



CODIFICATION OF TORT LAW IN INDIA: FEASIBLE OR IMPRACTICABLE?

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CHAPTER I: INTRODUCTION

The legal system of India is a hybrid of common and civil law. This is evident from the relation between our judiciary and our legislature, wherein the legislature enacts laws keeping in mind the flexibility exercised by the judiciary in interpretation and rulemaking. Here, the Indian legislature enacts comprehensive legislations which aim to account for every possible scenario in the present and the future, and the judiciary then adjudicates on matters arising from these legislations and pronounces their judgements, in line with the civil law system. The part where the legal system exhibits characteristics of a common law system lies in the power of the judges to adjudicate and lay down rules in matters where there exists no legislation. Additionally, judges in India also have the power to strike down legislations if they are unconstitutional in nature. Thus, the judges implement and add to the body of “judge-made rule”. This is especially true in the area of Indian tort law.

The law of torts remains uncodified in India to this day. The body of rules and principles which account for enforcement of rights under tort law remain in judicial opinions in Indian case laws and are also derived largely from English principles.

Though it can be said that tort law in India is uncodified, it cannot be said that no aspect of it is reflected in special statutes. This depends on the understanding one has about the

connotation of the term “codification”. If “codification” is understood as a general “code” which accounts for the compilation of all the principles and additional aspects of an area of law, it is rightfully stated that tort law is uncodified in India. However, statutes such as the Public Liability Insurance Act, 1991 and the Motor Vehicles Act, 1988 are examples of pure concepts of tort law, i.e. absolute liability and negligence, being enacted in special legislations. Still, there is no general guiding Code which overlooks all these special legislations and fills in the gaps for those principles which are not enacted in any statute. Tort law claims in India are mostly adjudicated upon using case law precedents with the help of principles derived from English cases.

It is in light of these observations that this paper is concerned with an analysis of the codification of the law of torts in India. It endeavors to firstly provide for a brief look into the history and background to the dynamic nature of the law of torts. Keeping this nature and the potential need for codification in mind, it goes on to study arguments for and against codification, by several authorities and the efforts of the Government and Supreme Court of India in furtherance of this effort. It then goes on to study the legal regimes of Common Law countries which have a codified statute for Torts, to draw inferences about the functioning of the system in that country. Drawing from these, the paper draws a conclusion about the viability of codification and the authors perspective on the same.

The purpose of this paper is to study the advantages and disadvantages of the potential codification of the law of torts in India, considering the arguments put forth in the consideration of codification of laws in



general and also specific to tort law. This effort is made keeping in mind the efforts made by the Government and the Supreme Court. The question this paper ultimately seeks to answer is whether the codification of the law of torts is a viable option for the Indian legal system.

CHAPTER II: BACKGROUND

In order to truly understand the nature of tort law, a brief glance at the history of torts in England is essential. This is done for the purpose of understanding the legal system from which tort law has been borrowed from by India and the role its history plays in arguments which support or oppose codification of tort law.

Tort law in England arose from the recognition of a standard of reasonable behaviour, which translated into rights and duties of citizens over time.¹ The enforcement of these rights then meant that for every right there existed a remedy and the principle of “*ubi jus ubi remedium*” became the basis of tort litigation.² This resulted not only in the recognition and prevalence of a rightful conduct, but also in a legal recourse to those who had been wronged by the conduct of those who did not adhere to their legal duties or those who did not exercise due care.³ Thus, the body of tort law was developed in a way that it constantly grew on the basis of what was then recognized as a reasonable conduct.⁴

Over time, though the principles of tort law have been updated and modified through case laws, the nature of its growth has remained the same. This is evident, for example, from the development of the understanding of the tort of negligence over time. At the time of its origin, negligence meant a failure to perform any legal duty arising from a well-defined and pre-existing legislation or contract.⁵ From the 16th to the 18th century, the concept of duty mostly arose from vocational occupations, specifically those whose standards of duty was higher (for example a surgeon or innkeeper).⁶ Here, the liability arose on the non-performance of any such duty relating to their practice, irrespective of the circumstances behind it. However, in the 19th century this understanding changed in light of a new standard of tort law, i.e. on the basis of carelessness or fault.⁷ The standard of ‘duty’ was also affected by the efforts of legal scholars to establish principles of law which were universal in their application. The idea was that the body of tort law was to generally cover situations arising from duties owed by all men, and for it to not be limited to only vocational duties.⁸ Thus, the new determinant of negligence was the “reasonable man” test, which analysed situations from the perspective of a fictional “reasonable and prudent man”.⁹ Here, if the actions of the defendant fell outside the scope of this standard of reasonability, he would be held liable for the tort of negligence.

¹ Dr. Minal H. Upadhyay, *The Law of Torts in India*, 2 IJRSML27, 27 (2014).

² *Id* at 28.

³ Robert J. Kaczorowski, *The Common-Law Background of Nineteenth-Century Tort Law*, 51 OHIO ST. L.J. 1127, 1127 (1990).

⁴ Dr. Minal H. Upadhyay, *supra* at note 1, at 27.

⁵ Robert J. Kaczorowski, *supra* at note 3, at 1127.

⁶ Victor E. Kappeler & Joseph B. Vaughn, *The Historical Development of Negligence Theory*, 8 AM. J. POLICE 1, 3 (1989).

⁷ Dr. Minal H. Upadhyay, *supra* at note 1, at 27.

⁸ Victor E. Kappeler & Joseph B. Vaughn, *supra* at note 6, at 5.

⁹ H. Terry, *Negligence*, 27 HARV. L. REV. 40, 49 (1915).



The scope of negligence also saw tremendous development in specific contexts such as consumer law, for example.¹⁰ This is evident from developments following the landmark case of *Donoghue v Stevenson*¹¹ which provide for a deeper insight into the dynamic nature of tort law. Another aspect of negligence which saw immense growth and a widened scope was the jurisprudence relating to defenses against these claims.¹² It is pertinent to note that the growth in the principles of negligence is still quite dynamic, and witnesses widening of its scope time and again.

CHAPTER III: THE CONCEPT OF “CODIFICATION” AND ISSUES ARISING FROM UNCODIFIED TORT LAW

3.1 WHAT IS “CODIFICATION”

The process of codification is one which generally involves the processes of restatement, reform and harmonization.¹³ Restatement refers to the process of merely putting down in the form of a legislation, principles which were already prevalent and being followed as law in society. Reform takes place in the process of codification as it gives the law-maker an opportunity to cure any defects which previously existed in that law prior to codification. Harmonization is the last step, which essentially refers to the structuring of a statute such that it makes sense as a whole. Here, a correlation is made between all the provisions and a few general

clauses are added which are applicable to all the provisions of the code uniformly. However, the process of codification may also take on a further burden of providing for a complete code, wherein there exists absolutely no gaps for judicial interpretation to take place.¹⁴

Generally speaking, codification is of two types. The type followed in civil law countries is known as the “substantive codification” and that in common law countries is known as “formal codification”. “Substantive codification” refers to the process by which codes are formulated in a way such that all possible situations and circumstances, even in the future, can be accounted for by the statute, and where there is coherence in the entire code and its parts. On the other hand, “formal codification” is the process by which rules which already exist are restated and compiled, without changing any of the principles. Due to the fact that the legal system in India is a mix of both systems of law, there are many instances of “substantive” and “formal” codification. For example, the Information Technology Act, 2000 is a form of “substantive codification”, whereas the Hindu Marriage Act, 1955 is an example of “formal codification”.¹⁵

It is also relevant here to clarify what is meant by a proposed “code” in this paper. In the context of this paper, a “code” pertaining to the law of torts refers to a general compilation

¹⁰ H. Street, *The Twentieth Century Development and Function of the Law of Tort in England*, 14 THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 862, 862-865 (1965).

¹¹ *Donoghue v Stevenson*, 1 [1932] A.C. 562.

¹² Victor E. Kappeler & Joseph B. Vaughn, *supra* at note 6, at 10.

¹³ Peter M. North, *Problems of Codification in a Common Law System*, 46 THE RABEL JOURNAL OF

COMPARATIVE AND INTERNATIONAL PRIVATE LAW 490, 493 (1982).

¹⁴ Frank Gahan, *The Codification of Law*, 8 PROBLEMS OF PEACE AND WAR, PAPERS READ BEFORE THE SOCIETY IN THE YEAR 1922 107, 107 (1922).

¹⁵ Jean Louis Bergel, *Principal Features and Methods of Codification*, 48 LA. L. REV. 1073, 1076 (1988).



of all the guiding principles of tort law in the form of a comprehensive set of provisions. This refers to an overarching code applicable to all of tort law, and not just a simple legislation for specific and limited parts of law.

3.2 WHAT IS THE ISSUE WITH UNCODIFIED LAW OF TORT

In India, the law of torts is widely prevalent in academia and legal literature. However, in terms of enforcement of the rights arising out of offences of pure tort law, the numbers are surprisingly low. The enforcement is largely indirect through other statutes which contain aspects of tort law, or through constitutional torts.¹⁶ The reasons for these low numbers are two. Firstly, it is due to the fact that people are largely unaware of their rights under tort law, and secondly, that the uncodified nature of torts adds to the fact that it is all the more unenforced.¹⁷

Furthermore, due to a lack of a uniform code for torts, there is confusion over the application of concepts derived from English common law. This is evident specifically in the case of slander, where the principles are not followed precisely. On the aspect of areas of tort law which have not been decided on by judges, there is added ambiguity. The burden on judges to decide on these matters, too, increases as the entire burden of law-making in that aspect falls on them.¹⁸

Considering the example of malicious prosecution, it is often observed that courts tend to refer to precedents and quotes from

authoritative books to come to a decision on that matter. However, in the case where two different opinions are noticed, there is a conflict.¹⁹

CHAPTER IV: ARGUMENTS FOR AND AGAINST CODIFICATION OF TORT

LAW

4.1 ARGUMENTS FOR CODIFICATION

Since most of the body of tort law in India is present in case laws and books, there is a need for a code which provides for an easy referral for both lawyers and for judges. The purpose of this is to reduce the ambiguity one might face in interpreting a judgement given by a particular judge, as a code would provide for a clear and complete definition and scope of the applicability of tort law. The absence of a code also prohibits lawyers from specializing in the field of tort law.²⁰

Bentham's opinion in support of legislation in relevant here, too. In his "the theory of legislation", he proposed that codification provides for clarity in understanding the wrong and certainty in its enforcement and the resulting remedy.²¹ For when a remedy is provided for clearly in a statute, it cannot be denied by the court.

Roscoe Pound, too, spoke of the pros of codification and called them "orderly arrangements", which aid the process of ascertainment of legal principles. Additionally, he also stated that codification

¹⁶ INTERNATIONAL ENVIRONMENTAL LAW RESEARCH CENTRE, <http://www.ielrc.org/content/a0206.pdf> (last visited April 10, 2021).

¹⁷ S. K. Bhatia, *Specific Problems of Law of Torts in India*, 11 JOURNAL OF THE INDIAN LAW INSTITUTE 510, 511 (1969).

¹⁸ R. Ramamoorthy, *Difficulties of Tort Litigants in India*, 12 JOURNAL OF THE INDIAN LAW INSTITUTE 313, 313-321 (1970).

¹⁹ *Id.*

²⁰ Dr. Minal H. Upadhyay, *supra* at note 1, at 31.

²¹ AJ Pandya, *Codification of the Law of Torts* (1969).



ensures publicity of rights, offences and their remedies.²²

Looking at codification of tort law from the perspective of the function of the legislature, the process is favourable in India for the purpose of “deconstructing” the law of tort as it exists today in order to remove the parts of it which are redundant. In enacting a code, the legislature will dive deep into all the principles of tort law which have been present over time, and it will be able to separate the “wheat from the chaff”. This also reduces the burden on a judge to scavenge through years of precedents in order to ascertain the applicable principle.²³ Especially considering the fact that tort law has a history which can be traced back to several centuries, narrowing down the scope of ascertainment of legal principles through precedents would save the lawyers, judges and the clients a lot of valuable time.

Sure, the scope of judicial interpretation in India will still be unchanged so as to expand the scope of these principles where considered necessary, but the load of judges will still be lessened.

Lastly, even if tort law were to be codified in India, the interpretation of the provisions would still be largely based on the principles which have pre-existed. Here, the basic principle of “justice, equity and good conscience” would still be applicable²⁴.

4.2 ARGUMENTS AGAINST CODIFICATION

One of the most eminent authorities to oppose codification of tort law has been S.

Ramaswami Iyer, who stated that, “Undoubtedly a code is useful, but it is well to recognise that this branch of law is still in the process of growth and while it would be difficult to prepare a code, it would not also help a proper development of the law to do so”²⁵ He further added that codification of tort law would be impractical also because it may not account for all the unforeseen circumstance which may arise in the future, keeping in mind the dynamic nature of tort law.²⁶

In this regard, Savigny’s opinion against codification of law becomes relevant. In opposing the need for codification, Savigny stated that codification may lead to hampering the development of law, that the principles in one code may project on future generations, and that if they are passed in a hurry, the law may be subject to many defects.²⁷ While Savigny’s third objection is not directly applicable in this scenario, the first two are still relevant. This is keeping in mind the very nature of tort law, wherein the principles are subject to change very often.

Furthermore, in consideration of the process of codification, one important aspect is simplification of law. However, the process of simplification is ambiguous and may also lead to altering central components of tort law. On the contrary, a comprehensive code may also turn out to be extremely complex in an attempt to make it all-inclusive and account for all potential situations.²⁸

In many instances, this may also lead to dissatisfaction of the legal community, which is accustomed to the process of ascertaining

²² *Id.*

²³ Frank Gahan, *supra* at note 14, at 112.

²⁴ Louis Bergel, *supra* at note 15, at 1076.

²⁵ S.RAMASWAMI IYER, *THE LAW OF TORTS* 27, (LexisNexis 2010).

²⁶ AJ Pandya, *supra* at note 21.

²⁷ AJ Pandya, *supra* at note 21.

²⁸ Peter M North, *supra* at note 13, at 503.



the law from years of precedents and drawing from them. To them, the tort law may seem too brief or indigestible.²⁹

On the aspect of judicial discretion, it is a fact that legislators lean towards giving judges the least amount of power of judicial discretion while devising legal codes. The perspective from which this idea of codification has arisen is that of the “tyrannical discretion of a judge”. Here, the idea is to enact a code which would limit the scope of interpretation such that there is a provision for every potential situation to arise.³⁰ However, keeping in mind the jurisprudence of tort law which has been based largely on judicial decisions, a code made with that intent would be disastrous, to say the least. The amending power of the legislature, too, would take away from the power of the judges in truly implementing tort law.³¹

CHAPTER V: EFFORTS OF THE INDIAN GOVERNMENT AND SUPREME COURT TOWARDS CODIFICATION

One of the earliest suggestion pertaining to codification of tort law was seen in 1886 by Sir F. Pollock, who extended his effort towards codification by proposing the “Indian Civil Wrongs Bill”, when requested to do so by the Indian Government. However, this bill was not considered once prepared, and the very first effort towards codification was ignored.³² After this, every effort or statement for the need for codified tort law has only been in the field of government liability.

Starting with the case of *Kasturilal Ralia Ram Jain vs The State Of Uttar Pradesh*,³³ in 1964 for the first time the judiciary realized the need for a legislation pertaining to tortious liability of the government, and suggested the Indian Legislature to enact such a legislation. Following this, in 1965, an attempt was made by the Indian Government based on the recommendation of the Law Commission, which eventually failed in the year 1967.

In 2002, under the Report of the National Commission for Review of Working of Constitution, a recommendation was made in the same aspect, i.e. for the liability of government employees. However, this was not taken up by the legislature.

Since then, many cases have spoken about the necessity for such a legislation. For example, in the case of *Vadodara Municipal Corporation v. Purshottam V. Murjani*³⁴, while deliberating on the liability of the Corporation, the court cited the case of *Municipal Corporation of Delhi v. Uphaar Tragedy Victims Association and Ors.*³⁵, to restate the need for codification of torts. The court spoke specifically about the need for a legislation pertaining to tortious liability of the government, and how the absence of a uniform legislation has resulted in conflicting judgements. The court also spoke of the efforts of the Indian government in introducing two Bills pertaining to liability of government officials in 1965 and in 1967, which eventually failed.

²⁹ Peter M North, *supra* at note 13, at 505.

³⁰ Frank Gahan, *supra* at note 14, at 107.

³¹ Peter M North, *supra* at note 13, at 507.

³² Alice Jacob, *Vicarious Liability of Government in Torts*, 7 JOURNAL OF THE INDIAN LAW INSTITUTE 247, 247-251 (1965).

³³ *Kasturilal Ralia Ram Jain vs The State of Uttar Pradesh*, 1965 AIR 1039.

³⁴ *Vadodara Municipal Corporation v. Purshottam V. Murjani*, AIR 2015 SC 321.

³⁵ *Municipal Corporation of Delhi v. Uphaar Tragedy Victims Association and Ors.*, (2011) 14 SCC 481.



Though these efforts shed some light on the fact that in certain aspects, the need for a comprehensive code has been felt by the Supreme Court of India and by the Indian Government, it is also observed here that these efforts have not been made towards a general overarching code. Nevertheless, the need for a general code is still evident from the court's concerns over conflicting judgements, and the recognition of the burden faced by the judges in deciding these cases.

CHAPTER VI: ANALYSIS OF CODIFICATION OF LAW OF TORTS WITH THE LEGAL SYSTEMS OF DIFFERENT COUNTRIES

For the purpose of this section of the paper, the discussion is limited in two aspects. Firstly, that only the legal systems of China, France and the United States of America (USA) have been discussed, and secondly, only a general overview of these legal systems in the context of tort law have been produced. The aim behind discussing the legal systems of these countries is to find out if the enactment of a code in a civil law country is largely different from an enactment in India, which is a hybrid of both civil and common law. Additionally, tort law in the USA is analysed in order to get a perspective from a purely common law country, and to draw inferences on the similarities therein.

1. CHINA

In China, the Civil Code of China, 2020 accounts for the codified principles of Chinese tort law. Part 7 of this Code provides for the different circumstances under which the code is applicable.

On the aspect of liability, the code proposes that on the violation of another person's civil law rights, a fault-based liability would ensue. There is additional liability for the violation of a consumer's right, too, in an instance wherein low-quality products cause injury. (Chapter VI)

In general, the code provides for strict liability and fault-based liability. However, in the application of the code, it is unclear which liability would be applicable. It is in light of this ambiguity, that the court has the power to deem fit the circumstance in which either of the type of liability would be applicable. Furthermore, the court also has other powers under this code to exercise judicial discretion, in connection with the issuance of warnings, or the impositions of fines.

Additionally, the wordings of the principles are such that they are classified as "general principles", and a definitive meaning and scope of them may be determined through judicial decisions. However, the position of the applicability of the pre-existing interpretation of the Supreme People's Court is not yet decided.³⁶

2. FRANCE

In France, it is the French Civil Code, which provides for the law of tort in a code. Under Article 1382 and Article 1383, The fault-based liability as a basis

³⁶ RODL PARTNER,
<https://www.roedl.com/insights/china-civil-code/part-7-liability-for->

tort#:~:text=1177%20Civil%20Code%20clarifies%20that,such%20person%20may%20take%20reasonabl e (last visited April 11, 2021).



for tort liability is provided for. It is also stated that in such cases, it is not the act of a man, but his negligence which ascertains liability on him. Article 1384, too, furthers one's understanding of fault-based liability.³⁷

Under the Code, the task of the judge is limited to strictly following the code and the principles laid down therein. In doing so, he has very less scope of judicial creation. However, it is in this task of applying the fault-based liability that he necessarily has to exercise his discretion, on the basis of his understanding of the code and by keeping in mind the societal values, too. Here, the provisions of the code are in a general overarching nature, but its application is quite firm in practice.³⁸

A drawback to this code is its inability to provide adequately for accidents, and in deciding matters pertaining to accidents, the judge has an additional task of interpreting the code in a way that the victim gets remedy under tort law.³⁹

3. UNITED STATES OF AMERICA

In the United States of America, similar to India, there still exists no uniform code pertaining to tort law. The reason for this failure was that conflicting decisions of the states on many aspects of tort law could not be unified, and also due to the

creeping concerns over excessive federal control over civil law.⁴⁰

Though there is no single code, there are principles decided over by the Supreme Court of the United States of America, which prevail over all of the states. For example, in the case of *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*⁴¹, the principle of a "federal tort of constitutional mandate" was formulated, which came to be known as the "Bivens Action".⁴² Thus, it is observed that from the perspective of the absence of a code and reliance on precedents, the law of torts in America is very similar to India. However, in a certain way, the tort law is compiled and codified under the American Restatement of Torts, which is a treatise in the USA which provides for the common law principles of the USA.⁴³

It can be observed from the aforementioned accounts of different countries, that in essence, Civil law countries have tried to provide for a general code with an overarching effect over tort law as a whole. For example, in China, the code provides for a basis for tort liability in all cases, which is to be decided by the judge. In France, too, an attempt to provide for a general guide to determine fault-based liability has been made. On the other hand, the tort law in the USA is largely similar to the Indian scenario,

³⁷ André Tunc, *A Codified Law of Tort - The French Experience*, 39 LA. L. REV. 1052, 1052-1075 (1979).

³⁸ *Id.*

³⁹ André Tunc, *supra* at note 37.

⁴⁰ Ronald W. Eades, *Attempts to Federalize and Codify Tort Law*, 36 TORT & INSURANCE LAW JOURNAL 1, 8 (2000).

⁴¹ *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

⁴² Ronald W. Eades, *supra* at note 40, at 10.

⁴³ Ronald W. Eades, *supra* at note 40, at 9.



in that it is uncodified and relies entirely on judge-made law.

An important aspect to be noted through these observations is the underlying similarity between the function of judges following the civil codes and the judges in the common law countries. For even in the civil law countries where a code has been enacted, the function of the judge in exercising his discretion is still wide, be it for the ascertainment of liability in China or for adjudicating on accident matters in France. In light of this, it is safe to say that there is no scope of doing away with the power of the judges, even in the civil law countries where the main effort is to implement the code in its truest form rather than to rely on judge-made law, i.e. precedents.

It can be said that where some common law countries give the judges power to exercise discretion upfront, other civil law countries do so under the guise of “strict judicial interpretation”. Nevertheless, the function exercised at the end of the day remains the same to a large extent. The only difference remains in the power of a common law judge to create precedents, and in the civil law judge to decide on a case-to-case basis.⁴⁴

CHAPTER VII. OBSERVATIONS AND CONCLUSION

Having perused the background of tort law, specific issues pertaining to the absence of a tort law code, arguments for and against codification, the analysis of the tort law regimes of other countries, and the efforts of the Indian Government and the Supreme Court of India towards codification, we now

move on to discuss the viability of codification of tort law in India.

However, before considering the viability of codification, it is pertinent to look at the very process of codification by the Indian legislature. The two houses of the Indian Legislature, i.e., the Rajya Sabha and the Lok Sabha provide for a strong system of law making wherein any bill introduced in either of the houses is debated over, amended thoroughly, and only enacted upon having the consent of a majority of the members. Even once an act has been amended, the legislature still holds the power to make changes to these acts through amendments, in order to make them adaptable to changing times and circumstances. In this regard, even the judiciary has the power to add to these legislations, by way of judicial interpretation which furthers the understanding and scope of the applicability of laws, and by way of striking down the laws they think are repugnant to the Indian Constitution. Thus, keeping this in mind, it is the opinion of the researcher that codification of the law of torts is viable in India. This is because any concern regarding a code limiting the scope of development of tort law can be countered either by the power of the legislature to amend the code, or the power of the judiciary to interpret it in a way which expands the scope of applicability of the provision in question. Furthermore, the very process of deliberating by the legislature would act as a safeguard against hurried legislations, and this method would also ensure that the legislators formulate the code keeping in mind the very dynamic nature of tort law and they may devise general and wide-reaching

⁴⁴ Sigmund Samuel, *The Codification of Law*, 5 THE UNIVERSITY OF TORONTO LAW JOURNAL 148-160 (1943).



provisions in order to accommodate the constant change. A general code may also resolve any doubts pertaining to the projection of the code on future generations, and if this projection is still felt, an amendment or repeal of the code, followed by a new code, may resolve the issue.

With respect the aspect of judicial discretion, nothing in the process of codification of the law of torts is going to be such that it takes away from the powers of the judges to interpret the code, lay down precedents, and thus formulate rules or guidelines, by virtue of Article 141 of the Indian Constitution. Additionally, where the need may be felt, the judiciary may even recommend changes to the legislature for future consideration. Moreover, as the judiciary upholds the duty to adjudicate keeping in mind the principles of justice, equity and good conscience, it can be left to the judiciary to ensure that these principles are still upheld, in the event that it is doubted that the code may not provide for it. Thus, an essential and underlying concept which will necessarily be prevalent in the code is the principle of equity.

It is proper at this stage to examine the two different types of codification, i.e. “substantive codification” and “formal codification”, as mentioned in Chapter 3.1 of this paper.⁴⁵ With regard to the Indian Legal system, for codification of tort law a mixture of the two kinds of codification will have to be employed for the purpose of providing for a “general code”. The reason for this is because in the process of “formal codification” a restatement of the existing principles of tort law deriving from case laws has to be done in a proper and systemized manner. Further, the process of “substantive

codification” shall also be employed in order to ensure that the provisions are broad enough to encapsulate a wide range of potential circumstances and that due systemization take place to make the code harmonious and comprehensible. In Chapter III of this paper, the exact scope of “codification” has been specified in the context of its use in our discussion. As the aim of this paper was to examine the viability of a code which consists of the basic guiding principles of tort law, along with a comprehensive set of provisions which form an overarching code applicable in all matters related to tort law, a process of codification employing both substantive and formal codification methods would be the perfect fit.

As an alternative, however, the process of “gradual consolidation” may also be employed, wherein limited aspects of tort law are compiled and enacted as law. Eventually, when the need is felt for a “sweeping code”, the same may be enacted and it may account for the entire body of tort law.⁴⁶

⁴⁵ Jean Louis Bergel, *supra* at 15

⁴⁶ Frank Gahan, *supra* at note 14, at 111.