties, we are of the view that an enterprise which is engaged in a hazardous or inherently dangerous industry which poses a potential threat to the safety of persons working in the premises or vicinity, owes an absolute and non-delegable duty to the patrons who visit the same to ensure that no harm results to anyone on account of hazardous or inherent nature of the activity which it has undertaken.[42]

Negligence, in other words, no longer had to be alleged or proven for liability! A cinema theatre was an inherently dangerous undertaking, which would trigger absolute liability for any harm; a rather dramatic expansion of the law. Other High Courts across the country soon did the same in a variety of substantive areas and contexts such as medical negligence,[43] electrocution,[44] wrongful conception,[45] negligent infection,[46] accidents at railway crossings[47] and several others.

As this trend continued unabated, a few courts began to worry about the sufficiency of evidence for their decisions.[48] The issue became especially important in the rare instances where the defendant expressly disputed the existence of the injury or a causal connection to its actions. When the question eventually reached the Supreme Court, it concluded that a court's exercise of its writ jurisdiction would be inappropriate when there were real disputed questions of fact that

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[41] Assoc'n of Victims of Uphaar Tragedy v. Union of India, (2003) 2 A.C.C. 114.

[42] *Id.* at ___.

[43] *See, e.g.*, Ramar v. Director of Medical and Rural Health Services, (2011) 1 M.L.J. 1409; Thangapandi v. Director of Primary Health Services, (2011) 1 M.L.J. 1329.

[44] *See, e.g.*, Kumar v. Himachal Pradesh Electricity Board, 1995 A.C.J. 1146.

[45] *See, e.g.*, Shobha v. Gov't of N.C.T. of Delhi, (2006) 3 A.C.C. 145.

[46] *See, e.g.*, Vijaya v. Chairman, Singareni Collieries Company Ltd, (2002) 1 A.C.C. 32.

[47] *See, e.g.*, Behera v. D.R.M. East Coast Railway, _____.

[48] *See, e.g.*, Kumari v. State of Tamil Nadu, A.I.R. 1992 S.C. 2069.

required additional evidence.[49] The Court was quick to add that the restriction applied only to the higher judiciary's writ jurisdiction under Articles 32 and 226, and that it did not restrain its own power to address the matter under Article 142,[50] which allowed the Court to pass any order "necessary for doing complete justice in any cause or matter.[51]"

To the extent that such factual disputes could operate as a limit on courts' writ jurisdiction in tort cases, the question nonetheless remained of how the court is to ascertain whether such a dispute does in fact exist. And here, the Court's guidance to high courts was sufficiently open-ended so as to render the limit meaningless. If there was "negligence on the fact of it," a court was entitled to exercise its writ jurisdiction, but not otherwise.[52] In practice, it has only been in the exceptional situation that a High Court has refused to find such negligence on the record. The net effect of this standard was that it extended tort law's rule of *res ipsa loquitur* to just about any claim brought using a court's writ jurisdiction. Additionally, the "negligence on the face of it" standard created an active incentive for High Courts to avoid acknowledging the very existence of any factual disagreement between the parties since such an acknowledgement would have required them to avoid hearing the case.[53]

In summary then, the subsumption of tort law and private law ideas into Indian constitutional law jurisprudence was both gradual and deliberate. Much of the impetus for the merger can be traced back to early constitutional law decisions and their insistence on awarding victims discretionary monetary awards for rights violations by state actors. When the subject matter of such public interest claims expanded, the absence of any real limits on courts' discretionary power to award compensation effectively resulted in the creation of a parallel form of private law adjudication under the rubric of a public law system of redress. What is perhaps more surprising than the actual phenomenon itself however is the fact that this merger—and its consequences—have been altogether ignored by scholars of Indian law.[54]

III. UNEXPLORED CONSEQUENCES

The hybrid *public law/tort* claim described in the previous Part—wherein a private law claim is brought as a public law action against a state actor, rather than as a private action against a private actor—is today a staple of the Indian constitutional law landscape. There is little doubt that it has produced important short term benefits for litigants, by expediting their ability to be heard, and by minimizing the system's reliance on formalities. It has also without question generated important benefits for the Indian higher judiciary as well, seen in the public's perception of its efficacy and responsiveness. Yet, its effects on the role of private law in the overall landscape of the Indian legal system have gone altogether unnoticed, primarily because these effects have been less obvious and immediate. While detailing these effects is worthy of its

[49] Chairman, Grid Corp. v. Sukamani Das, (1999) Supp. 2. S.C.C. 458; Tamil Nadu Elec. Bd. v. Sumathi, (2000) 4 S.C.C. 543.

[50] *Id.* at ___.

[51] CONST. OF INDIA, Art. 142.

[52] Tamil Nadu Elec. Bd. v. Sumathi, (2000) 4 S.C.C. 543, ___.

[53] One astute High Court's effort to supplement its factual record by choosing to exercise its writ jurisdiction and then referring the factual dispute to a court-appointed arbitrator was met with disapproval by the Supreme Court, which viewed the very acknowledgement of the factual dispute as necessitating a decline of jurisdiction. *See* Tamil Nadu Elec. Bd. v. Sumathi, (2000) 4 S.C.C. 543.

[54] *See* Madhav Khosla, *Making Social Rights Conditional: Lessons from India*, 8 INT'L J. CON. L. 739, 756 (2010) ("Within Indian legal scholarship, there has been no effort to understand such [public interest litigation] cases as involving tort actions.").

own separate treatment, this Part outlines the nature and scope of these consequences, leaving for another time and place a more elaborate analysis.

Before describing these consequences however, an important caveat is in order. The suggestion that the constitutionalization of Indian tort law has contributed to the problems described below, should not be taken to imply that Indian tort law (or private law more generally) was somehow unproblematic prior to this process. Indeed, the contrary is indeed true. In addition to being substantively underdeveloped and ossified in statutory language, the Indian private law system has been continually haunted by the problem of exorbitant court fees, rendering its very availability to private individuals fairly elusive. Writing in 1958, the Law Commission of India famously noted that

> India is…the only country under a modern system of government which deters a person who has been deprived of his property or whose legal rights have been infringed from seeking redress by imposing a tax on the remedy he seeks…The [court] fee which we charge is so excessive that the civil litigant seeking to enforce his legal right pays not only the entire cost of the administration of civil justice but also the cost incurred by the State in prosecuting and punishing criminals for crimes with which the civil litigant has no concern.[55]

Given these exorbitant fees, traditional tort law claims within the civil justice system have for long remained beyond the reach of ordinary litigants, and the public law/tort law jurisprudence can be seen as a mechanism designed to remedy—at least partially—that system-wide malaise, among others. Yet in so doing, it has itself contributed to the problem in by directing attention away from a reform of the private law system; and indeed produced a series of secondary problems for tort law litigation in India as a whole, which is what I outline below.

1. Substantive Neglect

The most direct consequence of tort claims being addressed through public law adjudication has been the stagnation of substantive tort law *qua* private law in India. The doctrinal and institutional impoverishment of Indian tort law has been the subject of extensive discussion ever since the Bhopal disaster, where the Indian legal system first confronted the inadequacies of its private law mechanisms.[56] In the years since, hardly any serious effort has been made to strengthen the substantive and institutional content of tort law in India.[57] Very few tort law cases make it to the higher judiciary on appeal, leaving the lower courts at liberty to develop and apply the general rules of tort law to individual disputes with little supervision. Additionally, the reality that lower court decisions are never reported in the Indian system leaves litigants with a good deal of uncertainty about the area.[58]

Against this backdrop, the development of the hybrid public law/tort claim has essentially proven to be a distraction. By raising the salience of substantive tort questions (e.g., negligence, causation) only within the context of writ adjudications, the legal system has at once relegated the content of traditional private law adjudication to a veritable backseat and simultaneously

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[55] 1 LAW COMMISSION OF INDIA, FOURTEENTH REPORT: REFORM OF JUDICIAL ADMINISTRATION 487 (1958).

[56] For an excellent account, see: Marc Galanter, *Legal Torpor: Why So Little Has Happened in India After the Bhopal Tragedy*, 20 TEX. INT'L L.J. 273, 275 (1985) ("The absence of tort claims is reinforced by, and reinforces, the absence of tort doctrine.").

[57] *See* JAMIE CASSELS, THE UNCERTAIN PROMISE OF LAW: LESSONS FROM BHOPAL (1993).

[58] This is somewhat perplexing and is yet to be examined in any detail by scholars. One suspects that it is largely because Indian lower courts are not "courts of record" under the Indian constitutional structure.

minimized the perceived urgency of real reform in the area. The law of medical negligence is a prime example. While a private law claim for medical negligence has existed in India for decades now, the law has long been shrouded in a good deal of uncertainty about the appropriate legal standard that courts need to employ when adjudicating such claims,[59] and in computing damages.[60] This uncertainty has in turn resulted in plaintiffs rarely ever succeeding in such cases. By contrast, courts have almost never hesitated to find for petitioners when deciding such (i.e., medical negligence) claims as writ petitions against government doctors and hospitals, and in awarding damages in such claims. And whereas mechanisms for computing damages in private law claims continue to remain controversial, contested, and unclear; hardly any court (or litigant) has questioned the way in which courts compute compensatory awards in their writ jurisdiction, for the very same subject matter. With the exponential growth of public law tort actions, it is unrealistic to expect any comprehensive reform of private law-based tort adjudication in the conceivable future, since the former is systemically structured as a substitute for the latter.

2. Doctrinal Manipulation

Even more troubling than the neglect of tort law as a private law subject in India has been the manner in which the higher judiciary's jurisprudence (of tort law in the public law domain) has modified and obfuscated many of the area's core mechanisms and devices. While the public law/tort law claims entertained by the Supreme Court and the High Courts build on core tort law ideas, the unique structural constraints that this method of adjudication operates under has required these courts to effectuate important and far-reaching modifications to established tort law doctrine. We noted a prime example earlier, where one court expressly noted that it was "not required" to undertake a fact-finding exercise to determine the existence of negligence on the part of the defendant, and that it was instead developing a theory of "absolute liability" for such situations, since they were exceptional.[61] What the court of course fails to mention is that a determination of absolute liability requires very little factual investigation on its part, besides proof of actual harm (i.e., something that an affidavit based system is perfectly suited to). The court's substantive reasoning and its new rule were thus driven almost entirely by the unique adjudicative structure involved, rather than by a considered need for a change in the rule. Along the same lines is the courts' expansion of the idea of vicarious liability to impose liability on government agencies for actions committed by their employees even when well outside the formal scope of their employment, or the courts' ready imposition of a duty of care for nonfeasance, almost unheard of in most other common law jurisdictions.

Changes along these lines aren't just problematic from a substantive point of view. They are additionally troublesome in so far as they are likely to not be limited to the unique needs of the adjudicative structure within which they are developed. Consequently, to lower courts

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[59] For the doctrinal confusion that the area has engendered, see: Jacob Matthew v. Union of India, (2005) 6 S.C.C. 1; Martin F. D'Souza v. Mohd. Ishaq, (2009) 3 S.C.C. 1; B. Jagadish v. State of Andhra Pradesh, (2009) 1 S.C.C. 681; Nizam's Institute of Medical Sciences v. Prasanth S. Dhananka, (2009) 6 S.C.C. 1; V. Krishan Rao v. Nikhil Super Specialty Hospital, (2010) 5 S.C.C. 513.

[60] In a recent landmark case, the Court ordered a private actor to pay out an uncharacteristically large sum of money, based on the earning potential of the victim. Balram Prasad v. Kunal Saha, (2014) 1 S.C.C. 384. The case garnered much publicity, principally because it was a major deviation from how courts had approached damage awards in such cases for years. Gayathri Vaidyanathan, *A Landmark Turn in India's Medical Negligence Law*, N.Y. TIMES, Oct. 31, 2013, http://india.blogs.nytimes.com/2013/10/31/a-landmark-turn-in-indias-medical-negligence-law/.

[61] Assoc'n of Victims of Uphaar Tragedy v. Union of India, (2003) 2 A.C.C. 114.

looking for guidance on substantive law, these modifications in doctrine might have a generalizable dimension, and come to be seen as no different from modifications made in the higher judiciary's exercise of its appellate authority over private law cases.[62] Such strategic manipulation of doctrine to suit the exigencies of the courts' writ jurisdiction could thus indelibly come to represent *the* tort law of India.

3. Moral Hazard

As an analytical matter, public law based tort claims present an additional problem. Recall that these claims involve imposing liability on state actors and institutions for actions committed by private individuals with or without actual governmental authorization. Additionally, such claims are meant to operate in parallel with traditional private law claims over the same set of facts. This parallel, complementary jurisdiction in essence recognizes two independent rights *and duties of care* in any ordinary tort law action.[63] The first is a traditional duty of care owed by the private actor in his/her private capacity to the victim; and the second is now a new structural (i.e., constitutional) duty owed by a state entity to that same victim. While the victim is at liberty to pursue either action or indeed both, enforcing the structural duty is consciously rendered easier and more expeditious; meaning that individuals have every incentive to pursue a public law claim to the exclusion of a private law one. In effect then, tort law claims have their duty of care bifurcated into a purely private one (owed by an individual), and a structural one (owed by the state).

The analytic bifurcation of the duty is of course beneficial to litigants in practice. As a systemic matter however, it interferes with the fundamental normative premises of tort law. According to a dominant school of thought, tort law's principal purpose is thought to lie in its ability to deter socially harmful behavior of different kinds, by forcing defendants to internalize the costs of their actions.[64] For this purpose to work however, it is obviously crucial that the actor saddled with the costs have the actual ability to change its behavior (and the outcome) in future cases. The deterrent function thus works because a careless driver is in a position to drive more carefully, in anticipation of (or in reaction to) having to bear the costs of carelessness. When the individual/entity on whom the costs are imposed has no ability to change the primary behavior that is causally responsible for those costs, liability is incapable of producing deterrence. In addition, it emboldens risk-taking by the causally responsible actor, since that actor now knows that the costs will be borne by someone else. This is the basic idea of a "moral hazard" and is common in the context of insurance.[65] Imposing liability on an independent state actor, and thereby eliminating (or reducing) a claimant's need for commencing an action against the private actor that is causally responsible for the harm, generates a distinct moral hazard. Thus, having a government health department compensate a claimant for the negligent behavior

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[62] To be sure, I am not claiming that this has already occurred as an empirical matter. Given that lower court opinions are yet to be systematically reported and published in India, validating this concern is impossible at this stage. Yet, my claim is that the risk of this occurring is pervasive, since the higher judiciary generates more decisions that fall into the public law/tort law category than those that fall into the category of strict private law actions.

[63] *See generally* John C.P. Goldberg & Benjamin C. Zipursky, *Shielding Duty: How Attending to Assumption of Risk, Attractive Nuisance, and Other "Quaint" Doctrines Can Improve Decisionmaking in Negligence Cases*, 79 S. CAL. L. REV. 329 (2006).

[64] *See* Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. REV. 377 (1994).

[65] *See* Steven Shavell, *On Moral Hazard and Insurance*, 93 QUART. J. ECON. 541 (1979); Steven Shavell, *On Liability and Insurance*, 13 BELL J. ECON. 120 (1982).

of a doctor employed at a government hospital without the doctor himself/herself being held liable in his/her individual capacity is unlikely to deter future negligent behavior,[66] and might indeed serve to induce such behavior since the claim effectively operates as a mechanism of insurance for individual action. In short, while victims might be made better off by public law based compensatory mechanisms, so too are actual and potential tortfeasors, since the costs of their behavior are borne by an altogether distinct state actor.

4. Claim Impersonalization

Even if one rejects the idea that tort law's primary purpose lies in deterring behavior, and locates it instead in the realization of corrective justice, the analytic bifurcation of duty created by the Indian higher judiciary remains equally problematic. In the corrective justice view, the institution of tort law operates by recognizing that a defendant's harm-producing actions require correction not just through the payment of compensation, but in addition by ensuring that such compensation come from the actual wrongdoer who is directly responsible for the wrong.[67] Central to this understanding is therefore a concept described by corrective justice theorists as the idea of "personality," which refers to the actors' capacity for purposiveness in their actions.[68] It is only because an actor is capable of purposive action—to avoid the injustice that is causally produced—that tort law's ascription of responsibility becomes defensible under the corrective justice idea.[69] In other words, an actor's direct ability to alter the injury-causing behavior is critical even to tort law's goal of corrective justice. When this attribute is eliminated, tort law ceases to work as an institution of corrective justice, and instead becomes a mechanism of mere distributive justice, where the system's principal goal lies in redistributing the benefits and burdens of society.[70]

Consequently, while the bifurcation of the duty may ensure payment *to* the victim, the fact that it comes *from* an actor other than the immediate wrongdoer undermines the goal of corrective justice. With compensation being readily obtained in public law actions, tort victims have little incentive to bring private law claims premised on the same set of facts. In the absence of such claims, the Indian hybrid public law/tort law claim effectively impersonalizes the injury as well as the claim in its compensatory zeal, thereby eliminating corrective justice from the system.

CONCLUSION

Much has been written about the virtues of India's constitutional rights revolution. Prior to its advent, access to courts was seen as largely illusory. In seeking to remedy this, the phenomenon of public interest litigation has come to play a fairly important role within the overall legal system. All the same, it has come at a rather significant cost: the entrenchment of

[66] What complicates this particular scenario is of course the presence of criminal liability for medical negligence in India.

[67] ERNEST J. WEINRIB, CORRECTIVE JUSTICE 3-4 (2012).

[68] *Id.* at 21-29.

[69] *Id.* at 25 ("[P]ersonality as the capacity for purposiveness contains the indispensable conditions for the ascription of responsibility for the effects of one's actions.").

[70] *See* John Gardner, *What is Tort Law For? Part 2. The Place of Distributive Justice*, *in* PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TORTS 335 (John Oberdiek ed. 2014).

the legal system's disdain for the extant processes and instrumentalities of justice. By shifting attention, decision-making, and recourse to itself in the exercise of its writ jurisdiction the Indian higher judiciary has only rendered more salient the ineffectiveness of India's lower courts, and the adversarial processes that they employ.

Nowhere is this more true than in relation to standard tort claims in India. By developing a parallel jurisprudence of public wrongs that are adjudicated as public law claims, the higher judiciary has successfully relegated to constitutional law matters that in most countries form the core of private law adjudication. Courts, lawyers, and litigants today celebrate this development as representing a highpoint in India's constitutional development. While they may indeed have something to celebrate in terms of the system's efficacy, simplicity, and transparency; these very virtues hide important fault lines that the courts' jurisprudence has produced. The system's efficacy has compromised on the traditional legal rules of evidence presentation and causal inference; its simplicity has for no independently justifiable reason successfully obfuscated various substantive tort law doctrines; and its supposed transparency has made much of the system "discretionary" at the remedial and adjectival levels. Every revolution has its casualties; and one prime casualty of India's rights revolution in this regard has been its already-ailing private law apparatus.