LIABILITY OF THE STATE IN TORT: AN *INDO-PAK* PERSPECTIVE

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FINAL APPROVAL

This is to certify that we have gone through and evaluated the dissertation titled **"Liability of the State in the Tort: An Indo-Pak Perspective"**, submitted by Mr. Hafiz Ghulam Abbas, a student of Ph.D (Law) under University Registration No. 48-SF/PHDLAW/F13, in partial fulfillment of the award of the degree of Ph.D (Law). This thesis fulfills the requirements in its core and quality for the award of the degree.

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Dedication

I dedicate my work to:

- **Dr. Hafiz Aziz-ur-Rehman**, Chairman Department of Law, IIUI
- **My Mother, Brother Ejaz Ahmad Sulehry & my wife**

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Abbreviations

AIR.....All Indian Report
ASJ.....Additional Sessions Judge
BRIC.....Brazil, Russia, India and China
CDA.....Capital Development Authority
CLC.....Civil Law Cases
FIR.....First Information Report
FAO.....Food and Agriculture Organization
FIA.....Federal Investigation Authority
HC.....High Court
HRW.....Human Rights Watch
ICCPR.....International Covenant on Civil and Political Rights, 1966
ICESCR .....International Covenant on Economic, Social and Cultural Rights, 1966
KEC.....Karachi Electric Company
KMC.....Karachi Metropolitan Corporation
KPK.....Khyber Pakhtun Khwa
LCI.....Law Commission of India
MLD..... Monthly Law Digest
NAB.....National Accountability Bureau
NDMA.....Natural Disaster Management Authority
NEPA.....The Natural Environmental Protection Agency
NEPRA.....National Electric Power Authority
NNS.....National Nutritional Survey
NWFP.....North Western Frontier Province
OGRA.....Oil and Gas Regulatory Authority
PCrL. J.....Pakistan Criminal Law Journal
PEMRA.....Pakistan Electronic Media Regulatory Authority
PEPA.....Pakistan Environmental Protection Authority
PIL.....Public Interest Litigation
PILER.....Pakistan Institute of Labour Education & Research
PLD.....Pakistan Law Digest
SC.....Supreme Court
SCMR.....Supreme Court Monthly Review
UDHR.....The Universal Declaration of Human Right, 1948
UNCAT.....The Convention against Torture and Other Cruel, Inhuman or Degrading or Treatment, 1984
UNICEF.....United Nations International Children's Emergency Fund
USAID.....United State Agency for International Development
WAPDA.....Water and Power Development Authority
WASA.....Water and Sewerage Authority

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The State Compensation Law, 1994 (China)

Abstract

Interactions between the state and the citizens, in any contemporary society, are huge in their number, common in their periodicity and imperative from the standpoint of their result/effect on the fortunes and lives of citizens. Such interactions, frequently, create legal difficulties, whose solution requires an application of different doctrines and provisions. Several problems so occurring fall within the realm of the law of torts. There is no specific legislation, in India and Pakistan, which administers the state liability for the torts committed by its public servants. The instant research is related to the tortious liability of the state in India and Pakistan. It, first, provides the concept of law of tort in common law as well as in Islamic perspective such as definition and defenses in law of tort. It, then, explores the developments of tort law in Greece, Roman, Islam, England, India and Pakistan respectively. It gives the idea of liability and state liability in Common and Islamic law perspectives. It points out the liability law/provisions in other jurisdictions of the World to see the application of the same in their legislations. Further, it also summarizes the situation of the rights and the problems faced by citizens due to abuse of executive powers, discretion, misfeasance, and maladministration by the state in Pakistan. It deems the present legal position in India and Pakistan and discusses the nature of the liability law in the same. It explores tortious liability law, its reforms and points out immunity clauses provided in different statutes in India and Pakistan. It examines the constitutional tort remedies jurisprudence developed by the Indian Higher Courts and later on also in the Higher Courts of Pakistan. In the backdrop of the above framework/research, it makes a comparison between the both jurisdictions, as India and Pakistan, to get findings/results of this research.

The main objective of this research is to examine the demand for a comprehensive legislation in order to bring uniform legal measures for speedy disposal of litigation and to provide reasonable compensation to the affected person for the tort committed by the public servants of the state. This research necessarily involves the adoption of a comparative framework to highlight the situation both in India and Pakistan. A qualitative method of research has been followed. It concludes that, since independence of Pakistan, it could not, as compare to India, develop state liability jurisprudence in tort law. It suggests codification of tortious liability of the state law in Pakistan by regulating the immunity clauses to overcome the problem.

Introduction/Statement of the Problem

The law of torts as followed by the courts in India and Pakistan is wholly English law of torts, which is founded on the principles of the common law of England.[1]The courts of India and Pakistan are bound to administer the common law of England rules only in so far as they are compatible with justice, equity and good conscience.[2] It has been generally suggested that the law of torts is rather underdeveloped in Indo-Pak and very little jurisprudence is available on this topic in both countries.[3]Nevertheless, since 1947 certain areas of torts conspicuously developed in both countries such as fatal accident claims, medical negligence and consumer protection. Codification of certain aspects of law of torts is another salient feature of these developments.[4] An important dimension of these developments is the gradual emergence of case laws and precedents on state's liability in tort. Interactions between the state and the citizens, in any contemporary state, are huge in their number, common in their periodicity and imperative from the standpoint of their result/effect on the fortunes and lives of citizens. Such interactions, frequently, create legal difficulties, whose solution requires an application of different doctrines and provisions.[5]Several problems so occurring fall within the realm of the law of torts.[6]There is no specific legislation, in India and Pakistan, which administers the state liability for the torts committed by its public servants.[7] The matter is then left upon the courts which have adopted innovative approaches to address the critical issues of state liability and

[1]Munir Ahmed Khokhar, *Law of Torts* (Lahore: Irfan law Book House, 2004), 13.
[2]Ibid., 14.
[3]Hafiz Aziz-ur-Rehman, *Citizens versus State: Public Servant Liability and Tort Reforms in Pakistan* (Islamabad: the Network for Consumer Protection, 2005), 2.
[4]Ibid.
[5]A Consultation Paper on "Liability of the State in Tort" Vigyan Bhavan Annexe, New Delhi, 2001, 2.
[6]Ibid.
[7]Hafiz Aziz-ur-Rehman, *Citizens versus State: Public Servant Liability and Tort Reforms in Pakistan* (Islamabad: the Network for Consumer Protection, 2005), 4.

citizens' grievances.[8] Indo-Pak courts have evolved tailor-made doctrines and principles to spell out the extent of governmental tort liability. Popular and widespread doctrines/maxims of "act of state, king can do no wrong, constitutional tort and dichotomy between state's 'policy' and 'operational' decisions" were discussed and responded in various judgments of higher courts.[9]As access to justice in these two developing countries is a major concern, High Courts and Supreme Court have quite courageously allowed tort claims through writ jurisdictions to afford better protection to the citizens against maladministration and misfeasance.[10] There are well-established reasons for the selection of this combination. Both countries inherited similar legal and social legacies and subsequently developed into two distinct streams. Being primarily common law jurisdictions, their social setups, development and institutional strengths are broadly comparable.

So far as no systematic study has been conducted to collate, analyze, interpret and compare these various developments in two jurisdictions. Sporadic and piecemeal approach still dominates and efforts have not been made to articulate and pin down the exact state of tort liability of the state. The results are quite obvious *i.e.* most of the public servants successfully escape their tort liability/ies[11] on the pretext of redundant and obsolete laws which are still alive on statute books and do not match with the judicial

[8]Hafiz Aziz-ur-Rehman, *Public Grievance Redress Laws, Procedures and Mechanisms in Pakistan* (Islamabad: the Network Publications, 2005), 7.

[9]A Consultation Paper on "Liability of the State in Tort" Vigyan Bhavan Annexe, New Delhi, 2001. 2; the Law Commission of India, *Liability of the State in Tort* (New Delhi: Ministry of Law, 1956), 3-6.

[10]In Pakistan the relevant sections are 183 (4) & 199 of the constitutions of Pakistan, 1973 and in India 32 & 226 of the constitution of India, 1949 respectively.

[11]Hafiz Aziz-ur-Rehman, *Citizens versus State: Public Servant Liability and Tort Reforms in Pakistan* (Islamabad: the Network for Consumer Protection, 2005), 4.

precedents set out by the courts to make them liable.[12] This research is presented to fill this gap.

Thesis Statement

The present state of the law which administers the liability of the state for the tort committed by its public servants in India & Pakistan is neither just in its substance, nor satisfactory in its form; hence it deserves a close second look in the present era in the larger interest of society.

Literature Review

There is a general dearth of literature on the proposed area of research in India and Pakistan. Academic tradition in both countries is not very strong (Though India being better than Pakistan in this regard) and not too many people could develop interest in the area of law of torts. However some sporadic efforts can be traced such as Report(s) of Indian National Commission to Review the Working of the Constitution, various articles appeared All India Law Reporter, Pakistan Access to Justice Programs' Background and Issue Papers, some broadly relevant dissertations and theses written by the students of LLM programs in both countries and the judgments of the courts. This research is an effort to fill the obvious gaps in existing literature. It is a pioneering work in the context of subcontinent as no meaningful discourse ever generated in this regard. It has strong linkages with access to justice literature in both countries as the researcher has approached torts as a mean to provide access to justice to poor and unprivileged. Further, there are several secondary sources which have been significant references for this research. Among them are the works written normally general in nature.

[12] These judgments have been discussed in the following research identifying the disparities therein.

In particular, the beneficial work is done by Hafiz Aziz-ur-Rehman with titled "Citizens versus State: Public Servants' Liability and Tort Law Reforms in Pakistan".[13]This very short research discussed the violations of the citizens' rights due to the negligent acts done by the public servants in Pakistan. It found no specific legislation to address the issue. It recommended for the codification of law of tort including liability of the public servants. Although it is very good research on the topic but is only limited to Pakistan and Indian jurisdiction has not been discussed. It does not discuss certain areas which the present research discussed such as constitutional tort and comparison with legislation and judgments of the courts in Indian jurisdiction.

In the same context, there was a well written consultation paper with the title of "Liability of the State in Tort" by "the National Commission to Review the Working of the Constitution in India in 2001."[14] This paper basically gave consultation on the report published by the Law Commission of India, 1956 on the subject which analysed the judgments of higher courts on constitutional torts, immunity clauses and criteria adopted to award compensation. It rectified almost all the recommendations given by the Commission in its report. It found that law on tortious liability of the state failed to meet the problems of the victims and its source is an archaic provision, which is almost two centuries old. It recommended for codification of law of tort and regularisation of good faith provision existed in Indian legislation. Although it gives a good idea about tortious liability of the state, constitutional tort and jurisprudence developed through judgement of

[13]Hafiz Aziz-ur-Rehman, *Citizens versus State: Public Servant Liability and Tort Reforms in Pakistan* (Islamabad: the Network for Consumer Protection, 2005).
[14]A Consultation Paper on Liability of the State in Tort by the National Commission to Review the Working of the Constitution, Vigyan Bhavan Annexe, New Delhi January 8, 2001.

the higher court in India but it is limited to Indian jurisdiction and does not cover Pakistan jurisdiction to discuss.

On the specific topic, there was a Ph.D thesis written by Chidananda Reddy S. Patil titled "Liability of the State for the Torts Committed by its Servants".[15]This research discussed the liability of the state for the tort committed by its servants in India. State liability under private and public law such as constitutional tort has been analysed through the judgements made by the higher courts in the same. It concluded that the law relating to liability of the State for the torts committed by its servants is not in conformity with the goals of modem welfare State. Especially personal liability of the servant has been focused. Although it is very good work on the subject but it has been written only in Indian perspectives.

There are two routes to get remedy for the victims of tortious acts such as through law of tort and human rights law. A Ph.D thesis has been written by considering human rights route titled "Liability of the State in Torts: With special reference to human rights" by P. K. Jayakumari. [16]It considered the violation of tort as violation of human rights in Indian perspectives only. Theory of liability of the state and constitutional tort has been discussed in details evaluating the judgments of higher courts in India. This research is confined to the liability of the state in India enforceable through writ petition, civil action in tort and through the process of criminal law. Although it is a good work on the topic but it does not discusses other jurisdiction such as Pakistan.

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[15]Chidananda Reddy S. Patil "Liability of the State for the Torts Committed by its Servants" (PhD diss., Karnatak University, 2002).

[16]P. K. Jayakumari, "Liability of the State in Torts: With Special Reference to Human Rights Violations" (Mahatma Gandhi University Kottayam, 2006) .

Similarly, a general study has been conducted as a Ph.D thesis by Muhammad Naeem with title of "Scope and Application of law of Tort in Pakistan".[17] It discussed the scope and application of law of tort in Pakistan perspective. Although it gives a general concept and development of tort and vicarious liability of the state and aster but it does not discuss the subject in hand in details. Especially it does not discuss in Indian perspectives.

Normally, the compensation s awarded under private law for the victims of tortious act committed by the state. But Indian higher courts have been started to award compensation under public law as well through innovative approach of constitutional tort. In this context "Tortious Liability of State under the Constitution" is work done by Justice U. C. Srivastava an Indian author.[18]It evaluated the doctrine of constitutional tort remedy developed by the Indian higher courts for the violation of fundamental rights. The doctrine of constitutional tort remedy has been evaluated only and other aspects of liability have not been discussed in this work especially in Pakistan perspective. In the same jurisdiction a paper on "Liability of State in India" has been written by Prof. G. B. Reddy.[19] This study is about the doctrine of sovereign immunity as a defense in Indian perspective. It focused on vicarious liability of the state involved in private and interfering with life and liberty of a citizen not warranted by law. It concluded that the doctrine of sovereign immunity has no relevance in the present-day context as it has undergone drastic change. The theory of state liability has been evaluated in Indian jurisdiction but Pakistan' law has not been discussed.

[17]Muhammad Naeem, "Scope and Application of Law of Tort in Pakistan" (PhD diss., University of the Punjab, 1991).
[18]Justice U.C. Srivastava. "Tortious Liability of State under the Constitution". Chairman, *J.T.R.I.*, Lucknow, India.
[19] Prof.G.B. Reddy. "Liability of State in India" Dept. of Law Osmania University, Hyderabad, India.

Similarly "Tortious Liability of Administration in Modern Times" is a study by Vivek Kerketta.[20]It applied the theory of liability on state administration to provide for social justice in a welfare state. It concluded that all actions of state and its instrumentalities must be toward the objectives set out in the constitution of India. It is a good study on the topic but only covers the Indian jurisdiction and other jurisdictions as Pakistan have not been discussed.

The maxim which gives the immunity to the state in tort actions is "The King Can Do No Wrong". There are various studies on it recommending its regularization such as "State Liability in Tort: Need for a fresh Look" a work done by Aman Hingorani in Indian jurisdiction.[21]This work evaluated the English maxim "The King Can Do No Wrong" which is still alive in Indian laws to claim immunity for any tort arising from the exercise of its 'sovereign power'. It concluded that the maxim is no longer in existence in England therefore it needs for fresh look in state liability in tort in India. Although it is a very relevant work which evaluates the maxim by applying on state liability in tort law in India. But Pakistan law has not been touched in this work.

In the same context "Vicarious Liability of the State in Tort in India: A Case for Reform" has been written a note by Debanshu Mukherjee & Anjali Anchayil.[22]This note discussed state liability regime in India. The main focus was Indian tort reforms. It underscored the need for legislation in this area and makes recommendations on the content of such legislation. Although, it discussed state liability law in the other jurisdictions of the world but the position in Pakistan has not been considered to discuss.

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[20] Vivek Kerketta, "Tortious Liability of Administration in Modern Times." India, November, 2011.
[21] Aman Hingorani. "State Liability in Tort: Need for a fresh Look" (1994) 2 SCC (Jour), 7.
[22] Debanshu Mukherjee & Anjali Anchayil, *Vicarious Liability of the State in Tort in India: A Case for Reform* (New Delhi: Vidhi Centre for Legal Policy, 2015).

Similarly "State Liability" is a very comprehensive paper written by Giuseppe Dari & Ors.[23] In this paper, three different purposes have been showed that state liability can serve as: i) to provide incentives for state agencies and private individuals to act efficiently; ii) to remove incentives for private parties and; iii) to allow a higher level of the administration to monitor the behavior of a lower level. Within this framework, they discussed substantive and procedural aspects of state liability in tort. Although it is a good compilation of state liability legislations of different jurisdictions but Indian and Pakistani jurisdictions have been neglected.

The same kind of comparative study "Approaches to Governmental Liability in Tort: A Comparative Survey" has been conducted by Frederick f. Blachly and Miriam E. Oatman.[24]This paper made comparison and summarized the ways in which the liabilities of the state and its agents for tort are solved in England, United States, Germany and France. Some attention has been given to the liabilities of officers, but it does not discuss in Pakistan & Indian perspectives.

The courts are awarding compensation to the victims of tort committed by the state in different ways. A good work "Tortious Liability of State: A New Judicial Trend in India" is done by Jamshed Ansari.[25] Various trends like the exemplary damages trend, human rights trend and checking the abuse of power by the officials have been evaluated in recognizing liability and awarding compensation to the citizens especially by the judiciary in the event of legal injury. This paper only discusses the ways of award of

[23]Giuseppe Dari & ors. "State liability." *European Review of Private Law* 18, no. 4 (2010).
[24]Frederick f. Blachly and Miriam E. Oatman. "Approaches to Governmental Liability in Tort: A Comparative Survey." *Law and Contemporary Problems* 9, no. 2 (1942): 181-213.
[25]Jamshed Ansari, "Tortious Liability of State: A New Judicial Trend in India," *Researcher* 6, no. 5 (October, 2014).

compensation to the victims of tortuous acts of the state in India. It is a good work on the topic but is only limited to Indian jurisdiction.

The law of tort could not develop due to several factors in Pakistan. A good work is done "Failure of Tort Law in Pakistan" by Warda Yasin.[26] This paper is general in nature and pointed out the factors due to that law of tort has failed to grow and provide relief to the poor and the injured. Liability for these non developments has been highlighted only in Pakistan perspective.

A Ph.D thesis explaining the concept of tort has been written by Basir Bin Mohamad with title of "The Islamic Law of Tort".[27]It discovered cases and principles governing tort in Islamic law. It concluded by taking an overall look at the ways the law of tort operates in the *Shari'ah.* It is a general study rather specific on subject in consideration. However, vicarious liability principle has been discussed to some extent.

Another Ph.D thesis "Tort Liabilities of Multinational Corporations in the Perspective of the Principles of Separate Legal Entity & Limited Liability" has been written by Warda Yasin.[28]The theory of tortious liability has been applied in multinational corporations in this study. Although it is a comparative study with India and Pakistan but is limited to the liability of the corporations rather than the state.

A number of research articles are available explaining the concept of liability and accountability of the state in the same and other jurisdictions.[29] Few theses have been

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[26]Warda Yasin, Failure of Tort Law in Pakistan. Available at: http://www.pljlawsite.com

[27]Abdul Basir Bin Mohamad, "The Islamic Law of Tort" (PhD diss., the University of Edinburgh, 1997).

[28]Warda Yasin, "Tort Liabilities of Multinational Corporations in the Perspective of the Principles of Separate Legal Entity &Limited Liability" (PhD diss., International Islamic University Islamabad, 2016).

[29] Articles from other jurisdictions are such as: Duncan Fairgrieve, "State Liability in Tort. A Comparative Law Study, "*Revue internationale de droit comparé* 55, no. 4 (2003): 1001-1002: John C. Jeffries Jr, "The Liability Rule for Constitutional Torts," *Virginia Law Review* (2013): 207-270: Lorian Hardcastle, "The Role of Tort Liability in Improving Governmental Accountability in the Health Sector." (PhD diss., Faculty

written on this topic. But there is no independent work on this topic especially with reference to India & Pakistan. This research is an effort to fill the obvious gaps in existing literature. An attempt has been made to show the dynamics of state's tort liability both from demand and supply side. It is a contribution in conceptual framework to analyze and evaluate tort based remedies in relevant jurisdictions. It also provides additional dimensions in 'Access to Justice' and codification of law of torts' campaigns.

Questions of the Research

Some broad issues which have been addressed elaborately during the present research are as following:

1. How Tort developed in Britain and Subcontinent?
2. How tortious liability of the state law developed in Subcontinent?
3. Whether the situation of citizens' rights against the state is satisfactory in Pakistan?
4. How constitutional tort remedy emerged and/or developed by Indian Higher Courts and then followed by Pakistan' Higher Courts? How the Higher Courts of India and Pakistan are dealing with related issues of constitutional tort?
5. Whether the role of judiciary is satisfactory in making the state liable for the torts committed by its public servants in Pakistan?
6. Whether the reforms done in state liability law by India and Pakistan after their independence, 1947 are satisfactory?
7. Do we need a comprehensive legislation/codification for making the state liable for the tort committed by its public servants in Pakistan?

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of Law, University of Toronto, 2013): Colin S. Phegan, "Public Authority Liability in Negligence," *McGill LJ* 22 (1976). Further, list of articles is given in bibliography.

Methodology of the Research

The research is doctrinal and involves primarily the content analysis of judicial decisions. It employs qualitative method with comparative analysis and evaluation of judicial decisions and legislations. During analysis original sources i.e. the verdicts of the Supreme Court and High Courts of India and Pakistan are consulted along with the reports of different law commissions. For critical appraisal of the role of courts, pertinent secondary sources such as juristic writings are consulted. The *Chicago Manual of Style* is used in the research for citation purposes. The English translation of the verses of the Holy Quran by Abdullah Yusuf Ali is used.[30]

In order to analyze the case law IRAC method has been primarily used. It mentions the case/ judgment from Indian jurisdiction on certain issues such as constitutional tort, the method used therein to award of compensation, jurisdiction of the court, immunity of the state and nature of the liability and then evaluates them. Further, the same is applied on the related cases in Pakistan jurisdiction, compares it and high light the gapes and short comings therein and suggests for concrete principles where necessary to fill the gaps.

[30] Available online at https://quranyusufali.com/

CHAPTER 1

DEVELOPMENTS OF LAW OF TORT: A HISTORICAL PERSPECTIVE

This chapter discusses the concept of law of tort in common law. It also explores the developments of law of tort in different areas such as Greece, Roman, England, India and Pakistan respectively. The concept of law of tort and its developments are being discussed as following.

1. 1. Legal Meaning and Concept of Tort

The word 'Tort' has been derived from the Latin term *'Tortum'* and its mean is conduct, which is tortious. It is equivalent of the Roman law *'Delict'* and English word 'Wrong'.[31] Black's Law Dictionary defines a 'Tort' as "a civil wrong for which a remedy may be acquired, generally in the shape of damages; a violation of an obligation that the law inflicts on everyone in the similar relation to one another as those involved in a matter."[32]The definition of tort also has been given by Salmond as, "a tort is a civil wrong for which the remedy is a common law action for unliquidated damages, and which is not exclusively the breach of a contract or the breach of a trust or other merely equitable obligation."[33]

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[31] John William Salmond, R. F. V. Heuston, and R. A. Buckley, *Salmond and Heuston on the Law of Torts*, 19th ed. (London: Sweet & Maxwell, 1987), 14; Munir Ahmad Khokhar, *Law of Torts* (Lahore: Irfan Law Book House, 2004),1.

[32] Garner, Bryan A., and Henry Campbell Black. "Black's Law Dictionary," 7th ed (1). 1999.

[33] John William Salmond, R. F. V. Heuston, and R. A. Buckley, *Salmond and Heustonon the Law of Torts*, 19th ed. (London: Sweet & Maxwell, 1987), 14.

Under this definition, Salmond considers a tort as a civil wrong. But then adds that there are some wrongs which are not tort such as: i) wrongs which are exclusively criminal in nature; ii) civil wrongs in which victim cannot get remedy for 'unliquidated damages', however it grants, exclusively, to certain other shape of civil remedy; iii) those civil wrongs, which are breach of contract exclusively; iv) those civil wrongs, which are exclusively breach of trust or equitable duties.[34]These can be discussed here shortly to differentiate with tort.

The tort being a civil wrong is broadly different from a crime. A crime is a wrong arising from a breach of a public duty. A tort, whereas, is a wrong arising from the breach of a private duty. However, a crime can also comprise a tort. For instance, assault is a tort, though it is also a crime. So a victim of assault may file a criminal case as well as civil suit for damages under the law of tort. Similarly theft of a worker of the property of his employer amounts to a crime of misappropriation as well as a tort of conversion. The wrongdoer may be prosecuted a crime and is imprisoned and brought also to a court to get compensation under law of tort.[35]

Further, there is a distinction between a contract and a tort. A contract is made by consent whereas a tort is imposed against consent. Contractual liability consequently arises out of agreement between the parties. Tortious liability on the other hand arises out of violation of contract.[36]A contract requires privity between the parties to it; in tort no privity is needed.[37]In addition, there are tortious duties which are subject to disparity by

[34]Munir Ahmad Khokhar, *Law of Torts* (Lahore: Irfan law Book House, 2004), 3.
[35]G. P. Singh, *the Law of Tort*, 25th ed. (Nagpur: LexisNexis Butterworths Wadhwa, 2009), 10.
[36](1936) 1 K.B. 399.
[37]G. P. Singh, *the Law of Tort*, 25th ed. (Nagpur: LexisNexis Butterworths Wadhwa, 2009), 5.

agreement, whether or not that agreement amounts in law to a contact between the parties.[38]

Similarly, quasi-contracts cover those circumstances where a person is made liable to another without any agreement for money or advantage taken by him to which the other person is better entitled. The responsibility under this contract is inflicted by the law due to that the defendant has been unfairly enriched at the cost of the plaintiff.[39] It differs from tort in that there is no duty owed to persons generally for the duty to repay money or advantage taken is payable to a specific person and the damages are 'liquidated damages' and not 'unliquidated damages' as in tort on these aspects, this contract has resemblance with the contract.[40]

A civil wrong which is the breach of trust cannot be considered as a tort. The ground of this barring is historical as the law of tort owes its source to the common law of England on the other hand the law regarding trust owes its source to the Equity Courts or the Courts of Chancery. So, the remedy for tort is an action for unliquidated damages whereas the same is not the case in breach of trust.[41]

In addition, there is another definition given by Frederick Polock, who says "every tort is an act or omission, not being only the breach of an obligation occurring out of a personal relation, or undertaken by a contract, which is associated in one of the subsequent modes to harm, including intervention with an absolute right whether there be measurable actual damage or not, undergone by a determinate person."[42]

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[38](1957) 1 Q.B 409; (1963) 2 Q.B. 43

[39]*United Australia Ltd. vs. Barclays Bank Ltd.,*: (1947) AC 1 (27) (Lord Atkin).

[40]G. P. Singh, *the Law of Tort*, 25th ed. (Nagpur: LexisNexis Butterworths Wadhwa, 2009), 5.

[41]Munir Ahmad Khokhar, *Law of Torts* (Lahore: Irfan law Book House, 2004), 36.

[42] Sir Frederick Pollock, *The Law of Torts: A Treatise on the Principles of Obligations arising from Civil Wrongs in the Common Law*, 4th ed. (London: Stevens and Sons Ltd., 1895), 1; Munir Ahmad Khokhar, *Law of Torts* (Lahore: Irfan law Book House, 2004), 2.

Under this comprehensive definition, tort may be an act which is: i) intended by the agent to cause harm without legitimate reason or excuse and does cause the harm; ii) in itself in contradiction of law, or an omission of legal obligation, due to which harm is caused and not intended by the individual so committing; iii) infringing of an absolute right and dealt as wrongful with no looking upon to the individuals' knowledge. This is an artificial expansion of the general exceptions or immunities, which are well-known to the system of English and Roman law; iv) causing damage, where the actor did not intend to cause it, however might and should with 'due diligence' have anticipated; v) consisted not only in circumventing or preventing harm, which the individual was duty bound to circumvent or prevent absolutely.[43]

In the backdrop of above definitions, it is inferred that, the tort is a civil liability and damages will lie for a civil injury. The fundamental requirement for the arising of the tort is the breach of duty. And tort has become specialized in its function whereas wrong has remained general in its nature. The basic objective of the law of tort is to compensate the victims or their dependents. The philosophy of grant of exemplary damages in certain cases is to deter the wrong doers and therefore deterrence is also another important objective of the law of tort.

1.2. Potential Claimants in Tort

In tort, a person who undergoes damage has right to file a suit against the person who caused him injury, however there are certain categories of person who cannot sue for their injury and also there are some persons who cannot be sued by any person. The role

[43]Sir Frederick Pollock, *The Law of Torts: A Treatise on the Principles of Obligations arising from Civil Wrongs in the Common Law*, 4th ed. (London: Stevens and Sons Ltd., 1895), 1; Munir Ahmad Khokhar, *Law of Torts* (Lahore: Irfan law Book House, 2004), 2. See also Harry Street, *The law of Torts*, 6th ed. (London: Butterworths, 1976), 2(b): John G. Fleming, "The Law of Torts," *Cambridge Law Journal* 48, no.1 (1989): 136.

of individuals as plaintiff of breach of their rights is greatly emphasized in law. Therefore, any rational person particularly those whose right is infringed are empowered to file a suit against these infringements to a court of law, on condition that, they are of sound mind and not disqualified by law. These are included such as businessmen, organization, government and other persons. Further, every person can claim who has joint right. In general, all persons have capacity to claim or to sue, however this rule is subject to modification regarding certain classes of persons. There are certain persons who cannot claim or sue.[44] These are included only to some limitations, convict person, alien enemy, husband and wife, corporation, unincorporated associations, (child in male, infant, minor), insolvents, foreign state as a state.[45]

1.3. Potential Defendants in Tort

Any rational person as businessmen, an organization, who causes injury to another by himself or his servant during employment can be defendant or is competent to be sued. But there are some exceptions to this rule in which they cannot be a defendants or cannot be sued.[46] These exceptions to some limitations includes, the state and its officers, foreign sovereigns, ambassadors, public officials, infants and minors, married women, trade union, lunatics, corporations, foreign corporations, highway authority, felonious torts and foreign torts.[47] The limitations provided in each case are subject to the permission of the central government and unless they themselves waived their privileges by submitting to the jurisdiction of the court.

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[44]Munir Ahmed Khokhar, *Law of Torts* (Lahore: Irfan law Book House, 2004), 57.
[45]Ibid., See these exceptions from 57-66.
[46]Ibid., 65.
[47]Ibid., See these exceptions from 66-86.

1.4. The Standard of Proof in Civil Tort Cases

Tort has three kinds of actions such as in negligence, intentional torts, and strict liability. These have little different elements, whereas, litigation process is mostly the same. The standards of proof are different for criminal as well as civil cases. The standard of proof for civil tort cases is preponderance of the evidence.[48] The standard of proof in negligence case is only being discussed in details.

1.4.1. Negligence in Tort

In the tort cases the most common factor is negligence. It is "the breach of duty caused by the omission to do something which a reasonable man, guided by those considerations which ordinary regulate the conduct of human affairs would do, or do something which a prudent and reasonable man would not do".[49] It happens due to a carelessness of tortfeasor and in effect harm is caused to other person.[50] A negligence suit has four elements that must be established to get any remedy. The plaintiff needs to prove these elements in his suit which are: i) duty of care; ii) breach of duty; iii) causation and; iv) harm. But Winfield considers only three constituents of negligence such as duty, breach and damages.[51]In addition, David G. considers five constituents.[52] Cause of action for negligence arises only when damage occurs which is an essential ingredients of tort.[53]A basic negligence lawsuit would require a person owing a duty to another person, then breaching that duty, with that breach being the cause of the harm to the other person.

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[48]G. P. Singh, *the Law of Tort*, 25th ed. (Nagpur: LexisNexis Butterworths Wadhwa, 2009), 592.
[49] *Blyth vs. Birmingham Waterworks Co*: (1856) 11 Ex 781, 784.
[50] G. P. Singh, *the Law of Tort*, 25th ed. (Nagpur: LexisNexis Butterworths Wadhwa, 2009), 458.
[51] Winfield and Jolowicz , *Winfield and Jolowicz on tort* (London : Sweet & Maxwell,1984), 69.
[52] David G. Owen, "The Five Elements of Negligence" *Hofstra Law Review* Vol. 35, No.4 (2007): 1686.
[53] *Cartlege vs. E, Jopling & sons Ltd.,*: (1963) 1 All ER 341.

i) Duty of Care: The first element of negligence is duty which is either to do or not to do something that will cause injury to other person. The existence of duty is governed by the text laid down in *Donoghue vs. Stevension* case.[54] For instance, it is a duty of the car driver to follow the regulations of the road such as to have driving license; speed limits etc are forced for the safety of others. A reasonable individual knows that not to follow the rules of the road may consequence to cause injury to another person.

a) Scope of One's Duty: The connection between parties forms the existence or absence of duty. The extent of some one's duty depends upon the relationship which changes responsibilities. [55] For instance, the duty of care owed a visitor may be different than one owed a trespasser.

b) The Reasonable Person Standard: A duty of care is on the basis of what a reasonable person, alike situation, would do. A reasonable person is a legal fiction. The reasonable person standard varies in accordance with the circumstances. It is an objective test on not what a person honestly thought was the right thing to do. The degree of care required of a person is that which an ordinarily prudent person would exercise under similar situation.[56]

ii) Breach: The plaintiff must prove a breach of duty of care. He must prove that the defendant's act or omission caused the plaintiff to be exposed to unreasonable risk of harm. In simple words, the responsibility of the defendant was not fulfilled against the plaintiff and he caused harm to the plaintiff.[57]

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[54] *Donoghue vs. Stevension*: (1932) AC 562.
[55] Munir Ahmed Khokhar, *Law of Torts* (Lahore: Irfan law Book House, 2004), 388.
[56] Ibid., 389.
[57] G. P. Singh, *the Law of Tort*, 25th ed. (Nagpur: LexisNexis Butterworths Wadhwa, 2009), 479.

iii) Causation: Negligence has two kinds of causation such as actual and proximate. Actual cause is sometimes referred to as cause in fact which means the plaintiff would not have been harmed. Proximate cause needs the natural, direct, and uninterrupted effect of a negligent act or omission to be the cause of a plaintiff's harm.[58] It also needs foreseeability.[59] For instance, a car driver loses control and hits a mailbox and mailbox hits an overhead power line and break off the utility pole onto the sidewalk a pedestrian is injured by the live power line. The actions of drivers are not the proximate cause of the harms of pedestrian as the resulting injury is so remote and so unusual as to render them unforeseeable. To decide the question whether the damage was caused by the wrong full act the 'but for' test is exercised.[60]

a) Eggshell Skull Theory: The "eggshell theory" is the legal principle about causation that a tortfeasor gets their sufferer as they find them.[61] This theory has been illustrated in the *Smith vs. Brain & Co. Ltd.*,.[62] Thus, if a plaintiff is harshly injured than a normal person due to a preexisting state, the defendant will be held as the cause of the injury. For instance, plaintiff having a blood disorder was needed to get blood transfusions and stay in the hospital for two weeks due to effect of accident. Under this theory, the actions of defendant would still be the cause of injury to the plaintiff although the consequences were not foreseeable.[63]

[58]David G. Owen, "The Five Elements of Negligence" *Hofstra Law Review* Vol. 35, No.4 (2007): 1681.
[59] G. P. Singh, *the Law of Tort*, 25th ed. (Nagpur: LexisNexis Butterworths Wadhwa, 2009), 459.
[60] Ibid., 178.
[61]The Law Dictionary, s.v, "Eggshell Skull," https://dictionary.thelaw.com/eggshell-skull-doctrine/ (last accessed at September 15, 2019).
[62] *Smith vs. Brain & Co. Ltd.*,: (1962) 2 QB 405.
[63] G. P. Singh, *the Law of Tort*, 25th ed. (Nagpur: LexisNexis Butterworths Wadhwa, 2009), 188.

iv) Harm: The suit in negligence cannot be filed in the court if harm to somebody does not cause.[64]Harm and causation are very essential to each other.[65]

The four elements must be present to start a case. It can be said in simple words that if there is a duty and breach of that duty, and a subsequent injury, it must be caused by that breach of duty.[66] It these criteria are fulfilled, the law permits to award of compensation to the victim of such injury in the form of damages.

1.4.2. Defenses to Negligence

The defense of "affirmative defenses" is used in negligence suit. It means that the defendant may not be liable if claims of victim of negligence are true and further if the affirmative defenses are established.[67] There are certain defenses such as:

i) Comparative Negligence: When negligence is involved on the part of both the parties, the court gives order to defendant to deem the comparative negligence of the plaintiff and decrease the proportion of recovery of damages to the plaintiff by that proportion;[68]

ii) Assumption of Risk: It means the plaintiff knows that the risk of harm is inherent with the circumstances and therefore surrenders the right to claim damages if harmed. It is, occasionally, done through a contract. For example, to go skydiving or playing high school sports. There is inherent risk linked with both of them and applicants assume the risk of harm;[69]

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[64] Harm is, "any touching of the person of another against his will with physical force, in an intentional, hostile, and aggressive manner, or a projecting of such force against his person". The law Dictionary, s.v, "Harm," BODILY HARM (last accessed at September 15, 2019).

[65] David G. Owen, "The Five Elements of Negligence" *Hofstra Law Review* Vol. 35, No.4 (2007): 1685.

[66] G. P. Singh, *the Law of Tort*, 25th ed. (Nagpur: LexisNexis Butterworths Wadhwa, 2009), 482.

[67]The law Dictionary, s.v, "affirmative defenses" AFFIRMATIVE DEFENSE (last accessed at September 15, 2019).

[68] G. P. Singh, *the Law of Tort*, 25th ed. (Nagpur: LexisNexis Butterworths Wadhwa, 2009), 593.

[69]Ibid.

iii) Statutes of Limitations: The law, civil and criminal, sets limits on when most legal measures can be started, which are called "statutes of limitations". These are placed through statute.[70]Possible causes for these limitations are for instance, after a while memories of witnesses reduce, evidence finds more hard to get or may be vanished, and people move and;

iv) Tolling of the Statute of Limitations: The statute of limitations, in some circumstances, may be taxed or extended. The plaintiff, in this case, cannot file the suit in its original form.[71]

1.4.3. The Use of Proof in Negligence

The need for a negligence case to be resolved through court is vital and obvious. The case under law of tort is very hard to settle on when an enforcement or infringement problems arise, and is also boring. The courts decide a case of negligence on the basis of direct or circumstantial evidence available to them. [72]

For this purpose, the courts must make a decision whether the misconduct of defendant under their liability of a provided duty, directly cause injury to other person. If the court discovers that the defendant is negligent, then defendant will be made liable for all injuries caused to the plaintiff. All the cases of negligence are very common and generally cope with harm concerning accidents in restaurants, motor vehicle accidents, public places, stores etc.,. Therefore, they need clear indisputable evidence that point outs the misconduct of the responsible person, as proof that a negligent act lead to such accident or harm.[73]

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[70] G. P. Singh, *the Law of Tort*, 25th ed. (Nagpur: LexisNexis Butterworths Wadhwa, 2009), 137.
[71] Ibid.
[72]Ibid.
[73]Ibid.

i) Burden of Proof & Presumptions

The burden of proof lies on the plaintiff to prove his suit in the court of law. He must prove that he was harmed due to act or omission for which defendant is liable.[74]But where the plaintiff has provided evidence adequate to plead the defendant to reply immediately, has abstained from performing so, the onus of proving negligence is released by the plaintiff.[75]Further the defendant, in a case in which injury caused in a car accident due to his negligent driving, may move the presumption by proving that car was not under his control at the time of accident.[76]

The doctrine in which a man can't get compensation if he has given consent to run the risk of accidental injury can be applied to those cases only which occur on a road. For proving contributory negligence the onus is on the defendant. [77]

The plaintiff, where harm is caused by the wrongful act of two parties, is not bound to a strict analysis of the immediate cause of the occurrence to discover whom he can sue. The plaintiff can sue all or any of the negligent parties conditional on rules as to remoteness of damage. He can get the full amount of damages from any of the defendants.[78]

In this regard, there are four elements of proof that must exist to prove negligent act and injury to the plaintiff such as:

i) It was a legal duty of the defendant (to save);[79]

ii) He failed to proper conduct by that party;

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[74] *Hammak vs. White*: (862) 11 CBNS 588.
[75] *Dekhari Tea Co. Ltd vs. Assam Bengal Ry Co. Ltd.*, (1919) ILR 47 Cal 6.
[76] *Liladhar vs. Harilal*: (1936) 39 Bpm Lr 44.
[77] *Dubli W. & W. Ry Co. vs. Slattery*: (1878) 3 App Cas 1155 (1169).
[78] *Palghai Coimbatore Transport Co. Ltd. vs. Narayanan*: ILR1939Mad 306.
[79] *Heaven vs. Pender*: (1883) 11 QBD 503.

iii) His failure led directly to the harm caused to the plaintiff and;

iv) A harm happened and was evident.[80]

The details of these four elements must be provided to a court in the shape of evidence, which can be direct or circumstantial. On condition that this proof is provided to the court, and it verifies the negligent act, the court will make liable to the defendant by awarding compensation to the plaintiff.

ii) Ways to Prove Negligence Case

A negligence case can be proved by using one of two forms of evidence such as direct or circumstantial evidence. The direct evidence is derived from personal knowledge of a witness or from images in a photo or video. Circumstantial evidence, whereas, needs a fact-finder to draw an inference on the basis of evidence produced.

a) Circumstantial Evidence

It is a kind of evidence that exists to indirectly prove a case, which is not as evident or clear as direct evidence. As direct evidence for a case would be a witness account, it can implicate the defendant to the negligent act.[81] This kind of evidence can be corporeal remnants of any harm which can be established by a series of scientific tests and theories. For this purpose, forensic science is one of the basic elements applied to give circumstantial evidence.

b) *Res Ipsa Loquitur*

In some cases, a plaintiff may rely on the doctrine of "*Res Ipsa Loquitur*". It allows the court to infer that a defendant acted negligently, even without other proof of misconduct.

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[80] G. P. Singh, *the Law of Tort*, 25th ed. (Nagpur: LexisNexis Butterworths Wadhwa, 2009), 592.
[81] Fleming James Jr., Proof of the Breach in Negligence Cases (Including Res Ipsa Loquitur) *Virginia Law Review* Vol.37, No 2 (1951): 194.

On the other hand plaintiff must prove that event happened does not occur in the absence of negligence and the defendant had exclusive control of the instrument that caused harm. *Res ipsa loquitur* is a kind of circumstantial evidence. It is derived from the Latin phrase "the thing speaks for itself", which refers to the accidents.[82] It needs four elements to be provided in turn for the evidence to be valid and existent which are: i) that the accident was because of the misconduct of the defendant; ii) the accident occurred under the duty of the defendant; iii) the plaintiff did not join in any actions contributing to the happening of accident and; iv) that the complete evidence and explanation of the accident be made greatly presented to the defendant. These elements give a clear description as to the failure in liability by the defendant and it's direct relationship to the harm caused by the plaintiff, and provides evidence to the defendant.[83]There is, however, an exception; accidents may be of such a character that negligence may be presumed from the fact of the accidents, the presumption conditional on the nature of the accident.[84]For example, dragging a wrong vein is evidence of negligence,[85] thus too is urging of a horse when it is within kicking distance of a passerby.[86]

This doctrine, *Res ipsa loquitur,* applies not only to a case where the thing that imposed the damage was under the only management and control of the defendant but also where it is under the management and control of someone for whom he is

[82] Law Dictionary, s.v *"Res ipsa loquitur,"* https://dictionary.law.com/Default.aspx?selected=1823 (last accessed at September 15, 2019).
[83]Fleming James Jr., Proof of the Breach in Negligence Cases (Including Res Ipsa Loquitur) *Virginia Law Review* Vol.37, No 2 (1951): 219.
[84]*Scott vs. the London Dock Co.*: (1865) 34 LJ Ex 220.
[85]*Wakeman vs. Robinson*: (1823) 1 Bing 213.
[86] *North vs. Smith*: (1861) 10 CBNS 572.

responsible or whom he has a right to control. The thing require not be in exclusive control given the evidence demonstrates outside influence a remote possibility.[87]

This doctrine is in spirit no more than a common sense approach, not limited by technical rules, to the assessment of the result of evidence in certain situations. It means that a plaintiff *prima facie* prove negligence where i) it is not possible for him to prove exactly what was the related act or omission which set in train the actions leading to the accident, but, ii) on the evidence as it stands.[88]

This doctrine just shifts the onus of proof, in that *prima faice* case is assumed to be made out, throwing on the defendant the duty to prove that he was not negligent. This does not mean that he must prove how and why the accident occurred. It is adequate if he convinces the court that he personally was not negligent.[89]Doctrine does not apply when the facts are adequately known. However this not essentially mean that negligence is not proved for the facts established may by themselves give rise to deduction of negligence.[90] Everyone is liable for the torts committed by him except under certain circumstances. These are called defenses, exceptions, immunity or protections provided by law of tort which are being discussed as following.

1.5. Important Defenses, Immunity or Exceptions to Liability in Tort in Common Law

In tort actions, the plaintiff is needed to establish the necessary essentials of the tort which the defendant or wrongdoer is alleged to have committed. On proving the necessary elements of the tort by the plaintiff or victim, the defendant or wrongdoer may

[87] *Lllooyde vs. West Midlands*: (1971) 1 WLR 749 (CA).
[88] G. P. Singh, *the Law of Tort*, 25th ed. (Nagpur: LexisNexis Butterworths Wadhwa, 2009), 596.
[89] *Woods vs. Duncan*: (1946) AC 401.
[90] *Backway vs. South Wales Transport Co. Ltd.,*: (1950) 1All ER 392.

avoid his liability by establishing any of the recognized general defenses, immunity or exceptions to liability in tort applies in his concerned case.[91]

There are certain defenses, immunity or exceptions to liability to the defendant in every tort action for example: i) leave and licence (*Volenti non fit injuria)*; ii) inevitable accident; iii) act of God; iv) statutory authority and; v) act of state. When an action is stated to be wrongful, it is presumed that no such meet the criteria stipulations of defenses, immunity or exceptions exist.[92] These can be discussed one by one shortly as under.

1.5.1. Leave and Licence (*Volenti non fit injuria)*

According to this 'maxim'[93] a person cannot subsequently sue when he has given consent to the commission of a wrong in the nature of a tort.[94] It presupposes a tortious act by defendant.[95] The maxim can be applied merely to: (i) intentional acts which, otherwise, are tortious; (ii) the cases where victim runs the risk of harm which would, otherwise, be actionable.[96] It does not apply to unlawful acts such as, no consent, leave or licence and nor where there is a violation of a statutory obligation. Further, it cannot be applied as well where the wrong-doer or defendant has been responsible for a hazardous

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[91]Munir Ahmad Khokhar, *Law of Torts* (Lahore: Irfan law Book House, 2004), 96; G. P. Singh, *the Law of Tort*, 25th ed. (Nagpur: LexisNexis Butterworths Wadhwa, 2009), 75.
[92]Ibid; see also S.C.Thanvi, revised Vishnu Konoorayar, "Law of Torts," *Indian Legal System*: 637. See at http://14.139.60.114:8080/jspui/bitstream/123456789/738/22/Law%20of%20Torts.pdf
[93] *Volenti non fit iniuria* is frequently -quoted type of the legal maxim made by the Roman jurist "Ulpian" which reads in original: *Nullainiuriaest, quæ in volentem fiat. (Digest,* Book 47, title 10, section 1 & 5, quoting Ulpian, On the Edict, Bk. 56. Literally translated as *"No injury is committed against one who consents").*
[94]*Smith vs. Baker & Sons*: (1891) AC 225 HL; *Imperial Chemical Industries vs. Shatwell*: (1965) AC 656.
[95]*Wooldridge vs. Summer*: (1962) 2 All ER 978 (CA). As cited G. P. Singh, *the Law of Tort*, 25th ed. (Nagpur: LexisNexis Butterworths Wadhwa, 2009), 95.
[96]*Ilott vs. Holbrook*: (1828) 4 Bin 628.

circumstance and the victim or sufferer takes the risk to protect persons involved in it. Notably, the maxim cannot be applied to negligence of wrong-doer or defendant.[97]

1.5.2. Act of State

An act of state is an act, which has been done for the performance of sovereign authority or power by any representative or agent of the state.[98] For this purpose, the instant act should: i) formerly be sanctioned or afterward ratified by the sovereign power and, ii) must be directed against for those who are not citizens of the state. It is hard to imagine actions of the state as between a sovereign power and its subject.[99] Action cannot be considered as act of the state if government justifies its act under umbrella of law; in this regard, its legitimacy and strength must be checked by applying the municipal law in the municipal courts. The principle, in England, of act of state applies to acts done outside Her Majesty' Dominions, and in addition, it is essential that the victim or sufferer should be an alien. However, this defense does not apply against a resident alien because he has the similar protection of law as an ordinary citizen has.[100]

1.5.3. Act of God

Act of God is also recognized as one of the general defence, immunity or exception to liability in tort. It is an accident which is solely the consequence of natural disaster and forces of nature for example flood, land-slide, storm, earthquake etc.[101] It means an act occurred due to natural reason directly without interventions of human beings and is "so unexpected that no human foresight or skill could reasonably be expected to anticipate

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[97]S.C.Thanvi, revised Vishnu Konoorayar, "Law of Torts," *Indian Legal System:* 637; Munir Ahmed Khokhar, *Law of Torts* (Lahore: Irfan law Book House, 2004), 98.
[98]Black's Law Dictionary, s.v. "Act of State," http://thelawdictionary.org/act-of-state/ (last accessed at December 12, 2016).
[99]S.C.Thanvi, revised Vishnu Konoorayar, "Law of Torts," *Indian Legal System:* 637.
[100]Ibid., 638.
[101]Ibid., 102.

it".[102] Thus, it is an act which is "due to natural causes directly and exclusively without human interventions, and that it could not have been prevented by any amount of foresight and pains and care reasonably to have been expected from him."[103] The act of God defense, immunity or exception was recognized first in *Nichols* v. *Marshal* case.[104]

1.5.4. Inevitable Accidents

It is that occurrence which could not have been prevented by the use of an ordinary care and skill of a reasonable person.[105] An accident has been observed by Green, M.R., as: "one out of the ordinary course of things, something so usual as not to be looked for by a person of ordinary prudence."[106] This defense cannot be applied to anything which either party might have circumvented.[107] For example, if a person drives a horse or carries firearms, it is his obligation to use reasonable care and; not to do harm to others in that way; even though using of such care an accident occurs, then he may pray that it was because of inevitable accident and not otherwise.[108] Thus, persons must protect against reasonable chances but they are not obligated to protect against fantastic chances.[109]

1.5.5. Statutory Authority

The defendant is not liable in this case if the act performed is sanctioned by a Statute or Act of the legislature.[110] It means that no action can be taken for the act where the

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[102]Ibid.
[103]*Nugent vs. Smith:* (1876) 1 CPD 423, 444.
[104]*Nichols vs. Marsland*: (1876) 2 EXD 1.
[105]"**An inevitable accident** is very important defence in the law of tort particularly in the realm of road accidents. It deals a state of affairs where a person, using due care, diligence and ordinary prudence, could not have anticipated an accident." (Merriam Webster Dictionary, s.v. "inevitable accident," https://www.merriam-webster.com/legal/inevitable%20accident (last accessed at January 1, 2017)).
[106]*Makin Ltd. vs. L.&N.E.Rly.:* (1943) 1 All ER 362.
[107]*Steiert vs. Kamma:* (1891) PR No. 3 of 1891.
[108]*Holms vs. Mather:*(1875) LR 10 Ex 261; *Fardon vs. Harcourt Rivington:* (1932) 48 TLR 215.
[109]*Fardon vs. Harcourt Rivington*: (1932) 146 LT 391 (392).
[110]"**Statutory Authority** in the law of tort is a defense even to nuisance, which is seen in England as a form of strict liability. If an act could be carried out under statutory authority without creating a nuisance as well as by creating a nuisance, the plea will be unsuccessful if the nuisance-avoiding way is not taken." (Legal

legislature has authorized the performing of an act (which if unauthorized would be a wrong) on the base that it cannot be dealt by any court that as a wrong which the authority has been given in law. As a result, the victim continued damage due to that act is without relief, unless the law maker has considered it appropriate to grant remedy to him. Further, there is no any action which lies for "*Damnum Sin Injuria*";[111] the remedy is to apply for damages granted by the law/act making legal what would otherwise be a wrong. Under the doctrine, the act is not wrongful as it is authorized by the legislature rather it is for a public purpose.[112] The basic idea behind the statutory immunity is that the lesser private right must surrender to the greater public interest.[113]This doctrine widens not only to the authorized actions by the laws/acts but to all potential effects of that certain action/s.[114]

Under the above discussion it can be stated that law of tort provides these conditions which when provide will put off an act from being wrongful which in their absence would be a wrong. So the act is supposed to be performed in such conditions. Similarly when an act is supposed in general conditions to be wrongful; it is said that no such qualifying condition exists.

Dictionary, s.v. "Statutory Authority," https://legal- dictionary.thefreedictionary.com/statutory/authority/ (last accessed at December 13,2016)).

[111]"It refers to a legal state of affairs in which the right of plaintiff is not given honor by another but where the violation of right of plaintiff does not give rise harm, or not a countable damage." (The Law Dictionary, s.v. "Damnum Sine Injuria," https://dictionary.thelaw.com/damnum-sine-injuria/ (last accessed at December 13, 2016)).

[112]*Quebec Ry vs. Vandry*: (1920) AC 662.

[113]*Allen vs. Gulf Oil Refinery Ltd.*: (1981) 1 All ER 353(HL) 365.

[114]*Manchester Corpn vs. Farnworth*: (1930) AC 171.

1.6. Developments of Law of Tort

History provides important information on the steady growth of any field including tort law.[115]So, it becomes essential to refer back to several case laws and legal position for the better understanding of the position related to the extent of tort in England and subsequently its emergence in India and Pakistan, which is being discussed in this part.

1.6.1. Developments of Law of Tort in Greece

The Ancient Greeks, about 1200-900 BC, had neither state laws nor punishments to enforce. The victim' family members themselves had settled the cases of murders by killing the murderer. If, for example, 'A' murdered someone that person's family had the right to kill 'A' back. This does not relate to the contemporary world because once you committed a crime you had to go to jail as punishment. This, resultantly, frequently started continual blood feuds in that era. The Greeks formulated their state laws in the middle of the 17th Century BC.[116] The first known written law of Ancient Greece was lay down by Draco in 620 which were so harsh that his name gave rise to our English term "Draconian" meaning "an unreasonably harsh law".[117]

Draco's laws were refined by Solon, an Athenian legislator & statesman who formed many new statutes such as tort laws, family laws, public laws and procedural laws.[118] As for as tort law is concerned, a tort takes place when someone does harm to 'A' or to his property. For example someone that has made an illegal change to the house

[115]K.M. Munshi, *the History and Culture of the Indian People-The Vedic Age*, vol.1, 6th ed. (Bombay: Bharathiya Vidhya Bhavan Inland Printers, 1971), 5.
[116]M. Gagarin, "The Unity of Greek Law" in *the Cambridge Companion to Ancient Greek Law*, ed. M. Gagarin and D. Cohen, (Cambridge: Cambridge University Press, 2005), 35.
[117]This term is referred, in modern times, to any extraordinarily harsh law. (Legal Dictionary, s.v. "Draconian Laws," https://legal-dictionary.thefreedictionary.com/draconian-laws/ (last accessed at December 12, 2016).
[118]M. Gagarin, "The Unity of Greek Law" in *the Cambridge Companion to Ancient Greek Law*, ed. M. Gagarin and D. Cohen, (Cambridge: Cambridge University Press, 2005), 35.

or personal property of 'A'. At that time many of these laws were written by Draco and Solon. These laws were related to particular punishment for particular crimes. Most crimes involved monetary penalties. Murder was a tort law, and the punishment was exile as set down by Draco. According to these laws, the doer had to pay fine for rape which was 100 Drachmas,[119]similarly the punishment for theft was depended on the sum/property stolen.

The law of ancient Greece developed most through Athens in 5th & 4th centuries, BC.[120] Prior to that era, archons (officials) had authority to adjudicate the cases hearing testimony and questioning them.[121] Athens, though, had written statues and established a formal court system in 5th century BC.[122]Two types of disputes were heard in these courts such as private and public.[123]In private disputes, merely an individual having personal interest could approach the court, in public disputes, whereas, any citizen could pursue the case.

In a private dispute, parties had to pay court fees, and could resolve the dispute without any penalty. In a public dispute, there were fine of 100 drachmas, but a court fee was not received from the parties.[124]

[119] "The **Drachma** was the unit of money that was used in Greece. In 2002, it was replaced by the Euro. The **Drachma** was also used to refer to the Greek currency system." (Cambridge Dictionary, s.v. "Drachma,"https://dictionary.cambridge.org/dictionary/english/drachma (last accessed at December 13, 2016)).

[120] M. Gagarin, "The Unity of Greek Law" in *the Cambridge Companion to Ancient Greek Law*, ed. M. Gagarin and D. Cohen, (Cambridge: Cambridge University Press, 2005), 35.

[121] A. Chroust, "The Legal Profession in Ancient Athens." 29 *Notre Dame Law Review* 339 (1954): 342

[122] Hornblower, S. and A. Spawforth, eds. *The Oxford Companion to Classical Civilization,* (Oxford: Oxford University Press, 1998), 221.

[123] Victor Bers and Adriaan Lanni, "An Introduction to the Athenian Legal System." (2003), 3. Available at http://www.stoa.org/projects/demos/article_intro_legal_system?page=3&greekEncoding=UnicodeC.

[124]M. Panezi, "Update: A Description of the Structure of the Hellenic Republic, the Greek Legal System, and Legal Research." 2017. Available at http://www.nyulawglobal.org/globalex/Greece1.html.

There were three types of courts in which disputes were heard. In the first kind of courts, majority of complaints were heard except killing or wounding. In the second kind of courts, homicide and wounding (including tort) disputes were heard.[125]And third kinds were the maritime courts to give predictable results to assist commerce.[126]In addition, certain *jurers* were also appointed from the old citizens having age of thirty or more without a criminal record.

There were certain laws giving a set of penalties. However in the absence of any guidelines in it the both party had option to suggest penalties and a second vote would be used to decide which would be inflicted.[127]Any appeal was not available from the decision of these jurors.[128]A mark able practice is mentionable here regarding the trial which was a public event. All the citizens had opportunity to attend the court proceedings.[129]

In brief, if someone was to bring legal actions in ancient Athens, he would get a lot of confusing procedures and customs. Contemporary lawyers might experience complexity confining themselves to a one-day trial. Nevertheless, the fundamental doctrines to present pleadings, the right to have one's side of the narrative heard, and judgments made by one's member of the society, would function two thousand five hundred years before just as they perform today.

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[125]A. Lanni, "Verdict Most Just: The Modes of Classical Athenian Justice." 16 *Yale Journal of Law and Humanities* (2004): 281.

[126] Ibid., 287.

[127] S. Hornblower and A. Spawforth, eds. *The Oxford Companion to Classical Civilization.* (Oxford: Oxford University Press, 1998), 396.

[128] Ibid.

[129] A. Lanni, "Spectator Sport or Serious Politics? *oi periesthkotes* and the Athenian Lawcourts." 117 *The Journal of Hellenic Studies* (1997):183.

1.6.2. Development of Tort in Roman Law

In Roman law the term 'Delict' is equivalent to the term 'Tort', which means "an obligation to pay a penalty because of a wrong or injury: an offense; a violation of public or private duty had been committed".[130]Until the 2nd & 3rd centuries AD, crimes related to public were not divided to private crimes. From that era, the remedy for private wrongs remained as civil proceedings.[131]The delict was fundamentally punitive action, though compensation was used to receive from accused as a fine which was awarded to the victim party and not to the state. Delict had four main kinds such as: i) *furtum* (theft); ii) *rapina* (robbery); iii) *injuria* (injury) and; iv) *damnum injuria datum* (damage to property).[132]To address the *injuria* the 'Twelve Tables', the earliest codification of Roman law (451–450 BC),[133] demonstrated the law in a situation of evolution from a scheme of private revenge to get compensation in place of taking revenge. In this regard, the amount for compensation was fixed by the state.[134]

But *talion*[135]was still allowed in case a limb of one person was broken by another man with condition that no resolution was acceptable by both of the parties. It is, however, uncertain if reprisal was ever exercised. The compensation for each offense was placed through law in early period. These laws, though, became outdated due to fluctuation of the value of money. Afterward, some flexibility was permitted to settle on

[130]The Law Dictionary, s.v. "Delict," https://thelawdictionary.org/delict/ title= "DELICT">DELICT (last accessed at Sep 13, 2019).
[131]F. H. Lawson, "Notes on the History of Tort in the Civil Law," *Journal of Comparative Legislation and International Law* Vol. 22, No. 4, (1940): 138.
[132] Ibid.
[133]James Muirhead. *Historical Introduction to the Private Law of Rome* (London: Adam and Charles Black, 1899), 97.
[134] Ibid.
[135]By which the person wronged could inflict the same injury. See its meaning at: talion.

compensation in each case. In addition, *injuria* not any more integrated only physical assault but also defamation and insulting behavior.[136]

The provisions regarding *"damnum injuria datum"* (property loss) are not identified in the Twelve Tables. They were, however in the early 3rd century BC in any case, superseded by the "*Lex Aquila*". Three categories were incorporated under this law such as slaves, buildings and animals.[137] An example is mentionable here; the compensation for unlawful killing of slave or an animal was equal to the uppermost worth of the slave or animal in the previous year. Similarly, compensation of any type of loss to the property was amounting to the uppermost worth in the last 30 days. In either case, the damage must have been caused by a wrong or negligent act. [138] The objective of the *Lex* was to begin a primarily compensatory assessment of compensation, in lieu of the determined fines which we familiar with to have established previously.[139] Though in the 2nd century BC, the inclusion of liability in the *Lex* into the Praetors' Edict (an annual declaration of principles) put it in place as the major basis of liability for the wrongful causation of loss by the imposition of corporeal damage to property.[140]

By the 2nd century AD, scholarly elucidation had brought into the *Lex* a doctrine that an individual must be responsible merely if the loss had been caused by his fault. Therefore, the *Lex* had started to be expanded by analogy in order that its doctrine possibly included any causation of monetary loss. After the era of the Emperor Justinian,

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[136] David Ibbetson, "How the Romans Did for Us: Ancient Roots of the Tort of Negligence," *U.N.S.W.L.J.* Vol. 26, No 2 (2003): 477.
[137] Ibid.
[138] Ibid.
[139] For example, in Table I, 13–15 of the *Twelve Tables* (Roman Statutes. Ed by Michael Crawford London: Institute of Classical Studies, 1996. (Bulletin of the Institute of Classical Studies Supplement 64), Vol. II, 565.
[140] Ibid.

the hide of Roman law permitted a break for breath, but the growth sustained with its revitalization to the end of the 11th century. In the beginning, there was little progress on the law because it was revealed in Justinian's *Corpus Iuris Civilis,* the modern name for a collection of fundamental works in jurisprudence, issued from 529 to 534 by order of Justinian I, Eastern Roman Emperor, for the glossators and commentators who were mainly interested to explain the manuscript rather than to construct on its foundations.[141] The 16th century, however, marked a move from this. Humanist scholars, mainly in France, started to discover the doctrines underlying the law. Similarly, neo-Scholastic scholars, principally in Spain, started the procedure of understanding to Roman law. These two groups flowed together into the work of the Dutchman Hugo Grotius. A first statement found in his "*De Iure Belli ac Pacis*"[142] regarding a general doctrine of liability for loss caused due to the fault of an individual.

The work of Hugo Grotius became the foundation of the theorizing of the Natural law advocates of the 17th and 18th centuries.[143] The ideas of these advocates passed into the scholarly exchange of the Europe of the Enlightenment. They were accumulated in the 18th and 19th centuries shaping the foundation of delictual liability provisions in two codes such as the French *Code Civil* of 1804 and the Austrian *Allgemeine Bürgerliche*

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[141] David Ibbetson, "How the Romans Did for Us: Ancient Roots of the Tort of Negligence," *U.N.S.W.L.J.* Vol. 26, No 2 (2003): 477.

[142] It is a 1625 book in Latin, written by Hugo Grotius and published in Paris, on the legal status of war. It is now regarded as a foundational work in international law. It was translated into English by Francis W. Kelsey (1925) with the collaboration of Arthur E. R. Boak, Henry A. Sanders, Jesse S. Reeves and Herbert F. Wright. Ibid.

[143] Such as Samuel Pufendorf, Christian Thomasius, Jean Barbeyrac & Christian Wolff. (David Ibbetson, "How the Romans Did for Us: Ancient Roots of the Tort of Negligence," *U.N.S.W.L.J.* Vol. 26, No 2 (2003): 477).

Gesetzbuch of 1811. These provisions, resultantly, gave the model for most of the codes of the 19th century.[144]

No system of law has more influenced the law. Most systems of law, whether stated to be civil or common law, borrow widely from Roman law as evidenced by the several basic Latin legal doctrines for instance caveat emptor, *res judicata* or *salus populi est supreme lex,* or laws regarding contracts, torts, families, wills and estates.[145]

1.6.3. Developments of Law of Tort in England

The broad scope of tort law was never devised by any authority in England. But duties enforced by the tort law of England are those which the Roman institutional writers summarized in the precept of *"Alterum non Laedere"*[146]which means 'not to injure another'.[147] There have been rules laid down under this Roman precept for the conduct-governing individuals of a civilized and cultured society.[148] In Europe, a systematic arrangement of law was given at first time by the Romans.[149]

In this regard, the first impact of the Roman influence started after the invasion of Caesar on Britain fifty years prior to Christ and they continued to stay there until 410 A.D. After three hundred years of rule, the Germans divided into three major groups as, the Angles, the Jutes and the Saxons and collectively called as English.[150]The land books (Diplomata) and laws of punishment and torts (Dooms) are the main basis of the Anglo-Saxon laws.[151]

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[144] David Ibbetson, "How the Romans Did for Us: Ancient Roots of the Tort of Negligence," *U.N.S.W.L.J.* Vol. 26, No 2 (2003): 478.
[145]Ibid.
[146] Encyclopedia Britannica, vol 22, 311. See at: http://www.librarything.com/work/10035064.
[147] Black's Law Dictionary, Henry Campbell Black, s.v. "*Alterum non Laedere,*" 5th ed. (1979), 72.
[148]Anand and Sastri, *Law of Torts*, 5th ed. (Delhi: Law Book Co., 1985), 1.
[149] J. M. Zane, *the Story of Law*, 2nd ed. (Indiana: Liberty Fund Publishers, 1998), 162-173.
[150] T. F. Tout, *A History of Great Britain*, Indian ed. (Jaiypur: Law Book House, 1944), 6-20.
[151] Potter, *Historical Introduction to English Law*, 2nd ed. (London: Sweet & Maxwell Ltd., 1926), 6.

Harold the King of England was conquered by William I of Normandy and the year 1066 A.D proved to be a turning point for England. The very significant characteristic of the Anglo-Saxon laws was the remedy in terms of cash and not in the shape of unliquidated damages which was in fact unfamiliar to the courts in those days whereas now it is a fundamental part of the definition of the term 'Tort'.[152]Under the Normans, the English law had made progress a lot that was primarily due to the establishment of '*Cusia Regis*'[153] by William.[154]

The authority to issue original writ gave the Chancellors a large control over the rights which the Royal Courts recognized in 12th and early 13th century. The writ and the right are correlative terms and gave a right system of actions in England.[155] The significant writ was 'Writ of Tress Pass' at that time.[156]It is said regarding the modern tort law that it originated from old forms or writs.[157]During the last half of the reign of Henry III the trespass of civil nature became common.[158]These writs granted remedies for the victims only and fine was not provided to the King. In this regard the writ of trespass upon the special case was supplemented by an extremely useful writ to give the relief harmed indirectly.[159]

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[152]Ramaswamy Iyer, *the Law of Torts in English and India*, 2nd ed. (London: LexisNexis, 2010), 23-24.
[153]"**Curia Regis** is a Latin term meaning "Royal Council" or "King's Court". It was the name given to councils of advisors and administrators who served early French kings as well as to those serving Norman and later kings of England." ,https://www.britannica.com/topic/Curia-Regis/ (last accessed at January 16, 2017).
[154] Sir W.S. Holdsworth, *Essays in Law and History* (Oxford: the Clarendon Press, 1946), 9.
[155]Ibid., 398.
[156] There were also other writs such as: i) the writ of rights; ii) the writ of debt; iii) writ of datinue; and iv) writ of replevin. Ibid.
[157] L. A. J. Armour and G. H. Samuel, *Cases on Tort* (London: Sweet &Maxwell, 1979), 15.
[158] S.F.C. Milson, *Historical Foundations of the Common law*, 2nd ed. (Oxford: Butterworth-Heinemann, 1969), 288.
[159] Sir Percy Henry Winfield, *the Province of the Law of Tort* (Cambridge: the Cambridge University Press, 1931), 11.

However, it was with the start of the writ of trespass that the law of tort could consequently reach this contemporary development in England.[160]

1.6.4. Developments of Law of Tort in India

The historical developments of tort law in India started with the advent of East India Company to the Subcontinent. Therefore, the origin of law of tort is associated with the formulation of British courts in British India. A short history of British Raj has revealed the developments of tort in that period. For the first time, the Queen Elisabeth permitted the "1st Charter of East India Company" on December, 1600. The company was allowed to trade at Surat by *'Firman'* from Emperor Jahangir on 1612.[161]The Company started, for the first time, to use the judicial powers on 1661 through "the Charter of Charless II". It was limited only for the factories and their branches of the Company in India.[162]

The Company was also given the powers to make laws; however, these powers were not amended till 1726.[163] Law and constitution was made for the betterment, good governance and trade of the Company. It is considered since 1726 that British Law has been introduced by "the Charter of George I" in India. The courts of Mayors were established in Calcutta, Bombay and Madras under the Charter. These courts had their powers to deal only the Englishmen.[164]The area of colony increased on the one hand the matters to deal became more complex on the other hand. Therefore, the parliament

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[160] W.W. Buckland and A. D. Mcllair, *Roman Law and Common Law*, 2nd ed. (Cambridge: Cambridge University Press,1966), 240-341; see also the study of Frederik F. Blachly and Miriam Oatman, "Approaches of Governmental Liability in Tort: A Comparative Survey" (pdf). It also describes the history of tort law in English Law perspective. 182-187; See chapter 1,page 11-54 for further study Carole Rhian Harlow, Administrative Liability: A Comparative Study of French and English Law (Phd diss., University of London, December, 1979).

[161]B.S. Sinha, *Legal History of India* (Luckhnow: Eastern Book Company Co., 1953), 1.

[162] G.C. Rankin, *Background to Indian Law* (Cambridge: Cambridge University Press, 1946), 1.

[163] V.D. Mahajan, *Constitutional History of India*. 3rd Ed. (New Delhi: S. Chand Publishers, 1971), 5.

[164] Prof. A. L. Goodhart, *the Migration of the Common Law* (London: Sweet & Maxwell, 1960), 22.

extended the jurisdictions of the courts to offices, persons and places. But, at the same time there was need of professional judges to deal the matters before them.[165]

In this regard, a supreme court was built in 1774 by replacing Mayors' courts. The Recorders' Courts were established in 1798 in place of the Mayors' courts of Bombay, Madras, however, a supreme court was established in Madras and Bombay in 1800 and 1823 respectively by replacing Recoders' Courts.[166]Further, there was also established a supreme court of judicatures in the different towns of residency. The Supreme Court had powers and jurisdictions to deal the matters of the court of Kings' Bench in England and common law was applied in this court.

It is significant to state here that the common law was also applied by this court in tort cases to give justice to people.[167] The Supreme Court had jurisdiction within the presidency towns only but the Company had other courts having jurisdiction within and out of these presidency towns as, *Suddar Nizamat* and *Diwani Adalats*.[168]The objectives of these courts were to deal the people outside the Towns. These courts, sometimes, differed from the Supreme Court in many respects.[169] In this regard, there was a dichotomy of the system of the courts which was not to be removed. By the Indian High Courts Act, 1861 matters were set right and the old existing dichotomy came to an end.[170] The England Law was made universal in India by passing of "the Charter Act, 1833".[171]

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[165]Prof. A. L. Goodhart, *the Migration of the Common Law* (London: Sweet & Maxwell, 1960), 22.
[166] Fawcett, *the First Century of British Justice in India* (Wotton: Clarendon Press, 1934), 227.
[167]*Waghela Rajsanji vs. Sheikh Masluddin:* (1887) L. R. 14 I, L. R. 11, Bombay HC. 551, 561.
[168] Dr. N. A. Mannan, *The Superior Court of Pakistan* (Lahore: Zafar Law Books, 1973), 48.
[169] The Employers' Liability (Amendment) Act, 1951, through its section 3 (d) has changed the position altogether.
[170] G.C. Rankin, *Background to Indian Law* (Cambridge: Cambridge University Press, 1946), 21.
[171]Ibid.

Under the section 8 of "the Act, 1861", all the records of the Company Courts were transferred to the High Courts.[172] The High Court of Bombay, Madras and Calcutta applied the tort law by using their ordinary original jurisdictions. The formal rules of law of torts are introduced by the English Rulers since 1772.[173]

The reception and adaptation of English law in India was made possible due to the common law trained judges to whom freedom was given. They had powers to reconcile differences under justice, equality and good conscience and they introduced also these rules in the *Mufussil* area. However, since the end of the 18th century until yet, "the English Common Law" as a whole and law of tort in particular is blend of "the English Common Law" applied to local conditions there. The British Court' jurisdiction as well as the function of the tort law enlarged till the independence of India, 1947. In this regard, tort law is to be applied in the light of justice, equity and good conscience.[174]Hence, it is not rendered[175]when a judge is to go against this kind of justice.[176] The same has been observed by the Privy Council.[177] However, this situation intersected into both countries, Indo-Pak, through Section 18(3) of "the Independence Act, 1947".[178]

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[172] Dr. N. A. Mannan, *the Superior Courts of Pakistan* (Lahore: Zafar Law Books, 1973), 50.

[173] After the Warren Hasting Plan. "By the time 1772, he was Governor in Council at Calcutta. He was of opinion that customs & traditions of the natives should protected. He realized the importance of the sound judicial system. Therefore, he introduced the judicial plans in 2 phases in the year 1772 & 1774." See at:https://notesmilenge.files.wordpress.com/2014/09/warren-hastings-judicial-plans.pdf (last accessed at January 26, 2017).

[174]*Surendra Kumar vs. Distt Board Nadia*: AIR 1942 Cal. 360, 365.

[175]*Nawal Kishore vs. Rameshwar*: AIR 1955, All 585; *Khushro* S. *Gandhi vs. N. A. Guzder*: AIR 1970 SC 1468.

[176]G. P. Singh, *the Law of Tort*, 25th ed. (Nagpur: LexisNexis ButterworthsWadhwa, 2009), 15.

[177]Ibid.

[178]Section18 (3). The Independence Act, 1947 (IO & II GEO.6. CH. 30).

1.6.5. Developments of Tort in Pakistan

Pakistan was independent in August 14, 1947 from British India. There was no any system of law to run the State machinery at that time. Therefore, most of the laws previously applicable to British India had been permitted to follow on emergency basis in Pakistan, including law of tort. It was applied at the same footing of "English Common Law" as in British India. A relevant Section 18(3) of "the Indian Independence Act, 1947"[179]is important example in this regard.[180]

The foundation of legal system of Pakistan is "English Common Law". But these laws have not been amended much since its independence to meet the requirements of the society. As Section 18 (3) of "the Independence Act, 1947" (as mentioned above) has been adopted by the earlier Constitution of the Islamic Republic of Pakistan by their Articles 224,[181] 225[182] and 280[183] respectively. Similar provisions also have been made in the Constitution of Pakistan, 1973, in its article 268 (1) that reads as, "except as provide by this Article all existing laws, subject to the constitution continue in force, so for as applicable and with the necessary adaptation, until altered, repealed or amended by the legislature."[184]

In this regard, Pakistan has not been made efforts to amend the adapted laws from the British rule except that the government has been held vicariously liable under the Constitution of Pakistan, 1973. Its Article 174 says that, "the Federation may sue or may

[179] This Act made and adopted by the British Parliament by receiving royal assent on 18 July 1947. It established two new independent Dominions: India (Hindu) and Pakistan (Muslim). (The Independence Act, 1947 (IO & II GEO. 6. CH. 30).
[180]Ibid., Section 18(3).
[181] The Constitution of the Islamic Republic of Pakistan, 1956, Articles 224.
[182] The Constitution of the Islamic Republic of Pakistan, 1962, Article 225.
[183] The Constitution of the Islamic Republic of Pakistan, 1972, Articles 280.
[184] The Constitution of the Islamic Republic of Pakistan, 1973, Article 268.

be sued by the name of Pakistan and a province may sue or may be sued by the name of the province."[185]Resultantly, the government frequently had escaped from its liability related to torts committed by its servants under the guise of the act of sovereign. So, the citizens are not able to get remedy against the State and its servants and they suffer ultimately.

However, some provisions have been made for the protection of employees working in factories in Pakistan.[186]Amendments also have been made in the copy right law to facilitate the people in educational institutions as text books by the federal government. "The Natural Environmental Protection Agency" (NEPA) has been established for the protection of environment in Pakistan.[187]

Although, the tort law is dispersed in different statutes and in case laws but some Acts consist of considerable part of the wrong and compensations.[188] These enactments are mentionable here for instance, "the Fatal Accidents Act, 1855",[189]"Pakistan Penal Code, 1860",[190]"Patent and Design Act, 1997",[191]"Patents (amendment) Ordinance, 2000",[192] "the Code of Civil Procedure, 1908",[193] "Trade Marks Act, 1940"[194] "The Code

[185]Ibid., Article 174.
[186] In this regard, the employer will pay compensation on contribution basis.
[187] Muhammad Naeem, "Scope and Application of Law of Tort in Pakistan" (PhD diss., University of the Punjab, 1991), 101.
[188] As mentioned by WardaYasin, "Tort Liabilities of Multinational Corporations in the Perspective of the Principles of Separate Legal Entity and Limited Liability", (PhD diss., International Islamic University, Islamabad, 2016), 39.
[189]The Fatal Accidents Act, 1855 (Act No. XIII of 1855).
[190] The Pakistan Penal Code, 1860 (Act XLV of 1860) Section 499 Defamation, Section, 351 Assault, Section, 339 Wrongful restraint, Section, 340 Wrongful Confinement, Section, 441 Criminal Trespass, Section 279-289 Negligence.
[191]The Patent and Designs (amendment) Act, 1997.
[192]The Patents (amendment) Ordinance, 2000.
[193]The Code of Civil Procedure, 1908 Act No. V of 1908 (21st March 1908) Section 19 Suit for compensation for wrongs to person or movables, Section, 91 Public Nuisance.
[194]Trade Marks Act, 1940 (V of 1940).

of Criminal Procedure, 1898",[195] "the Employers Liability Act, 1938",[196]"the Provincial Employees Social Security Ordinance, 1965",[197]"the Punjab Consumer Protection Act, 2005",[198]"Pakistan Environmental Protection Act, 1997",[199]"the Workmen's Compensation Act, 1923",[200]"the Companies Act, 2017"[201] and "the Factories (Amendment) Act, 1934".[202]

It is fact that the attitude of litigants related to tort actions has not been appreciable in Pakistan.[203] This attitude is due to certain reasons. Important changes have not been taken place in law of trots since its introduction by the British. For instance, amendments have not been happened in the criminal law of negligence,[204] public nuisance[205] and defamation[206]as these described in the Pakistan Penal Code, 1860 and the Code of Criminal Procedure, 1898 respectively. Similarly, the law of torts has been applied by Pakistan courts as it had applied by the British Raj in Subcontinent. Negligence, defamation and nuisance in law of tort are the important examples in this regard.[207]Though, there have been taken place the amendments in the law related to

[195]The Code of Criminal Procedure, 1898 as amended by Act 2 of 1997, Section, 133 Public Nuisance.
[196] Employers' Liability Act, 1938.
[197]The Provincial Employees Social Security Ordinance, 1965 (W.P. Ord. X of 1965).
[198]The Punjab Consumer Protection Act, 2005 (Pb. Act II of 2005).
[199]Pakistan Environmental Protection Act, 1997 (Act No. XXXIV of 1997).
[200]The Workmen's Compensation Act, 1923 (Act No. VIII of 1923).
[201]The Companies Act, 2017 (Act no. XXI of 2017).
[202]The Factories (Amendment) Act, 1934 (Act XXV of 1934).
[203]These major reasons are:"likeness of criminal prosecution by the litigants, court-fee and the British, lack of interest by the lawyers, on codification of law of torts, doctrines of champerty and maintenance, expensive litigation and excessive tolerance by the people, therefore, due to these reasons tort law has failed to develop and provide relief to the poor and the injured party." For further details see the study of Warda Yasin, Failure of Tort Law in Pakistan. Available at: http://www.pljlawsite.com (last accessed at January 28, 2017)).
[204] The Pakistan Penal Code, 1860, Sections 279-289 & 336.
[205] The Code of Criminal Procedure, 1898, Section133 & 142.
[206] The Pakistan Penal Code, 1860, Section 499.
[207]Warda Yasin, Failure of Tort Law in Pakistan.

vicarious liability of the government,[208]copyrights law[209]and the common man as employer.[210]But, these changes were made to get the objectives for study, teachings and research in educational institutions as a textbook.[211] It is pertinent to mention here that the compensation under "the Fatal Accidents Act, 1855" and *Diyat* in Islamic law are the same thing because both are blood money and ensue from the wrongful act of the killer, for example *"Qatl-i-Khta".*[212]It is mentionable here that "the Law and Justice Commission of Pakistan" has made recommendations to repeal "the Fatal Accidents Act, 1855" because the same issues are dealt with the *Qisas* and *Diyat* provisions. According to the Section 1 of "the Fatal Accidents Act, 1855" a suite lies against a person who is guilty of some default, negligent and wrongful act a suite can be filed against him and would have been liable for the injury to the deceased person if the latter had not died of it.[213]A right of action on child, parents, husband and wife are not conferred in this section.[214] It entails that no suit for damages will be maintainable if there is no child, parent, husband or wife of the deceased person under "the Fatal Accidents Act" even if the deceased person has other living heirs.[215]

The compensation is already incorporated in the code in the shape of *Diyat* and *Arsh* in the *Qisas* and *Diyat* law. Only in *Daman* cases, the discretion of the court will be functioned whereas; the court is the only judge to grant the compensation under "the Fatal Accidents Act, 1855". The damages may be granted under the Act considering the

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[208] The Constitution of the Islamic Republic of Pakistan, 1973, Article 174.
[209] The Copyrights (Amendment) Act, 1973, Section 4.
[210] The Employees Social Security Ordinance, 1965. Ibid.
[211]Muhammad Naeem, "Scope and Application of Law of Tort in Pakistan" (PhD diss., University of the Punjab, 1991), 101.
[212]*Qaiser Ali &Ors* v. *K.R.T. Corporation:*(P.L.D. 1986 [Karachi] 489, 509, 514).
[213] The Fatal Accidents Act, 1855, Section 1.
[214]Ramaswamy Iyer, *the Law of Torts in English and India*, 2nd ed. (London: LexisNexis, 2010), 78-79.
[215]Muhammad Naeem, "Scope and Application of Law of Tort in Pakistan" (PhD diss., University of the Punjab, 1991), 101-2.

status of the parties who are involved whereas, the court cannot exceed the amount in compliance with *Diyat* law. Nonetheless, it seems in the existence of *Diyat* and *Qisas* law that the significance of the law of fatal accident is bound to suffer. Hence, it is suggested for the amendments to sue for damages by legal heirs and to fix the age of the deceased person in order to survive the law under "the Fatal Accidents Act, 1855".[216]

It is also pertinent to mention here that improvements were made for the protection of health and safety of the workers. For example, "The Industrial Relation Ordinance, 1969" was amended to regulate relations between workers and employees. "The Workmen's Compensation Act, 1923" was amended to grant more compensation through "the Schedule IV of Workmen' Compensation Amendment Act, 1957".[217] "The Factories Act, 1934" were amended by "the Factories Rules" in the provinces.[218]

By discussing developments, it is also mentionable here that there are such torts which are crimes as well for example, malicious prosecution, assault, theft and battery. The old rule of distinction between civil and criminal prosecution does not apply to Pakistan[219]as well as in India.[220] This rule has been abolished in England.[221] The action can be started when a tort is either civil wrong or a criminal wrong. In this regard, preference should be given the tort action to follow the action related to crime. To refrain

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[216]The fixation of age is different in different cases for example; Miss *Shamsun Nissa & another vs. K.R.T. Corporation*: (P.L.D. 1975 [Karachi] 913) (60 years). See further for fixation of age in different cases Muhammad Naeem, "Scope and Application of Law of Tort in Pakistan" (PhD diss., University of the Punjab, 1991), 101.

[217]*Hasham vs. Saeeda Begum*: (P.L.D. 1963 [Karachi] 21 at pp. 22-23).

[218]Punjab Factories Rules, 1978 (No. 5-2(Lab-II)/72); Sindh Factories Rules, 1975 now Sindh Factories Act, 2016 (Act no. XIII of 2016); Factories (N.W.F.P) amendment Act, 1946.

[219]*Muhammad Akram vs. Farman*: (P.L.D. 1990 S.C. 28.p. 36).

[220]*Abdul Kader vs. Muhammad Mera*: I.L.R. (1881) 4 Mad. 410; *Keshab vs. Muniruddin*: (1908) 13 C. W. N. 510 as cited Munir Ahmed Khokhar, *Law of Torts* (Lahore: Irfan Law Book House, 2004), 9.

[221] Criminal Law Act, 1967, Chapter 58, Section 1.

from committing tort in future, a tort action is necessary to award the damages to make sure that these actions taken have eternal effects on the mind of offender.

1.7. Conclusion

This chapter discussed, first, the concept of tort in common and Islamic law perspective then its developments in Greece, England, India and Pakistan. It finds that, every person has civil/private right such as property, liberty, dignity, honor etc, which cannot be violated except his consent or legal cause. In case of infringement of these rights, he can claim for compensation through court. It concludes that the law of tort in Indo-Pak is completely on the basis of "the British Common Law" which is governed as rules "justice, equity and good conscience".[222]In this regard, the courts can be more progressive than the English courts and can evolve new principles of tort liability not yet acceptable by the English Law in Pakistan and India to decline the outdated principles of common law. It also concludes that the law of tort still has not been codified in India and Pakistan since their independence, 1947.

[222]It has also been held: "Section 9 of the Civil Procedural Code., which enables a civil court to try all suit of civil in nature impliedly confers jurisdiction to apply the law of torts as rules of justice, equity and good conscience". (*Rohtas Industries vs. Rohtas Industries Staff Union*: (AIR 1976 SC 425) *Rohtas Industries vs. Rohtas Industries Staff Union*: (1976) 2 SCC 82 (93) as cited Munir Ahmad Khokhar, *Law of Torts* (Lahore: Irfan law Book House, 2004), 13.

CHAPTER 2

LIABILITY OF THE STATE SERVANTS TOWARDS CITIZENS

In the above chapter one, the concept of law of tort and its developments in Greece, England, India and Pakistan have been discussed. It also needs to discuss the concept of liability and liability of the state to establish the instant research and finally its findings. So, this instant chapter provides the basic concept of liability, state liability and its developments. It discusses the development of liability law in British India, India, Pakistan especially and other jurisdictions of the World generally (just for reference). It also summarizes the current situation of the rights and the problems faced by citizens in Pakistan due to abuse of executive powers, discretion, misfeasance, and maladministration by the state. For this purpose, organs of the state are also being discussed along with other institutions such as Law Enforcement Agencies (Police, FIA), Media, Food, Railways, Natural Disaster Management and Health.

2.1. The Concept of Liability

The meaning of the term 'Liability' is "'the state of being bound[223] or obliged in law or justice to do, pay, or make good something; legal responsibility'[224],'the state of being

[223]Legal Dictionaty, s.v. "Liability," http://legal-dictionary.thefreedictionary.com/liability(last accessed at November 11, 2016).

[224] Black's Law Dictionary, s.v. " Liability," http://thelawdictionary.org/liability/(last accessed at November 12, 2016).

liable'[225], and 'the state of being legally responsible for something'".[226]The liability, according to Salmond, is "the bond of necessity that occurs between the wrong doer and the remedy for the wrong."[227] A wrong may be committed by a breach of duty enforceable by law or morality. There is difference between moral wrong and legal wrong. A legal remedy will be available for breach of legal duty whereas, social pressure as a sanction will be available for breach of moral duty. There are two divisions of legal duty such as under civil and criminal law. The punishment is for wrong doer in criminal law whereas compensation is received for damages in civil law. The victim party in both cases has right against the wrong doer therefore, wrong doer is duty bound to comply with their claim.[228]

Liability, in other words, is of two kinds such as civil liability and criminal liability.[229] Civil liability deals with the right of plaintiff against the defendant in civil actions; criminal liability, whereas, deals with in criminal actions. It may also be divided in to penal and remedial. Remedial liability is that in which the sole intention is to enforce the right of victims and not to punish the wrong.[230] Thus, the liability of the debtor is to repay the money to the creditor and not to suffer a sentence of imprisonment in criminal jail. Such liability is known as remedial liability.[231]The liability of the wrong doer is called penal liability when the law finds it inexpedient to enforce a duty

[225]Collins Dictionary, s.v. "Liability," https://www.collinsdictionary.com/dictionary/english/liability(last accessed at November 12, 2016).
[226] Oxford Dictionary, s.v. "Liability," https://en.oxforddictionaries.com/definition/liability (last accessed at November 12, 2016).
[227] P.J. Fitzgerald, ed., *Salmond on Jurisprudence* 12th ed. (London: Sweet & Maxwell, 1966), 4th re.pt., (Bombay: N.M. Tripathi Pvt. Ltd, 1999), 349.
[228]Ibid.
[229]Ibid.
[230]Ibid.
[231] There are, however, three exceptions to this general rules as: i) "duties of imperfect obligations; ii) the duty breached is by its very nature incapable of enforcement; iii) the specific enforcement of the duty is inexpedient". Ibid.

specifically it fulfills its purpose by inflicting punishment on the wrong doer. However, penal liability does not arise from the mere doing of a wrongful act this act must have been done with a guilty mind. Two conditions, thus, are essential to constitute a wrong giving rise to penal liability: a) material, i.e., *acts rea* the act done by the person charged and, b) formal, i.e., *mensrea* of the guilt mind with which the act should be done.[232] This research, however, focuses on civil liability (tortious liability) and criminal liability of the state in general to discuss.

Tortious liability under English law is based on duty of care, breach of duty and causation.[233] According to English law, there must be some general conception of relations giving rise to a duty of care. The liability for negligence is based on a general public sentiment of moral wrongdoing for which offender must pay.[234]The duty of care has been explained under the case of *Donoghue* vs. *Stevenson* 1932.[235]Under this observation, "then in law, who is my neighbor?" The answer is that "a person who is so closely and directly affected by act of omission or commission that I ought to reasonably to have them in thought as being so affected". Following this case, certain cases also discussed duty of care.[236]The second element is duty of care, establishing that the duty of care was breached. Test for this will be the objective test of reasonable man and behavior.[237]The cases, like professions of doctors, will be held according to standards of

[232]P.J. Fitzgerald, ed., *Salmond on Jurisprudence* 12th ed. (London: Sweet & Maxwell, 1966), 4th re.pt., (Bombay: N.M. Tripathi Pvt. Ltd, 1999), 349.
[233]Walid Fuad Kais, "Distinguishing between Contractual and Tort Liability," (Master Diss., University of Amsterdam, 2011), 8.
[234]Ibid.
[235]*Lord Atkin, Donoghue vs. Stevenson:* 1932 A.C. 562 H.L.
[236]*Home Office vs. Dorset Yacht Co Ltd:* 1970 UK H.L 2; *Anns vs. Merton London Borough Council:* 1978 AC 728H.L; *Caparo Industries plc vs. Dickman & Ors:* 1990 UK H.L 2; *Karim Buksh vs. KESC*: 1997 CLC 507.
[237]*Caparo Industries plc vs. Dickman & Ors*: 1990 UKHL 2.

reasonableness.[238]The breach of duty of care and damage or harm done or caused should be connected and directly in relation to the causation wherein the test 'but for' is applied in this situation.[239] Further, tort of negligence is considered to be the tort of most dynamic which is, "a violation of legal obligation to take care which consequences in damage to the victims".[240]The protection provided, under English law, is the tort of negligence which is reached throughout the duty of care as it shapes one of its elements, particularly it must be proved to who has the right for this duty and to be more definite what such duty must be so as to protect the personal integrity, property and economic status.[241]

2.2. The Concept of State Liability

As it discussed above that a wrong may be committed by a breach of duty enforceable by law or morality. So, the liability may be imposed as a legal consequence of a person's act or omission if he is legally bound to act under a legal duty.[242] The liability is considered as remedial wherever the State enforces a right that is because of the plaintiff and its objective is not the punishment of the defendant. Though, the objective of the law is completely or partially the punishment of the wrongdoer therefore, the liability is illustrated as penal. As the major objective of criminal law is the punishment of the offender, so the criminal liability is constantly penal. But civil liability is not constantly

[238]*Bolam vs. Friern Hospital Management Committee*: [1957] 2 All ER 118.
[239]*Barnett vs. Chelsea*, [1969] 1 QB 428; *McGhee vs. National Coal Board*: [1972] 3 All ER 1008; *Wilsher vs. Essex*: [1988] 1 All ER 871.
[240]W.V.H. Rogers. *Winfield & Jolowicz on Tort*, 17th Edition (London: Sweet &Maxwell Ltd, Aug 2006), 132.
[241]*Donoghue* vs. *Stevenson* 1932 A.C. 562 H.L.350. See also chapter 1, 11-54 for further study on the concept of Legal Liability by "Carole Rhian Harlow, Administrative Liability: A Comparative Study of French and English Law (Phd diss., University of London, December, 1979).
[242]Ibid.

remedial, as the instant purpose of civil proceedings is compensation. Sometimes, however, there is objective of punishment of the wrong doer as well.[243]

The problems of an individual with respect to the state are becoming gradually complex in the contemporary society. They are observed presently in the eyes of society rather an individual. Each right has a duty as well. The desire to blend right with duty has been historically recognized in order to attain the purpose of a unified community.[244]Generally, a right is that which may be demanded or claimed as just, moral or legal by a person who is entitled for this. The relation of the rights of the person to other person in the society has regularly led to thoughtful changes of the legal values of the contemporary democracy. In the 20th century, the state liability concept marks a move from moral to metaphysical base and is going with the direction of searching the greatest danger bearer and most efficient loss sharing. Usually, liability is grounded on some finding wrong or fault as well as finding accountability and responsibility for some happening.[245]

So as to be a ground of liability, the law must have inflicted a duty of carefulness and caution. Particular legal systems will put down their own cases where there would be duty to take care.[246]It appears that where law makes an obligation it must give assurance for the definite enforcement of it. Hence, it is obvious that 'liability' proposes 'legal liability' and the law inflicts obligation and responsibility on each person to repair loss undergone by another person.[247] However, there are some problems which appear

[243]*Donoghue vs. Stevenson:* (1932 A.C. 562 H.L. 350).
[244]*Simranjith Singh Mann vs. Union of India:*2002 Cr. L. J. 3368.
[245]P.J. Fitzgerald, ed., *Salmond on Jurisprudence* 12th ed. (London: Sweet & Maxwell, 1966), 4th re.pt., (Bombay: N.M. Tripathi Pvt. Ltd, 1999), 350.
[246] A.K. Sarkar, *Summary of Salmond's Jurisprudence* 14th ed. (Nagpur: LexisNexis ButterworthsWadhwa, 2010), 154.
[247]Ibid.

concerning state liability for instance, the state is not an "individual" although the state can act merely through an individual. If liability is fixed on the state, one has to settle criterion to decide in what circumstance and subject, to what situations, the acts of then individual may be attributed to the state concerned.[248] Another problem which may happens is that sometimes individuals are conferred immunity for valid grounds. Although, they can be held accountable through the ordinary rules of liability but there are cases of immunity from liability for state actions.[249] The scope of immunity depends upon each state policy. Some examples in this regard are act of state, judicial immunity, statutory immunity, sovereign immunity, and immunity conferred on public functionaries for action taken in good faith. There may have impact by all these on the liability of the state enlightening the particular purpose.[250]

2.3. The Concept of Vicarious Liability of the State

The idea of rule of law by A.V. Dicey needed governments to be held liable.[251]Though, Dicey has acknowledged that, "there were some laws which applied to only government and the political imperative is to put government on a level playing field with the rest of us".[252]Generally, one who commits tort is liable himself. However, one is to be held liable for the tort committed by other under some circumstances, this kind of liability is called 'vicarious liability'.[253]

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[248]A.K. Sarkar, *Summary of Salmond's Jurisprudence* 14th ed. (Nagpur: LexisNexis Butterworths Wadhwa, 2010), 154.
[249]Ibid.
[250]Ibid.
[251] A V Dicey, *Introduction to the Study of the Law of the Constitution* (London: St. Martin's Press, 1959), 193.
[252] Ibid., 193-4. See also the study of Mark Aroson, "Government Liability in Negligence," *Melbourne Law Review* 32 (2008): 44-82.
[253]Jess Stein, ed., *The Random House Dictionary of English Language* (New York: Random House, 1967), 1590; for details see also *Vicarious Liability in Tort: A Comparative Perspective* (Cambridge: Cambridge University Press, 2010), 1-18.

The term 'vicarious' is derived from Latin word *'vice'* which means "in the place of, the liability of a person for the tort committed by other person in which he had no part". So, the term 'vicarious liability' means 'liability instead' i.e., exercise performed or suffered by one person instead of another. A *'vicar'* is one who does the functions of other person; he is a deputy of another person. This liability may happen under statute or common law.[254] State is duty bound to protect its citizens from external as well as internal disturbance and their rights. So, state is vicariously responsible for the tort committed by its servants as well.[255]

The definition of vicarious liability, under tort law, is: "a liability imposed by the law upon a person as an effect of; (i) a tortious act or omission by another person; (ii) some relationship between the actual tort feasor and the defendant and; (iii) some connection between the tortious act or omission and that relationship."[256] There are three relationships, in contemporary law, which please the requirement of vicarious liability, i.e., that of "principal and agent", that of the "master and servant" and, that of "employee and independent contractor".[257]The liability of a master for the torts of his servant during his employment is the most common example in this regard.[258]

Vicarious liability has its source in the legal assumption, according to Salmond, that, "all acts done by a servant in and about his master's business are done by his master's express or implied power and are therefore in truth are the acts of his master for which he may be fairly held responsible which steadily became decisive."[259]It is based on

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[254] S. Ramaswamy Iyer, *The Law of Torts,* 6th ed. (Madras: The Madras Law Journal Office, 1965), 489.
[255] P. S. Atiyah, *Vicarious Responsibility in the Law of Torts* (London: Butterworths, 1967), 3.
[256] Ibid.
[257] Ibid.
[258] R. F. Heuston, ed., *Salmond on the Law of Torts,* 7th ed. (London: Sweet and Maxwell, 1977), 542; J.S. Colyer, *A modern view of the Law of Torts* (Oxford: Perganon Press,1966), 14.
[259] P. J. Fitzgereld, *Salmond on Jurisprudence*, 12thed. (London: Sweet & Maxwell Ltd, 1979), 401.

two theories such as: i) 'traditional theory', which means a form of liability imposed on one party for the tortious act of another and; ii) the 'master's tort' theory,[260]in which the law attributes the act rather the tort of the servant.[261] Though, afterward master's tort theory has been rejected in favor of the traditional theory.[262] In relation to the irrelevance of the basis of vicarious liability has been observed by Atiyah that, "in general it looks uncertain whether much is to be achieved by an examination of the true basis of vicarious liability".[263]

Further, there are two important Latin maxims, *'respondent superior'* and *'qui facit per aliumfacit per se'* to discuss here which are very much concerned to the doctrine of vicarious liability. The first maxim, a *qui facit per alium, facit per se'* means that "he who performs duty through another is considered to do himself",[264]and second maxim "*respondeat superior"* means that "let the principal be held responsible".[265]The maxim "*qui facit per alium, facit per* se" can be applied to justify the liability of master, if the medieval command theory prevailed.[266]At the end of 17th century, the industry and commerce expanded and it, therefore, required an adjustment of this narrow concept. The basis of the contemporary principle of liability for torts committed by the servants during employment was lastly placed in the earlier part of the 19th century after some

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[260] The master's tort theory really originated in the case of *Twine vs. Bean's Express Ltd.,*:(1946)1 All. E.R.202 C.A. ; It was given further support in the case of *Broom vs. Morgan:*(1953) 1Q B. 597 C A. quoted by Chidananda Reddy S. Patil "Liability of the State for the Torts Committed by its Servants" (PhD diss., Karnatak Uuniversity, 2002), 10.

[261] P. S. Atiyah, *Vicarious Responsibility in the Law of Torts* (London: Butterworths, 1967), 6.

[262] Peter W. Hogg, *Liability of the Crown in Australia, New Zealand and United Kingdom,* (Sydney: The Law Book Company, 1971), 65; P. S. Atiyah, *Vicarious Responsibility in the Law of Torts* (London: Butterworths, 1967),7.

[263] P. S. Atiyah, *Vicarious Responsibility in the Law of Torts* (London: Butterworths, 1967), 7.

[264]Roger Bird, ed., *Osborn's Concise Law Dictionary,* 7th ed. (Delhi: Universal Law Publishing Co., 1998), 275.

[265]Ibid.,290.

[266] John G. Fleming, *the Law of Torts,* 5th ed. (Sydney: The Law Book Company Ltd, 1977), 354.

experiments with the theory of implied command.[267]A compromise was represented by this method between two contradictory policies such as: i) the social interest in providing an innocent injured party with an option against a financially accountable wrong doer and; ii) a hesitation to inflict any unwarranted burden on company.[268] The other maxim *"respondeat superior"*, whereas, does not elucidate why the master should be answerable or accountable. It does not enshrine a doctrine that the employer ought to pay.[269]

In spite of the recurrent invocation of such persuasive expressions as *"respondeat superior"*or *"qui facit per alium, facit per se"*, the contemporary principle of vicarious liability cannot procession as deduction from legalistic places, but should be freely acknowledged as containing its foundation in a blend of policy concerns.[270]About these maxims, Winfield observed that, these maxims are of 'no help' for the reason that "the former only says the principle poorly in two words, and the latter only gives an imaginary elucidation of it."[271]The court rightly observed:

> "a blend of ideas has enthused several unpersuasive judicial attempts to find a familiar basis for the maxim. What was once presented as a legal doctrine has deteriorated in to a rule of expediency, improperly defined, and altering its shape before our eyes under the impact of altering social and political circumstances."[272]

Above discussed theories may be insufficient to give details concerning the doctrine of vicarious liability. Though, the fact remains that, "both ancient and contemporary laws

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[267]Ibid., 354.
[268]John G. Fleming, *the Law of Torts*, 5th ed. (Sydney: The Law Book Company Ltd, 1977), 354.
[269]R. F. Heuston, ed., *Salmond on the Law of Torts*, 7th ed. (London: Sweet and Maxwell, 1977), 542.
[270]John G. Fleming, *The Law of Torts*, 5th ed. (Sydney: The Law Book Company Ltd, 1977), 355.
[271]W.V.H. Rogers, ed., *Winfield & Jolowicz on Tort*, 12thEdition (London: Sweet &Maxwell Ltd, 1984), 602.
[272]*Kilboy vs. South-Eastern Fire Area Joint Committee*: (1952) S.C. 280, 285 *per* Lord Cooper.

consider examples of vicarious liability in which one person is held answerable and accountable for the act of another."[273]

The vicarious liability doctrine is justified by giving several reasons. According to 'Baty' there are nine different bases which had been presented to justify the vicarious liability. These grounds are such as: "(i) control; (ii) master's benefit from servant's work; (iii) revenge; (iv) care and choice; (v) identification; (vi) evidence; (vii) indulgence; (viii) danger and; (ix) satisfaction". He rejected each of them by expressing that no one of the grounds taken was consistent with law.[274]Atiyah proposes, however, that there is constituent of reality in most of the nine reasons discussed by Baty and further states that: "there may be none of them taken by itself an adequate ground for the doctrine but the combined result of them may be irresistible."[275]The same logics have been given by most of the subsequent scholars in this regard. The doctrine of loss distribution is possibly the most acceptable justification of vicarious liability discussed these days.[276]

In tort law, there exists no any established principle than that a master is answerable for the torts of a servant committed during his job but there exists not any contentious scheme than that a principal is usually answerable for the torts of an agent committed within the extent of his power.[277] Therefore, it has been observed by the Lord Pearce in a case that, the principle has not developed from any very obvious rational doctrine but from social expediency and rough justice.[278]Tortuous liability, in the contemporary law, is usually based on some idea of fault. The effect of vicarious liability,

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[273] P. J. Fitzgereld, *Salmond on Jurisprudence*, 12th ed. (London: Sweet & Maxwell Ltd, 1979), 400.
[274] P. S. Atiyah, *Vicarious Responsibility in the Law of Torts* (London: Butterworths, 1967), 15.
[275]Ibid., 15.
[276]Ibid., 22; FowlerV. Harper & Fleming James Jr., *The Law of Torts,* vol. 2 (Boston: Little Brown & Co. 1956), 1370. G. P. Verma, *State Liability in India: Retrospect and Prospect* (New Delhi: Deep & Deep Pub. 1993), 9.
[277]P. S. Atiyah, *Vicarious Responsibility in the Law of Torts* (London: Butterworths, 1967), 99.
[278]*Imperial Chemical Industries Ltd* vs. *Shatwel* (1965) AC 656.

however, is to make one person compensate another for loss not because of his fault in any way but the fault of his servant or agent. Wrongful acts are those which are considered to be mischievous in the eye of law.[279]

Generally, servants are impoverished people and, therefore, not able to pay compensation to the victims. The master having positioned the servant in a place where he can cause harm to others is gratified by law to suppose the liability to pay for the harm.[280] Therefore, this type of vicarious liability is to be established in convenience and public policy in any state. The victim can claim from the master in the case of vicarious liability for the injury caused by his servant proving that the wrongful act was in fact authorized by the master. And the master's liability is implied merely when the act was done during duty. The foundation of vicarious liability is on the personal negligence of the master which is different from the theory of 'servant's tort or guarantee. In this regard Lord Brougham has explained it in easy way such as:

> "The principle of liability, and its cause, I get to be this: I am responsible and liable for what is done for me and by my commands by the man I employ for, I may turn him off from that employee when I satisfy: and the cause that I am responsible and liable is therefore, that by employing him I set the complete thing in action, and what he does, being done for my advantage and under my commands, I am liable and responsible for the results of doing it."[281]

The idea of legal liability comprises on tortious, criminal and contractual liabilities. The liability is the legal accountability and responsibility of a wrong doer to the wrong. A wrong is just a wrong act which is in contradiction of the principle of right and

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[279] V. D. Mahajan, *Jurisprudence and Legal Theory*, 5th ed. (Lucknow: Eastern Book Company, 2006), 27.
[280] Venkata Subarao, *Jurisprudence*, 9th ed. (Luckhnow: Eastern Book Company, 2008), 206.
[281] Glanville Williams, "Vicarious Liability: Tort of the Master or of the Servant?", *Law Q. Rev*72 (1956): 522.

justice.[282]The state liability is an enumeration of the idea of "*rule of law*" and "*equality*". The state is responsible for the wrongs done by its servants during their duty.[283] There would be destruction of very legal system itself due to nonexistence of liability and the existence of vast parts of immunity. In this regard Dr. Upendra Baxi observes:

> "When those affected by power can, in theory, hold their rulers accountable (in one way or the other), we speak of a liberal democracy or a 'rule-of-law society'. This type of society basically seeks to ensure that grants of power to the rulers are at the same time charters of accountability for the ruled."[284]

There is need to citizen larger rights and diverse remedies against the government functionaries than against the fellow citizens. Further, the state being a master will be held liable to give compensation to the citizens whose rights are violated by the illegal and excessive actions on its part.[285]However, "the state is not liable where the acts done are essential for safety of life or property, judicial or quasi-judicial judgments given in good faith".[286] There are specific statutory clauses in different statutes[287] which protect the governmental authorities from tort liability that, however, would not extent to malicious acts. But this research in hand discusses that public servant must be liable and accountable for the torts committed by him negligently during his legal duty.

The problem of state liability, at present, for wrongful acts of its servants has increased great significance. The research in hands is confined to the state liability in

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[282]P. J. Fitzgereld, *Salmond on Jurisprudence*, 12[th]ed. (London: Sweet & Maxwell Ltd, 1979), 215.
[283] P. Ishwara Bhat, *Administrative Liability of the Government and Public Servants*, 1[st] ed.(New Delhi: Eastern Law House, 1983), 10.
[284] Upendra Baxi in Introduction to I. P. Massey, *Administrative Law*, 4[th] ed. *(Luckhnow: Eastern Book Co., 1995)*, xvi: For a very comprehensive details see *Vicarious Liability in Tort: A Comparative Perspective* (Cambridge: Cambridge University Press, 2010), 1-18.
[285]Munir Ahmad Khokhar, ed., (Lahore: Irfan Law Book House, 2004), 171.
[286]Ibid.,65.
[287] These provisions has been mentioned and discussed in detailed in chapter 3 of this research.

tortious acts committed negligently[288]during his legal duty of its public servants in Pakistan as well as in India. The public servants must be defined by law and the servants in exercise of these authorities must not commit a wrong to citizens.[289]

2.4. Liability of the Public Servant

It is important to make distinction from the liability of the state to the liability of an individual servant of the state. As a general rule, all persons can sue and to be sued. Though, this is a general rule and is subject to amendments regarding some groups of persons.[290] There are certain persons or bodies who cannot sue, while there are others who cannot be sued in tort law.[291] For instance, these have personal disability in tort law and cannot sue in some cases as: i) convict or felons; ii) alien enemy; iii) husband and wife; iv) corporations; v) unincorporated associations; vi) child in male; vii) infant; viii) minor; ix) insolvents and bankrupts; x) foreign state as a state. Further, following cannot be sue or have exceptions to be sued in tort law as: i) the state and its officers; ii) foreign sovereigns; iii) ambassadors; iv) public officials; v) infants and minors; vi) married women; vii) trade union; viii) ix) lunatics; x) corporation; xi) foreign corporation; xii) high way authority; xiii) felonious torts and foreign torts.[292]This instant research is exhaustive only to state liability generally and public servants specifically.

To the extent that the liability of the individual servant is concerned, he would be liable same as other private person, if he has acted illegally or took action out of the

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[288] Negligence is, "a conduct that falls below the standards of behavior established by law for the protection of others against unreasonable risk of harm. A person has acted negligently if he or she has departed from the conduct expected of a reasonably prudent person acting under similar circumstances."(Legal Dictionary, s. v. "Negligence," http://legal-dictionary.thefreedictionary.com/negligence (last accessed at April 1, 2017)).

[289]Durga Das Basu, *Commentary on the Constitution of India,* vol. 8, 8th ed. (London: LexisNexis, 2009), 6.

[290]Munir Ahmad Khokhar, ed., *Law of Torts* (Lahore: Irfan law Book House, 2004), 57.

[291]Ibid., 56.

[292]Ibid., 65.

scope of his authority.[293] This liability is governed under ordinary law of contract, criminal or tort law. A servant cannot be held liable personally for the harm to the citizen performing of his job without mala fides or biasness. In this regard, there are two important facts: (i) such act has to be done to perform his legal obligation and; (ii) he must not be ultra virus his authorities.[294]Particular statutory clauses are prepared to protect him from liability where, he is required to be protected for actions taken during his duty.

It is important to mention here the meaning of the term public servant, so that it may easy to understand and impose the tortious liability on those who are responsible for the injury caused to citizens. So, it is discussed under the following paragraph.

2.4.1. Who is a Public Servant?

The state does not do any act itself but through an individual like 'public servant'. "The Pakistan Penal Code 1860"[295]and "the Civil Servants Act, 1973"[296]respectively have defined the terms 'public servant' and 'civil servant' independently. Public servants have been defined under "the Pakistan Penal Code" very comprehensively, which even includes judges, commissioned officer in the military, naval and air force of Pakistan.[297] Further, the higher courts in their decisions have elaborated its scope.[298]Though, immunity of public servants in the perspective of this broader definition will not be considered in this research. The higher immunity to certain category of public servants is afforded under particular laws and regulatory systems in Pakistan. In this regard, the

[293]Ibid., 159.
[294]Ibid., 159-160.
[295]The Pakistan Penal Code (Act XLV of 1860), Section 21.
[296] The Civil Servants Act, 2016 (Act no. IX of 2016, an act to further to amend to the civil servants act, 1973), Section 2(b)).
[297]Hafiz Aziz-ur-Rehman, *Citizens versus State: Public Servant Liability and Tort Reforms in Pakistan* (Islamabad: the Network for Consumer Protection, 2005), 5.
[298]PLD 1964 Dacca 330 and PLD 1961 Dacca 753.

article 248 is mentionable here which provides protection to higher authorities.[299]Similarly, the prosecution cannot be started against serving armed forces personnel and judges under "the National Accountability Ordinance 1999".[300]This approach, however, desires to be seriously reviewed for the introduction of a culture of accountability and good governance in the country.

Accountability is a basic element of any institution or state to run their business smoothly. Due to non-existence of public accountability nowadays, "corruption is a low-risk and high profit business". Due to non-existence of accountability, rule of law purposes cannot be achieved.[301]Unfortunately, there is no law on tortious liability and accountability of the public servants in Pakistan however; major developments have taken place in the area of public accountability through judicial process.[302]

2.5. Liability of the State & Its Developments in British India

"History is the record of past events, developments, trends and traditions resulting out of human activity."[303] It explores the gradual development of any subject like State Liability.[304] So, it is essential to refer back to some case laws and legal position for the better understanding of the position related to the degree of liability of the state in Pakistan and India. This portion deals, in some detail, with state liability laws prevailing

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[299]Islamic Republic of Pakistan, 1973, Article 248.

[300] The NAB Ordinance, 1999 (Ordinance no. xviii of1999 as modified on 26, 03, 2010). Section 5 (m).

[301] According to James Madison, "The accumulation of all powers, legislative, executive and judiciary, in the same hands . . . may be justly pronounced the very definition of tyranny." The Federal list No. 47, from the New York Packet. February 1, 1788. New York.

[302]The concept of liability and accountability developed through judiciary will be discussed in detailed in chapter 4 and 5 of this research.

[303]K.M. Munshi, *The History and Culture of The Indian People-The Vedic Age, Foreword,* vol.1, 6th ed. (Bombay: Bharathiya Vidhya Bhavan, 1971), 25.

[304]"Historical Perspective of the Liability of State in India", chapter 2, 38. http://shodhganga.inflibnet.ac.in/bitstream/10603/201573/8/08_chapter%202.pdf (last accessed at Dec 1, 2016).

in other jurisdiction. First, it is being discussed the developments of state liability law in British India till 1947.

2.5.1. East India Company and Liability of the State

The development of state liability law starts with the advent of "the East India Company" in Sub-Continent, which was established under "the Charter Act, 1600". It was made, basically, for the business and was autonomous corporation which has no link between servant and the British Crown. Therefore, immunity power utilizing by the Crown was never expanded to the Company.[305] The Supreme Court of Calcutta was given the powers under regulating "the Act, 1773" to handle the matters against the Company.[306]Under "the Bengal Regulations," the Company was made vicariously liable for the torts committed by its servants.[307]The privileges of the Company were stopped under "the Charter act, 1833".[308]It was liable same like an ordinary individual through the different decisions of the courts.[309] The liability of the Company emerged in the case of *Dhakjee Dada Jee* vs. *East India Company*.[310] The immunity was confirmed in the case of *East India Company* vs. *Syed Ally*, 1827.[311]These cases conclude that "the East India

[305]*A.G. of Bengal vs. Ranee Surnomoy Dossee:* (1863) 9 M.I.A; 387, 424.
[306]M.C.J. Kazzi, Constitution of India, 4th ed. (1984), 23.
[307]According to the preamble "the authority of the laws would extend not only to private disputes, but the Government would also be precluded from injuring private property." (Bengal Regulations of 111, 1793. Preamble). See at:https://archive.org/stream/in.ernet.dli.2015.110208/2015.110208.The-Regulations-Of-The-Bengal-Code_djvu.txt (last accessed at Dec 10, 2016).
[308] Charter Act, 1833, Section 10.
[309]*The Bank of Bengal vs. East India Company*: (1831) 1 Bignwel's Report at 119-122. The court held that:"the Company is not sovereign entity but subject to the control of Crown and parliament";*Gopee Mohan Deb vs. The East India Company*: (1840), (Morley's Digest, vol. 11. (307-335).The Calcutta Supreme Court held that: "an action of trespass would lie against the Company."
[310]*Dhakjee Dada Jee vs. East India Company*: (1843) 2 Morley's Digest 307. 71.
[311]*East India Company vs. Syed Ally*: (1827) 7 MIA. 555.

Company" was liable vicariously for the tortious acts done by its servants except in case of 'Act of the State'.[312]

2.5.2. Secretary of State, the Government of India Act, 1858 and Liability of the State

The Company was ceased to exercise its powers and control over the territories of the Company.[313]"The Secretary of State in Council for India" had liability similar to the Company. The extent of liability was administered under "the Government of India Act, 1858". The Secretary of State had right to sue and be sued[314] and the liability of Secretary and Company was made very clear under the instant Act.[315]The court started to inquire for the determination of liability of the secretary for torts committed by its servants. The important question related to liability of the state was answered in P & O Steam case.[316]The secretary was liable to give compensation to the plaintiff in result of negligence of its workmen. Further, the Secretary was no eligible to use the sovereign shield of the Crown for immunity.[317]

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[312] An Act of State "is an act exercising power or a country that cannot be overturned by the courts."Black's Law Dictionary, s.v. "Act of State," http://thelawdictionary.org/act-of-state/ (last accessed at December 12, 2016).

[313]"Historical Perspective of the Liability of State in India", chapter 2, 49.

[314]Government of India Act, 1858, Section 65.

[315]Ibid., Section 66-68.

[316]*Peninsular and Oriental Steam Navigation Company vs. Secretary of State India*: (1861) 5 Bom. H.C.R. App. 1

[317]Sir Barnes Peacock observed: "In determining the question the East India Company would, under the circumstances, have been liable to an action, the general principles applicable to the Sovereigns and States, and the reasoning deduced from the maxim of the English Law that the King can do no wrong, would have no force."Ibid.

2.5.3. The Government of India Act, 1915 and Liability of the State

"The Government of India Act, 1915" was passed for the individuals to sue the state, for the purpose of uniformity and to widen the liability of the state.[318]There were no much changes related to liability after "the 1858 Act". To provide this, the section 32 was interpreted in the case of *Venkata Rao* vs. *Secretary of State*.[319]

2.5.4. The Government of India Act, 1919 and Liability of the State

The India Act was passed in 1919. The individual could get proper remedy in result of infringing his rights by the servants of the state.[320] The important decision, however, was made between procedural aspect of suability and the substantive aspect of liability by section 32 (2) of "the India 1915 Act". In *Kessoram Podder & Co.* vs. *Secretary of State*,[321] it was held that:"the commanding order was one which no one but the government could make and being an act of the sovereign authority, the secretary if could not be sued regarding it."[322]Further, in the case of *Mata Prasad* vs. *secretary of State*,[323] it was held that: "a person charged by a competent court and punished for that offence is not entitled to sue the Secretary for damages in respect of the act of the government in exercise of its sovereign powers."[324]

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[318] See Section 32 (1) and (2) which are important provisions related to the rights and liabilities of the Secretary of State in Council. (The Government of India Act, 1915. Section 32 (1) and (2)).

[319] The court observed: "Their Lordships are not disposed to think that this section, which is a section relating to parties and procedure, has an effect to limit or bar the right of action of a person entitled to a right against the Government, which would otherwise be enforceable by action against it, merely because an identical right of action did not exist at the date when the East India Company was the body, if any, be sued." (*Venkata Rao vs. Secretary of State:* (1937) 39 BOMLR 699).

[320]"Historical Perspective of the Liability of State in India", chapter 2, 38.

[321]*Kessoram Podder & Co. vs. Secretary of State*: A.I.R. 1928 Cal.74.

[322]Debanshu Mukherjee & Anjali Anchayil, *Vicarious Liability of the State in Tort in India: A Case for Reform (*New Delhi: Vidhi Centre for Legal Policy, 2015), 6.

[323]*Mata Prasad vs. Secretary of State*: A.I.R. 1931 Oudh. 29

[324]Ibid.

2.5.5. The Government of India Act, 1935 and Liability of the State

The above discussed Acts and cases reveal that the state liability emerged gradually. But an important Government of India Act was passed in 1935 which was a milestone to a responsible government in British India. An important right to make law was given to federal and provincial legislature. This either removed or granted a right to sue federal and provincial government.[325] A right was given under section 176(1) to the legislature to make any law to exempt the secretary from liability.[326]So, it would not be liable for those actions which are performed during sovereign powers/functions. This concept was given in the case of *Elti* vs. *Secretary of State;* the court exempted the State from liability.[327]In another case of *Gurucharan Kaur* vs. *Madras Province*,[328] the court held that, "the government is not liable for the acts of police done in discharge of their statutory duty in good faith." Further, the State is not liable when loss is caused during the performance of sovereign functions. This fact was held in *Secretary of State* vs. *Nagerao Limbaji* case.[329]

Under the above discussion, it can be concluded that the duty to pay compensation in British India on the part of the King was not present under British law. The reason behind this was that the immunity did not wide to "the East India Company" or "the Secretary of the State in India" which was otherwise available to British Crown. Hence, sovereign immunity principle is only a judicial creation in India, which has its

[325] Government of India Act, 1935. Section 176.
[326]Ibid., Section 176(1).
[327]*Elti vs. Secretary of State*: AIR 1939 Mad 663.
[328]*Gurucharan Kaur vs. Madras Province*: AIR 1942 Mad. 539.2 MLJ 14.
[329] The court held that: "the provision of facilities for bombing practice was a public duty undertaken by the State in order to provide training for the army. Such duties are not exercised by the State for its own benefit, but for the protection of the entire population." (*Secretary of State vs. Nagerao Limbaji*: (AIR 1943 Nag. 287)).

source in verdicts of the judiciary, when the matter of liability of the state in tort was brought in the case of '*Peninsular*' before the Supreme Court of Calcutta in 1861. In this historical and significant case, Lord Peacock declined to widen the doctrine "the King can do no wrong" to torts committed by the servants of "the Secretary of the State in India". He also cleared the proposition that "the East India Company" was not doing any sovereign function. However, the functions of the state were divided into "sovereign and non-sovereign functions" for the determination of tortious liability of the state.

2.6. Liability of the State in other Jurisdictions of the World

In history, almost unlimited 'immunity'[330] has been enjoyed by the states against the legal claims by citizens for remedy in tort. The origin has been that of 'sovereign immunity' both in the civil and the common law societies. The well known maxim such as "*the King can do no wrong*"[331]reflects quite precisely the common understanding on the existing legal remedy for harm undergone by people as a consequence of actions or omissions of the state.[332] However, the rule of absolute immunity has experienced

[330]Immunity is "an exemption from performing duties that the law generally requires other citizens to perform, or from a penalty or burden that the law generally places upon other citizens." (Legal Dictionary, s.v. "Immunity," https://legal-dictionary.thefreedictionary.com/immunity (last accessed at June 12, 2017).

[331]The maxim "proves to have played a vital role in the development of governmental accountability in England, sometimes serving precisely the opposite function that a casual reading of the maxim might suggest."(The Origins of Accountability: Everything I know about sovereign immunity, I learned from King Henry III, Guy I Seidman, 49 *St. Louis U.L.J.* 393 (2004-2005): 5.

[332]*Le roi ne peut mal faire* (a Latin term). The maxim "the king can do no wrong" can stand for 4 different things such as:(1) "The King is literally above the law and cannot do wrong by definition;(2) Even if the king's actions are not lawful by definition, there is no remedy for the king's actions through the courts;(3) (True Origin) The King has no power or capacity to do wrong (King Henry III as the example) and;(4) The King is eminently capable of doing wrong but cannot do so lawfully." ("The Origins of Accountability: Everything I know about sovereign immunity, I learned from King Henry III", Guy Seidman, 49 St. Louis U. L.J. 393 2004-2005): 5. Further, "Common law sovereign immunity was based upon the theory that king could no wrong. The king was believed to be divine in nature and it would be a contradiction of the king's perfection to allow suits against the king." (W. Holds worth, A History of English Law, 5th ed. (1942), 458-69).

noteworthy erosion from the 19th century onwards as well as particularly in the 20th century.[333]

The idea of sovereign immunity and tortious liability of the state have developed very distinctly in various jurisdictions.[334] For example **in Asian jurisdictions,** state liability is used first and foremost to monitor the public employees that seem a common practice.[335] State liability is complicated **in Chinese** law. The existing principles regarding liability of the state are exemplified by "the State Compensation Law, 1994". The individual public servant would also be held liable for criminal liability as well as administrative.[336] There are a noteworthy cases regarding state liability in China, especially "wrongdoings by public prosecutors, corroborating the general notion that Chinese authorities employ the State Compensation Law to monitor public servants and to ensure they act in a lawful manner."[337]

Hong Kong promulgated "the Crown Proceedings Ordinance" in 1957 which was followed by "the Crown Proceedings Act, 1947" of (UK). The principles of liability of the state were made by Macao in 1991, set by "the 1976 Portuguese Constitution" into law, under "the Decree-Law 28/91".[338]Its Article 2 reads such as: "the administration, collective public bodies and agents shall be liable for the illegal acts during public management."[339]

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[333]Giuseppe Dari-Mattiacci, Nuno Garoupa and Fernando Gómez-Pomar, "State Liability," *European Review of Private Law 18*, no. 4, (2010): 7.
[334]Ibid., 45. Annexure 'A' "briefly discusses the continental approaches in relation to sovereign immunity and state liability in tort."
[335]Ibid.
[336]The State Compensation Law, 1994, Article, 24.
[337] Keith Hand, "Watching the Watchdog: China's State Compensation Law as a Remedy for Procuratorial Misconduct," 9 *Pac. Rim L. & Poly* (2000): 95.
[338]Giuseppe Dari-Mattiacci, Nuno Garoupa and Fernando Gómez-Pomar, "State Liability," *European Review of Private Law 18*, no. 4, (2010): 46.
[339]Decree-Law 28/91, Article 2.Ibid.

"The State Compensation Law of **Taiwan**" (SCL) was passed in 1980along with "the Enforcement Rules for SCL" which were passed in 1981. Article 24 of "the Constitution of Taiwan, 1947" was the foundation of compensation law and its enforcement rules.[340]

State liability i**n Japan** is guaranteed by "the Constitution, 1946" under its Article 17.[341]"The Law on Compensation by the State, 1947"deals with, which really extends liability of the public administration in tort.[342]Cases of state liability are dealt in ordinary courts since the abolishment of the administrative courts. Though, the features of public laws are still potted in proceedings against the government as well as its administrative bodies.[343]

In South Korea, state liability is established by "the State Compensation Law, 1951" that was revised in 1967 and has been amended for the six times. Tortious conduct of public servants or employees during performance of official duties have been regulated under this law. **Vietnam** also has enacted its law on State Liability to Pay Compensation in 2009.[344]

State liability in **Thailand** is regulated by two laws such as: i) "the Act on Government Administrative Practices, 1996" and; ii) "the Act on Establishment of Administrative Court and Administrative Court Procedure, 1999". It is mentionable here

[340]Article 24. It says that, "any public employee who, in violation of law, infringes upon the freedom or right of any person shall, in addition to being subject to disciplinary measures in accordance with law, be liable to criminal and civil action. The victim may, in accordance with law, claim damages from the state for any injury suffered." (The Constitution of Taiwan, 1947).

[341] Article 17 says: "every person may sue for redress as provided by law from the State or a public entity, in case he has suffered damage through illegal act of any public official."(The Constitution of Japan, 1946).

[342]*Sawarabi Kabushiki Kaisha vs. City of Kyoto*: 691 Hanrei Jiho 57 (Kyoto Distt. Ct. 1972).

[343]KatsuyaUga, *Development of the Concepts of Transparency and Accountability in Japanese Administrative Law in Japan: A Turning Point,* ed. Daniel H. Foote (University of Washington Press, 2007).

[344] Law on State Compensation Liability (no. 35/2009/qh12).

that reforms in this legislation were started in Vietnam and Thailand to increase transparency for public administration.

State liability in **Latin America** inclines to pursue the European practices that are the French kind doctrines though with certain limited real enforcement.[345] In **Brazil**, the doctrine of sovereign immunity, for instance, never actually was present. State liability has been guaranteed by "the Brazil's Constitution, 1988" under its Article 37[346] reinforced by "the Brazil's Civil Code, 2002" under its Article 43.

State liability has been developed through case law in **Argentina** and in **Chile** also liability of judicial branches as well as the legislative of the government, nevertheless there is a practical issue for its application. State liability is mentioned as well in "the **Colombian** Constitution, 1991" under its Article 90.[347] "The Constitution of **Ecuador**, 2008" under its Article 11 mentions the state liability in Ecuador.[348] In **Uruguay**, the state liability has been incorporated in "the Constitution of Uruguay, 1967" under its Article 24.[349] Same like Article 113 of "the Constitution of **Mexico"** enshrines state liability.[350]

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[345]Giuseppe Dari-Mattiacci, Nuno Garoupa and Fernando Gómez-Pomar, "State Liability," *European Review of Private Law 18*, no. 4, (2010):47.

[346] Article 37 states as:"the direct or indirect public administration of any of the Branches of the Union, States, Federal District and Counties, shall obey the principles of legality, impersonality, morality, publicity and efficiency...'." (The Brazil's Constitution, 1988).

[347]"The State will answer materially for the extra-legal damages for which it is responsible, caused by the acts or omissions of public authorities...'."(The Colombian Constitution, 1991).

[348] Article 11 says that, "the exercise of rights shall be governed by the following principles..., (9) the State shall provide redress to the person who has sustained damages as a result of this judgment; when the responsibility for such acts by public, administrative or judicial servants is identified, they shall be duly charged to obtain restitution."(The Constitution of Ecuador, 2008).

[349]According to Article 24, "the State, the Departmental Governments, the Autonomous Entities, the Decentralized Services, and in general any agency of the State, shall be civilly liable for injury caused to third parties, in the performance of public services, entrusted to their action or direction."(The Constitution of Uruguay, 1967).

[350]Article 113 says that, "the laws regarding administrative responsibilities shall determine the obligations of public officials, with the purpose of safeguarding the legality, honor, loyalty, impartiality, and efficiency in the discharge of their functions, positions, duties, and commissions; the sanctions applicable for acts or

In the **United Kingdom** (UK), the immunity was available to the sovereign from liability for torts committed by him for a very long time.[351] Though, a limited relief was granted to the victim against the Crown as a matter of grace. Two landmark cases as; *Adams* vs. *Naylor*[352] and *Royster* vs. *Cavey* gave the instant momentum for law reform in the UK.[353]"The Crown Proceedings Act, 1947" (CPA) was passed; consequently, which changed totally the legal regime. For example, it established that the Crown is liable in tort same as a private individual of full age and having capacity, though certain exceptions in favor of the police officials as well as certain statutory corporations are reserved.[354]

In **USA**, "the Federal Tort Claims Act (FTCA), 1946" provides the concept of liability of the state. A victim, subject to certain exceptions, can bring a matter against the US for tortious acts committed by government servants or federal agencies during the performance of official duty.[355] The Act specifies also certain exceptions for liability for

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omissions that they incur, as well as the procedures and authorities to apply them...." .(The Constitution of Mexico).

[351] See Debanshu Mukherjee & Anjali Anchayil, *Vicarious Liability of the State in Tort in India: A Case for Reform* (New Delhi: Vidhi Centre for Legal Policy, 2015) which also has explained the tort liability of the state in tort in UK, USA & France.

[352] *Adams vs. Naylor*: (1946) AC 543.

[353] *Royster vs. Cavey*: (1947) KB 204.

[354] Section 2(1) (a) "imposed a general tortious liability on the Crown for the acts committed by its employees or agents. the liability of Crown was made similar to that of a private agent under the common law proceedings. Section 2(1). The Crown would be liable as well for all acts or omissions of its agents committed in the course of their employment. Section 2(1) (b) and (c) impose liability." The liability of the Crown, under this Act, has been laid down for breach of statutory duties. Sub-section 2 (2) and 2(3). The Crown Proceedings Act, 1947. See also Konrad Schiemann, The State' Liability in Damages for Administrative Actions, *Fordham International Law Journal* 33, no.5 (2011): 548-563. See chapter 2, 54-108 for further study Carole Rhian Harlow, "Administrative Liability: A Comparative Study of French and English Law" (Phd diss., University of London, December, 1979).

[355] Under the provision, United States is liable, "for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." (The Federal Tort Claims Act (FTCA), 1946: 28 U.S. Code, Section 1346 (b)).

example, intentional torts,[356] exercise of statutory powers,[357] discretionary function exception,[358]armed forces,[359]and "Section 1983 Actions"[360]respectively. The landmark decision in *Bivens* vs. *Six Unknown Named Agents*,[361]changed the position in liability law. Since this case, a remedy against federal officials can be given when constitutional rights of citizens are also violated.

Tortious liability of the state law **in France** has slowly developed from "limited immunity for the sovereign to that of absolute state liability".[362] In 1870, a system of 'administrative guarantee' was done away by judgment.[363] Tortious liability of the state in France has been grown through case laws. Under the principles enclosed in the Civil Code, the important case *Blanco*[364]did away with the determination of state liability. The rule of liability of the state changed to one founded on risk from 1919 onwards. Consequently, the state can be held liable for the risk involved in its actions.[365]It is the affected individual who needs just to show that injury caused was due to the official or the body during the performance of duty.[366]

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[356]Ibid., 28 U.S. Code, Section 2680(h). However, it should be pointed out that "the exception does not prevent the government from being held liable for a suit based on negligence that led to the intentional tort." (*Sheridan* vs. *United States*, 487 U.S. 392).
[357]Ibid., 28 U.S. Code, Section 2680 (a).
[358]28 U.S. Code, Section 2680 (a).
[359]Ibid., 28 U.S. Code, Section 2680 (j).
[360]Ibid., Section, 1983 provides for the liability.
[361]*Bivens vs.* Six *Unknown Named Agents:* (1971) 403 U.S. 388.
[362] Harry Street, *Governmental Liability: A Comparative Study*, Issue 4 (London: Cambridge University Press, 1953), 57.
[363] Frederick F. Blachly & Miriam E. Oatman, Approaches to Governmental Liability in Tort: A Comparative Survey, 9 *Law and Contemporary Problems*vol.9. No. 2 (spring, 1942): 182.
[364] Rec. Cons. d'Et 1873, Supp. 1, 61.
[365]Ibid., 209.
[366]Ibid., 209.See chapter 1,page 11-54 for further study Carole Rhian Harlow, "Administrative Liability: A Comparative Study of French and English Law" (Phd diss., University of London, December, 1979).

"The Civil Code of **Germany**, 1900" (BGB) establishes the liability of the officials of the state under its important Section 839(1).[367] Further in private law, the state is liable for the torts committed by its officers under Article 34 GG of "the Basic Law of Federal Republic of Germany".[368]For the violation of official obligation by officers, these provisions impute liability to the state or the public authority that employs them, which must be distinguished by looking into the objective of the duty.[369]

According to the state **liability law of Spain**, the state is liable for the tortious actions and omissions of the public servants.[370] The concerned public administration is bound to pay compensation to any individual victim provided that the injury caused of the normal or abnormal, doing performance of the public tasks.[371]It is broader than liability laws in other states because the fault is credited on a "no-fault basis".[372]In Spain, according to legal commentators "overcompensation" or a practical "social insurance" structure has been established under the blanket of liability of the state.[373] Tortious state

[367] It says that, "if an official commits a breach of official duty intentionally or negligently and caused harm to other person, consequently, the victim may seek compensation from the damages from the official with this condition that the victim cannot get relief in another place for instance through social security." (The Code of Germany, 1900).

[368]**Article 34. "Liability for violation of official duty":** "If any person, in the exercise of a public office entrusted to him, violates his official duty to a third party, liability shall rest principally with the state or public body that employs him. In the event of intentional wrongdoing or gross negligence, the right of recourse against the individual officer shall be preserved. The ordinary courts shall not be closed to claims for compensation or indemnity." (Basic Law for the Federal Republic of Germany in the revised version published in the Federal Law Gazette Part III, classification number 100-1, as last amended by Article 1 of the Act of 23 December 2014 (Federal Law Gazette I, 2438); Paula Giliker, *Vicarious Liability in Tort: A Comparative Perspective*, (Cambridge: Cambridge University Press, 2010), 52.

[369] Gerald Spindler and Oliver Riekers, *Tort Law in Germany* (Aspen: Kluwer Law Int'l, 2011), 66. See also Alska Scherer, State Liability-Ten Years of Francovich Is German State Liability Law Compatible with EU?, (Master thesis., Lund University, Spring 2001), 19; see also Ulrich Gagnus, the Reform of German Tort Law, *Working Paper* No. 127 (April, 2016).

[370]Debanshu Mukherjee & Anjali Anchayil, *Vicarious Liability of the State in Tort in India: A Case for Reform* (New Delhi: Vidhi Centre for Legal Policy, 2015), 31.

[371] Organic Law Regulating Public Administration, 1976, Section 139.

[372] Pablo Salvador Codrech & Carlos Ignacio Gómez Ligüerre, *Vicarious Liability and Liability for the Actions of Others, InDret.* (July 03/2002).

[373] Teresa Rodríguez de las Heras Ballell, *Introduction to Spanish Private Law: Facing the Social and Economic Challenges* (Madrid: Rout ledge-Cavendish, 2010), 30.

liability has seen important growth through a judgment of the Court of Cassation in **Italy**. The Italian courts in a path breaking judgment *Cassazione Sezioni Unite* held that, "civil courts may hold liable to public authorities to compensate damages for legal wrongs caused to a private person."[374]Since, it credited special capability to administrative courts for the establishment of liability and, in case of violations, award of compensations to the victims.[375]

A scheme of liability of public functionaries of their acts has been established through case laws **in Netherlands** which is known as "the *Egalite* Principle which is based on the principle of equal apportionment of public burdens."[376]In the Netherlands, private law operates as a security net and it makes possible for sufferers to get compensation if the administrative law presents no ways of alternatives.[377]

In above section, it looked at the concept of liability of the state, developments of the law on liability of the state for their tortious acts in various states and further pointed out related provisions enshrined in the legislation of other states. It reveals that these states firstly granted blanket immunity to the sovereign from lawsuits. They have, though, slowly retreated from this doctrine, dealing with this matter in a different way from the doctrine prevailing in India and Pakistan (both jurisdictions will be discussed in

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[374] The decision from the *Cassazione Sezioni Unite,* 22nd July 1999, no. 500 performed a new judicial concept or innovation. "It finally adopted the thesis of the reparability of harm caused by the state and public authorities to private parties."(The previous situation of Italian law is summarized by Thomas Glyn Watkin, *The Italian Legal Tradition* (London: Dartmouth Publishing Company, 1997);Giuseppe Dari-Mattiacci, Nuno Garoupa and Fernando Gómez-Pomar, "State Liability," 18 *European Review of Private Law*, no. 4, (2010): 10).

[375]Giuseppe Dari-Mattiacci, NunoGaroupa and Fernando Gómez-Pomar, "State Liability," 18 *European Review of Private Law*, Issue 4, (2010): 11; Debanshu Mukherjee & Anjali Anchayil, *Vicarious Liability of the State in Tort in India: A Case for Reform* (New Delhi: Vidhi Centre for Legal Policy, 2015), 31.

[376]The Free Dictionary' s.v. "*Egalite*," https://www.thefreedictionary.com/egalite(last accessed at April 7, 2017).

[377] Debanshu Mukherjee & Anjali Anchayil, *Vicarious Liability of the State in Tort in India: A Case for Reform* (New Delhi: Vidhi Centre for Legal Policy, 2015), 32. See also Esther Engelhard et al., Egalite as the Foundation of Liability for Lawful Public Sector Acts, *Utrecht Law Review* vol. 10, no. 3 (June 2014): 55-76.

next chapter in detailed). Further, an examination of state liability law practice in other states/ jurisdictions reveal the emergence of a moderate sight of liability of the state over time. This is fact particularly in "Continental Europe" where the doctrine of state liability has been included in their constitutions. Such constitutional provisions have been reinforced by judicial decision growths and have expanded the extent of tortious liability of the state.[378] Various jurisdictions for example Spain, France, and Italy, taking very liberal view of state liability, have developed principles of the subject.[379] In contrast, the important common law jurisdictions, as the UK and the USA, have been slow movers comparatively to the imposition of tortious liability of the state.[380]

Immunity in tort law, over the last quarter century, has been restricted almost in every jurisdictions of the world. A number of states, whereas, have eliminated immunity in tort law for whole groups and bodies.[381] The movement to restrict immunity in tort has been based in part on the "rule of law", which needs to be treated all equally under the law. Notwithstanding the endeavors of this movement, immunity in tort law perseveres in different types at the federal, state, and local levels which must be regularized.

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[378]Giuseppe Dari-Mattiacci, NunoGaroupa and Fernando Gómez-Pomar, "State Liability,"' 18 *European Review of Private Law*, Issue 4, (2010): 12; Debanshu Mukherjee & Anjali Anchayil, *Vicarious Liability of the State in Tort in India: A Case for Reform (*New Delhi: Vidhi Centre for Legal Policy, 2015), 14

[379]Debanshu Mukherjee & Anjali Anchayil, *Vicarious Liability of the State in Tort in India: A Case for Reform* (New Delhi: Vidhi Centre for Legal Policy, 2015), 14.

[380]Ibid.

[381]Ibid.

2.7. Rights of the Citizens and their Violations by the State in Pakistan

In Pakistan, rights of the citizens[382]are violated by the state due to their abuse of executive powers, discretion, misfeasance, and maladministration. In a result, non-confidence of public on the state weakens "rule of law" and gives rise violence in the country.

2.7.1. Relationship between Rights of the Citizens and the State

Before discussing the current situation of citizens' rights in Pakistan, it is essential to see the relationship between state and rights of its citizens for the better understanding of the issue. In this regard, the main focus is on the point that the state is under obligation to protect its citizen' rights. In case it fails, citizens can claim their rights against it.

'Right', according to Salmond, is, "an interest recognized and protected interest by a rule of right. It is an interest, respect for which is a duty, and the disregard of which is wrong".[383]"Any interest which law recognizes or enforces whatever be the nature or extent of that recognition or enforcement is a legal right. It is made and enforced either by the constitution or by an ordinary law."[384] To enable a human being for this realization, a certain amount of protection and freedom from violations from other members of the society becomes essential. The protection of these interests and the ways for that objective leads to the idea of the protection of human rights.[385] This could be attained, provided these interests with regard to them were lawfully recognized, by the

[382] 'Citizen' means "a citizen of Pakistan as defined by law the Constitution of the Islamic Republic of Pakistan", 1973. Article 260(1).
[383]P.J. Fitzgerald ed., *Jurisprudence* (Lahore: P.L.D. Publishers), 98.
[384]Ibid.
[385]Roscoe Pound, *History of Jurisprudence* (St. Paul, Minn: West Publishing Co., 1959), 29; P.J. Fitzgerald ed., *Jurisprudence* (Lahore: P.L.D. Publishers), 99.

society.[386]Under the 'Social Contract Theory', "the source of the state is attributed to the need for security of these human rights".[387]

The state, which represented the will of the people, emerged as an organism[388] which would protect the all members of the society and resolved disagreements between them.[389] The civil law and criminal law were developed for this purpose. Eventually, it turned out to be evident that the matter of protection of human rights was not resolved by the development of state. The likelihood of the state itself infringing the rights of those to be protected by it happened to factual. Consequently, the issue of declaring one's liberty and freedom against the state and the principles and the process for this objective became essential. There must be a solid legal system which is acceptable to the all people in a civilized society.[390]

The rights and liberties of the people have to protect by law in a model state and simultaneously grant merely limited authority to the state against the people. Due to inspiration of the natural law ideal authority of the state came to be restricted by law and a variety of constitutional plans and declarations of rights were emerged.[391] For example, "the United Nations Charter, 1945" (UNC) reaffirmed the already existing ensured legal rights against the abuse of authority by the state.[392] There were several other declarations which were accepted by the World such as "the Universal Declaration of Human Right,

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[386]Dr Raj Kishan Pathak, "The Concept of Historical and Judicial Development," 11*C.I.Q* vol.xii, (April-June 2000):243.
[387] Dr. B.N. Mani, *Jurisprudence, Legal Theory* (Faridabad: Allahabad Law Agency, 1999), 80.
[388] Roscoe Pound. *Jurisprudence.* vol. 11(St. Paul, Minn: West Publishing Co., 1959), 61.
[389] Roscoe Pound, *An Introduction to the Philosophy of Law* (New Haven: Yale University Press, 1922), 73.
[390] Justice Venkataraman, "Ensuring Justice," *Bhavans Jour* 15, vol. 48, no. 11 (June 2002): 15.
[391] Justice V.R. Krishna Iyyer: Human Rights in India (New Delhi: Deep and Deep Publishers Ltd., 1999), 54; Freedman, *Introduction to Jurisprudence* (London: Sweet & Maxwell, 1994), 75.
[392]Oppenheim, L. (Lassa), *Oppenheim's International Law*vol.1 (New York: Addison Weslyey Longman inc., 1992), 984.

1948" (UDHR) which, however, was remained as non-binding in nature.[393] So the United Nations (UN) adopted two conventions such as, "International Covenant on Economic, Social and Cultural Rights, 1966" (ICESCR) and "International Covenant on Civil and Political Rights in 1966" (ICCPR).[394] The implementation and their enforcement of obligatory rules of international law to protect human rights and fundamental freedom remained as a mere promise.

As far as Pakistan is concerned, the spirit of the existing international human right standards is adequately reflected in "the Constitution of the Islamic Republic of Pakistan, 1973". It incorporates an enforceable group of human rights as "Fundamental Rights"[395] and the non-enforceable group of human rights as "Directive Principles of State Policy"[396] which the state is duty bound to realize in put into practice. The succeeding progresses have, in general, been made in accordance with the constitutional standard. Significant contributions by the judiciary have been making as well to attain this standard of human rights protection existing within the provision of constitution under Article 184(3) and 199.[397] Pakistan, additionally, has also signed and ratified some treaties and conventions to protect human rights.[398]It is a primary duty of government functionaries to

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[393] H. O. Agarwal, *International law & Human Rights* 7th ed. (Faridabad: Central Law Publications, 2001), 38.

[394] According to Article 9 (5) "anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation."(International Covenant on Civil and Political Rights, 1966).

[395] In Pakistan, the Fundamental Rights are enshrined in Part (II) Chapter (1) of the Constitution of Pakistan, 1973, Article 8-28.

[396] The Chapter 2 of the Constitution (Article 29 to 40) lays down the Principles of Policy. Ibid.

[397] The Constitution of the Islamic Republic of Pakistan, 1973, Article 184(3) &199.

[398]For example: "International Convention on the Elimination of all Forms of Discrimination 1966";"Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984";"International Convention on the Suppression and Punishment of Crime of Apartheid, 1973";"International Convention against Apartheid in Sports, 1985";"The Convention the Prevention and Punishment of the Crime of Genocide, 1951";"Convention on the Rights of the Child, 2006";"The Convention on the Elimination of all Forms of Discrimination against Women, 1979";"Abolition of Slavery, Slave Trade, Suppression of Traffic in Person, 1905";"The Convention against Torture, Cruel inhumane behavior, 1987";"ICCPR, 1966"&"ICESCR, 1966".

protect and promote the human rights and the rule of law in the country, that is specifically so in case of law enforcement agencies. This kind of duty also has been described by the "Vienna Declaration, 1993".[399]This research examines the problems created by the state actions to citizen's rights. So, it will be restricted to liability of the state in tort causing of violation of rights by its public servants.[400] This research is undertaken in the belief that sufficient remedies must be provided for the protection of citizens' rights. Mere glorification of the rights and stress for the need of protection will not be sufficient if once the rights are violated.

2.8. Modern Approach to Liability of the State: An Appraisal of Some Functions of the State

The functions of the modem state are complex and it dispenses now, social services of different kinds in all fields of social, economic and developmental activities apart from its traditional functions such as defense, police, law and order.[401] In the context of the changed role of the state the court felt that the state liability should be made consistent with its present day role and not hidebound to the thinking of *laissez faire* era. The courts have made an attempt to regulate the outdated law to the pragmatism of modem life. By liberal interpretation, they extended state liability by making, increasingly, functions of

[399]The Declaration says that: "the administration of justice, including law enforcement agencies, in full conformity with the applicable standards contained in international human rights instruments, is essential to the full and non- discriminatory realization of human rights; and is indispensable to the processes of democracy and sustainable development." (Vienna Declaration, 1993, Article 27).

[400]There are two different routes for the protection of right such as human rights law and law of tort. This study in hand focuses on law of tort route. See the two routes discussed by the study of Francois Du Bois, "Human Rights and Tort Liability of Public Authorities," *Law Quarterly Review* 127 (October, 2011):589-609.

[401]Chidananda Reddy S. Patil "Liability of the State for the Torts Committed by its Servants" (PhD diss., Karnatak University, 2002), 128.

the state as non-sovereign.[402] The state immunity is restricted to the traditional function of the state.[403]

The vital and primary function of the state is to protect citizens' rights and access to justice for them as well. There are three main organs of the state such as judiciary, legislature and executive. The role and practice is mentionable here in the context that, to what extent state, through its organs, is responsible for the current situation of citizens' rights violations in Pakistan. Additionally, practices of some important institutions shall also be discussed such as law enforcement agencies (Police, FIA), food, railways, media, natural disaster management and health. These shall be discussed one by one. Firstly, judiciary is being discussed as following.

2.8.1. Citizen' Rights and the Judiciary

Judiciary is one of the important organs of the state. It's important function is to make available justice to the citizens of the state without any discrimination. Access to justice is a basic right of every citizen of the state. Some important common factors prevent the poor from accessing justice and, the poor face problems to seek redress through the court system.[404]

There is a well-known expression that "justice delayed is justice denied". It is not only expression but also the common notion of the existing condition of judicial system of Pakistan.[405] Speedy justice is also related to "access to justice" that is a basic right of

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[402] Chidananda Reddy S. Patil "Liability of the State for the Torts Committed by its Servants" (PhD diss., Karnatak University, 2002), 128.

[403] Ibid. These propositions inferred from different cases which have been discussed in the following sections of this research.

[404] Such as, according to Roberto, "lack of information; high costs; corruption; excessive formalism; fear and mistrust; excessive delays; and geographical distance." (Roberto Gargarella, "Too far removed from the people, Access to Justice for the Poor: The Case of Latin America". p. 2.

[405] Hafiz Aziz-ur-Rehman, *Citizens versus State: Public Servant Liability and Tort Reforms in Pakistan* (Islamabad: the Network Publications, 2005), 11.

every citizen guaranteed in the Constitution of Pakistan, 1973.[406]Speedy justice is unanimously accepted in the World as a significant character of the rule of law. However, the situation is very critical related to justice system in Pakistan.[407]

One of the major factors of unwillingness of the citizens to go to court is excessive delay. It is usually asserted that the courts take a lifetime to make a decision of a case here in Pakistan. There are various circumstances of court delays in which some are understandable in principle whereas others are not. For instance, it is fact that there are a small number of judges[408] especially in poor regions whose workloads are too heavy.[409]The impact of this delay may be difficult and complicated. However, efforts made in Khaber Pakhtun Khawah (KPK) by the lower courts had decreased the average case time for proceedings from approximately 10-15 years to 4-5 years. Delay materializes to be larger in the lower courts in provinces because more action and investment have been taken place in the Higher Courts of the country. These processing times are lengthy under world standards and not up to the mark. Ultimately, this lengthy process becomes a reason for frustration, aggravation and lack of confidence in the judicial system.[410]Some factors one way or the other become reason in case delay and obstruct access to justice.[411] These, resultantly, affect the efficiency of the courts wherein

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[406]According to the Article 38 (d), "inexpensive and expeditious justice is a state obligation." (The Constitution of the Islamic Republic of Pakistan, 1973. Article 38(d)).

[407]Hafiz Aziz-ur-Rehman, *Citizens versus State: Public Servant Liability and Tort Reforms in Pakistan* (Islamabad: the Network Publications, 2005), 12.

[408] It has been estimated that "there are now nearly 2,000 judges in Pakistan at all levels of court, for a population of roughly 160 million. Each judge is burdened with an extremely high caseload."(Dr Richard Blue & Ors, *Pakistan Rule of Law Assessment Final Report* (Washington, DC: United State Agency for International Development, 2008), 20.

[409]For further details studies see Annual Report of Supreme Court of Pakistan June 2015-May 2016 available at www.supremecourt.gov.pk.

[410]Dr Richard Blue & Ors, *Pakistan Rule of Assessment Final Report* (Washington, DC: United State Agency for International Development, 2008), 20.

[411]For instance, "a small number of judges and trained staff in relation to the populace, non existence of case management, outmoded procedural laws (civil as well as criminal), non seriousness of the lawyers,

the poor are prevented from accessing to justice. The efficiency of the judiciary, for instance, in Pakistan[412]is ranked among the lowest countries.[413]On a regional index of the effectiveness of judiciary on a level of 0 - 10, Pakistan has been rated at (5), Bangladesh (6), Sri Lanka (7) and India (8).[414]

The existing system has not much put the liability of delays on judiciary and therefore victims of delays are not able to get remedy for their loss of time, resources and labor in such delayed cases. Resultantly, victims lose their trust and confidence on the judicial system to get their interests and basic rights.[415] There are several examples of blind justice which show the picture of justice system in Pakistan for example, Mr. Azizullah was 30 years old and married young man, who spent 9 years in jail without committing any crime until he was released by the orders of the Baluchistan High Court on 3 March, 2005.[416]Even he had to spend nine years of his prime life to prove innocent. There was another case of blind justice in which Syed Afzal Haider, a victim of personal grudge and criminal abuse of state power, spent 18 years in prisons to prove innocent.[417]He was just as innocent 18 years back but his prime life consumed in various jails across Pakistan, especially he could not carry his education.

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professional standards and legal education, immunity of judges for case delaying, and the propagation of special courts which increase the caseload on judges."The report further notes that, "no legal and judicial reform plan can change deep historical patterns of suboptimal behavior through sheer force of elaborate design and planning. It is important to be realistic about what can be achieved over the shorter term."Ibid.

[412]For performance of Supreme Court see Annual Report of Supreme Court of Pakistan June 2015-May 2016.

[413]Mahbubul Haq, *Human Development in South Asia 1999: The Crisis of Governance* (Karachi: Oxford University Press, Karachi, 1999), 65.

[414] Figure 3.8, "How efficient is the judiciary". Ibid.

[415]Hafiz Aziz-ur-Rehman, *Citizens versus State: Public Servant Liability and Tort Reforms in Pakistan* (Islamabad: the Network for Consumer Protection, 2005), 12.

[416]*The Dawn News*, Islamabad, March 4, 2005, www.dawn.com (last accessed at March 5, 2017).

[417]Rizwan Ahmad Tariq, "Afzal Haider: Guilty or Innocent," *the Jang Sundy Magzine*, serialized in Jang Sunday Magazine of April 3-9, April 10-16, April 17-23 and April 24-30, 2005, www.jangnews.com (last accessed at April10, 2017).

It is unfortunate that two real brothers, Ghulam Sarwar and Ghulam Qadir are names that must not be forgotten, had already been hanged when the Supreme Court released them from murder charges.[418]The acquittal of a murder charges after 24 years and these two real brothers execution has placed a critical question mark on the judiciary of the country.[419]In the same case, Mazhar Farooq was released by the Supreme Court because of a weak prosecution and evidence. He went to the jail when he was young and came out as an old man. He, though, had to spend 24 years of his prime time in jail.[420]

Judges are not liable and accountable for this blind and delayed justice in Pakistan, because they have immunity and are not accountable and liable in this regard.[421] It was derived from the courts of medieval Europe to stop people from attacking a verdict of the court by suing the judge. Ultimately, it became broadly accepted in the English courts as well as in United States' courts. The U.S. Supreme Court recognized judicial immunity for the first time in the case of *Randall* vs. *Brigham.*[422]

[418] The Dawn News, October 24, 2016, www.dawn.com (last accessed at March 10, 2017).
[419]Iqtidar Gilani and Fida Hussnain, "Corruption in Judicial System Delays Justice," *The Nation*, November 27, 2016, http://nation.com.pk/newspaper-picks/27-Nov-2016/corruption-in-judicial-system-delays-justice (last accessed at April 1, 2017).
[420]Ibid.
[421] The concept of immunity is that, "certain individuals and entities are granted from both damage awards and assessments of liability in tort. Immunity is a defense to a legal action where public policy demands special protection for an entity or a class of persons participating in a particular field or activity. Historically, immunity from tort litigation has been granted to government units, public officials, charities, educational institutions, spouses, parents and children." (Legal Dictionary, s.v. "Immunity," http://legal-dictionary.thefreedictionary.com/immunity (last accessed at April 1, 2017)).
[422] *Randall vs. Brigham:* (1868) 74 U.S. (7 Wall) 523, 19 L. Ed. 285. In this case the Court held that:"an attorney who had been banned from the practice of law by a judge could not sue the judge over the disbarment. A judge was not liable for judicial acts unless they were done maliciously or corruptly."

In Pakistan, the judges for their judicial acts have the legal immunity under ordinary law[423] while the privileges and services of judges of the higher courts are provided protection through constitutional law.[424]

Above discussed situation reveals that the situation of rule of law and access to justice is not at a good position due to which most poor people are facing problems when seeking justice for example, a long imprisonment and hanging of when the persons were not guilty, wherein, judges, prosecutors and police as a state functionaries and lawyers as an individual are responsible and equal to blame for the irrevocable loss bored by such a long imprisonment.[425] As a short term step, there is need for compensating the aggrieved persons and families and, as a long term, accountability laws must be made to hold them liable and accountable to avoid such unfortunate incidents in future.[426] If these laws are made and utilized effectively, the graph of the delay in courts would be decreased and; the access to justice, rule of law and confidence of the poor on judicial system will increase.

2.8.2. Citizen' Rights and the Legislature

The legislature is second important organ of the state. The responsibilities of the legislatures have been mentioned clearly in the Constitution for the performance in National[427] and Provincial Assemblies.[428] In which important functions are to made laws

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[423] For example, The Judicial Officers Protection Act, 1850; Pakistan Penal Code, 1860, Sections 4, 77; The Code of Civil Procedure, Section 135 (1);Contempt of Court Ordinance, 2003; Pakistan Penal Code, 1860, Section 4.

[424] The Constitution of the Islamic Republic of Pakistan, 1973, Article 204 & 209 (7).

[425]Iqtidar Gilani and Fida Hussnain, "Corruption in Judicial System Delays Justice," *The Nation*, November 27, 2016, http://nation.com.pk/newspaper-picks/27-Nov-2016/corruption-in-judicial-system-delays-justice (last accessed at April 1, 2017).

[426]Ibid.

[427] Elected representatives of National Assembly are responsible to:
i) "participate in legislation;

and good governance for the protection of human rights.[429]The third tier, whereas, of government in Pakistan is Local Government for the purpose of, to devolve financial, administrative and political role to the elected representative at grass root level.[430] It has also certain important responsibilities at local level for the development of public programmes. But in general, elected representatives don't know fully the role to play due to intermittent democratic process. Throughout military rules, the constitution remained in abeyance; therefore, they intentionally elected members of assemblies into development task rather than in law making. This unawareness and uncertainty

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ii) make laws and policies for the institutions of the Federal Government like, defense, foreign affairs, currency, post office, railway, seaports and federal tax etc;
iii) oversight the government and supervise the actions of government;
iv) keep check and hold accountability to executives;
v)represent the will of citizens and speak of the problems faced by their areas in National Assembly;
vi) solve difficulties disturbing someone or considered as unjust, on behalf of a segment in his area;
vii)act as mediators between their constituents and the administration and ensure that their constituent get fair share for health care, education and employment assistance."See further: The Constitution of the Islamic Republic of Pakistan, 1973. Article 90 & 90 (1).

[428] Elected representatives of Provincial Assembly are responsible to:
i) "make laws related to provincial departments such as education, health, agriculture, revenue, irrigation, social welfare and others;
ii) administer the provincial financial affairs by 'Provincial Consolidated Funds';
iii) keep checks and balance over executives by control over the financial affairs;
iv)keep oversight upon policies, practices and performance of the provincial departments as well as provincial governments and;
v) raise and discuss issues of public interest in the assembly in the form of questions, adjournment motions, call attention notices, general discussion, putting resolutions and scrutinizing various reports."See further: The Constitution of the Islamic Republic of Pakistan, 1973. Article 123, 130, 141, 142 &123; There are four primary functions of parliamentarians according to the paper of Shafique Chadhry such as: i) "they have direct authorization from different interest segments for their representation; ii), they are lawmakers to made and amend laws and policies at all levels. iii), they (executives)keep oversight and hold the government liable and iv), having necessary influence over masses they are the social reformed, helping mould society and national institutions to the challenges of the world." See further Shafique Chaudhry, "Role of Parliament and Parliamentarians in Promotion and Protection of Human Rights" (paper presented at the Workshop on Human Rights, Abuja, March 23, 2004).

[429]Shafique Chaudhry, "Role of Parliament and Parliamentarians in Promotion and Protection of Human Rights" (paper presented at the Workshop on Human Rights, Abuja, March 23, 2004). 1.

[430]Though, the local government administrative system consists such as: i) "A Union Council for each Union; ii) A District Council for each District; iii) A Municipal Committee for each Municipality; iv) A Municipal Corporation for each City; v) A Metropolitan Corporation for the Capital City. Every province require under Article 140-A of the constitution to set up a local government structure. For that reason, every province has made their separate law regarding local government." ("Responsibilities of Elected Representatives", 7. Prepared by Pak Voter Available at: https://www.pakvoter.org/sites/default/files/files/TRC/Responsibilities%2520of%2520elected%2520representatives.pdf (last accessed at September 9, 2017).

concerning responsibilities of elected representatives also effected into non-performance of law makers.[431]

In recent history, the country has witnessed scores of happenings of violence against civilians particularly minorities, women, children and weaker segments of the society.[432]In this regard, the parliamentary treatment of human rights is a vital indicator of country's resolve towards resolving the problems, as the Parliament is supreme legislative and policy making organ of the state. On this issue, there is an important report by Free and Fair Election Network (FAFEN) which is based on the parliamentary responses to various challenges of human rights and the constitutional duties of the state to guarantee fundamental rights of the citizens. This report comprises legislative and representative steps taken by the parliamentarians on human rights abuses and their redressal mechanisms between June 1, 2013 & November 30, 2016.[433]

There, however, are certain steps taken by the legislatures through legislation for the prevention of abuses and protection and promotion of the human rights of the citizens in the country. The government had pledged to made laws under its "Action Plan for Human Rights, 2016" regarding torture, domestic violence, Hindu and Christian marriages, protection of women and children, compulsory vaccination, justice system reforms and custodial deaths. The government presented merely five pieces of legislation in National Assembly and Senate which may be classified as human rights matters. This legislation was related to the protection of children against sexual abuse, reforming

[431]"Parliamentary Oversight of the Executive". Available at: https://www.loc.gov/law/help/parliamentary-oversight/parliamentary-oversight.pdf) (last accessed at September 10, 2017).

[432]For details see "The State of Human Rights", the Annual Report published by Human Rights Commission of Pakistan, 2017. Available at: hrcp-web.org/hrcpweb/wp-content/uploads/2018/04/SHR-2017-highlights.pdf.

[433] Free and Fair Election Network (FAFEN), *"Human Rights' Issues in Parliament"* (Islamabad: June 1, 2013-November 30, 2016). Available at www.fafen.org;www.openparliament.pk. (last accessed at September 9, 2017).

justice system, censuring sectarian and religious hate-speech and Hindu marriages. However, only one of these legislative proposals could be made to-date regarding child protection.[434]

As it stated above that legislature is an important organ of the state having important duty to made laws to protect and promote the citizens' rights. But unfortunately, in Pakistan, political representatives and people are not fully aware of the importance of the constitutional and legal responsibilities in national, provincial and local governments.[435]This is because of military interventions again and again in electoral process of Pakistan and complete lack of civic education in the same. Further, lawmakers themselves pay no attention to their real obligations like, "legislation, accountability of executives, policy formulations, budget making, and raising the public concerns in assemblies (both in National and Provincial)."[436] Citizens, whereas, force and demands from law makers to do activities, which are not lie in their domain and; entitled to local government representatives. Further, there is lack of cooperation between treasury and opposition members. Reliable and competing political parties are foundations for a functional democracy that can advocate substitute policies and hold each other to liable and accountable.[437]Therefore, the identified causes for the subject in issue are needed

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[434]Similarly, recently the joint sitting of the Parliament has passed legislative proposals on rape and honor-killing submitted by the Private Members. In the Senate, these proposals initiated by previous government but still are pending. It is mentionable here that the parliamentarians introduced 23 bills in the Senate and 30 in the National Assembly related to the protection and welfare of children, women , minorities, disabled citizens and fundamental rights of citizens but unfortunately any of these Private Member bills has not been enacted by the National Assembly so far. It is also mentionable here that besides legislation, the Parliament has passed 53 Resolutions, held 19 discussions, asked 373 Questions and took up 15 Calling Attention Notices on the issue of human rights. Ibid., 2-3.liamentfiles.com

[435]"Responsibilities of Elected Representatives", 8. Prepared by Pak Voter; Shafique Chaudhry, "Role of Parliament and Parliamentarians in Promotion and Protection of Human Rights" (paper presented at the Workshop on Human Rights, Abuja, March 23, 2004). 2.

[436]Ibid.

[437]Shafique Chaudhry, "Role of Parliament and Parliamentarians in Promotion and Protection of Human Rights" (paper presented at the Workshop on Human Rights, Abuja, March 23, 2004), 9.

special attention to aware both the parties and made liable and responsible especially to the elected candidates for not making the effective laws and protecting the rights of the people. This, ultimately, can play a very important role in weakening the opinions of citizens related to the constitutional and legal obligations of elected members of parliaments at all level.[438] The privilege of freedom of speech is a very powerful immunity which may be misused by the representatives,[439]and can be caused terrible effects. In a result, innocent citizens could be slandered with having no any remedy, which must be lemmatized and regularized accordingly. Human Rights promotion is a field in which there is scope for cross-party cooperation. For the parliamentary development in Pakistan, this is an attractive model, like Westminster system, which is a means to combine principled cooperation on rights with legitimate political opposition in policy.[440]

2.8.3. Citizen' Rights and the Executive

Executive is the third organ of the state which puts the laws into execution as distinguished from the judicial and legislative organs. It carries the laws into effect or superintends the enforcement of them.[441] In a written constitution "the executive power must be such as is given to the executive or is implied, ancillary or inherent. It must

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[438]Ibid.

[439]There are four aspects in which the scope of freedom of speech can be viewed such as: "Whom is the protection for? When does protection begin and end? Is the protection only within the precincts of Parliament or also beyond? What acts are covered by freedom of speech?".Ibid.

[440]For instance, in the Westminster system, "the Human Rights Committee includes members from treasury and opposition and is specifically charged with reviewing legislation to identify arbitrary powers or potential for undermining of fundamental rights. The mandate of committee is to stand back from the government's political objectives in proposing any law, and considers only human rights implications". Ibid., 5).

[441] Article 90 says that:"the authority of the Federation is vested in the President and is to be exercised by him either directly or through officers' subordinates to him." The Article 90 (1) further proclaims that:"executive authority is to be exercised by the president in conjunction with Article 48(1) which requires that president shall act in accordance with the advice of the Cabinet or the Prime Minister." (The Constitution of the Islamic Republic of Pakistan, 1973).

include all powers that may be needed to carry into effect the aim and objects of the constitution."[442]Executive functions[443] include to "the execution of laws, the maintenance of public order, the management of state property and nationalized industries and services, the direction of foreign policy, the conduct of military operations and the provisions and supervision of such services as education, public health, transport and state insurance."[444]

Any departure from the above discussed duties and functions of the 'Executives' leads towards irregular and dangerous consequences which proves injurious to smooth transactions of business of the State and; ultimately "rule of law". The letter and spirit of law and their duties will have also positive result of avoidance of frivolous litigation and wastage of public time as well as expense. Non-consideration of these duties and responsibilities, in contrast, is burdened with the risk of giving rise to unnecessary litigation and hurdles to obstruct the speedy dispensation of justice. To burden the courts of law with the issues which should be handled at the departmental stage is against the policy and public interest.[445]

2.8.4. Citizen' Rights and the Police

The key function of police is to maintain the law and order in society. As it has direct interaction with the public therefore there may be many chances to violate the citizens' rights. In Pakistan, it is common trend to speak out on violations of human rights and atrocities by the police whereas its remedy area still remains at miserable situation. In

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[442]*Ram Jawaya Kapur* vs. *State of Punjab* AIR 1955 SC 549 ("Theory of Separation of Power"; Articles 73 and 162 of the Constitution of India, 1949; "in the absence of law, the state cannot monopolise any trade or business to the total or partial exclusion of citizens under Article 19(6) of the Constitution").

[443] Article 98 states as: "On the recommendations of the Federal Government (*Majlis-e-Shoora*Parliament, Subs. by P.O 14 of 1985 w.e.f.2 March 1985) may by law confer functions upon officers or authorities subordinate to the Federal Government." (The Constitution of the Islamic Republic of Pakistan, 1973).

[444]AIR 1951 (267 Mad FB).

[445]*Amin Jan vs. Director General T& T and others*: (1985 PLD 81[Lahore]).

spite of all the oratory related to the police reforms and different new steps, public grievances continue to persevere and the condition is going worse.[446]

There are multiple problems in this perspective such as: violation of due process,[447]illegal detention of people in illegal law enforcement raids, illegal searches, unlawful seizure and destruction of property. Most of the abuses done by the police servants are not reported by the victims due to the unawareness of their rights, futile complaint procedure and fear of police retaliation.[448]

In this context there are several events happened in the past, in which one is that 35 Pakistanis repatriated from Guantanamo Bay by the Americans in September, 2004 were being detained in Adiala Jail, Rawalpindi without being charged or brought before any court of law since past 8 months.[449] There are three most problematic areas related to police custody such as: extrajudicial killings, torture and death in police custody. Major reasons behind this situation is that police is most abusive, corrupt, and unaccountable institution of Pakistan. This fact has also been recognized in the recent report by "the Human Rights Watch" (HRW) titled "This Crooked System: Police Abuse and Reform in Pakistan" which states that: "Pakistan's police is widely regarded as among the most abusive, corrupt, and unaccountable institutions of the state. Effective systems of

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[446]Hafiz Aziz-ur-Rehman, *Citizens versus State: Public Servant Liability and Tort Reforms in Pakistan* (Islamabad: the Network for Consumer Protection, 2005), 8.

[447] For example, "denial of access to legal counsel, denial of access to information, torture, failure to advise the detainee on legal rights and fabrication of evidence." Ibid., 7.

[448]Ibid.

[449]Rauf Klasra, "Runaway Terrorist to Blame for Agony of Pak Prisoners," *The News*, Islamabad, May 14, 2005, www.thenews.com (last accessed at March12, 2017).

accountability and redress for grievances are crucial in order to transform the police from a repressive institution into a service that impartially protects life and property."[450]

Further, the report highlights the cases including "arbitrary arrests, false claims, torture and ill treatment of suspects, and fake encounter killings[451]by the police". It recommends for reformation to deal with these problems, especially in developing mechanism for grievance remedy and accountability for abuses.Considering the situation of rights discussed above it reveals that the situation of rights is very shocking and miserable here in Pakistan. For example, under "the Human Rights Commission of Pakistan" only in January to December, 2004 in police encounters accused were killed 271 (39.7%) escaped 154 (22.6%) and arrested 257 (37.6%) and in 2015, over 2,000 people were killed in armed encounters with the police, most in the Punjab Province.[452]A number of these killings through encounter were fake, which did not happen in situations in which citizen' lives were at risk. These instant cases are only reported whereas most of the cases remain unreported. Therefore, there is more critical situation in this regard.[453]

When it is talked about this situation in an international perspective, it needs to move towards the standards given by the United Nation Organization (UNO). For instance, there are 8 articles framed by "the UN's Perspective on Law Enforcement and Human Rights" for the adoption of law enforcement officials. Their role and functions

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[450]Human Rights Watch, *This Crooked System* (Human Rights Watch: September 26, 2016) available at https://www.hrw.org/report/2016/09/26/crooked-system/police-abuse-and-reform-pakistan (last accessed March 12, 2017).

[451]For example, in the case of Syed Alam who was killed in, 2015 by the police to evade accountability for corruption. Ibid., 102.

[452]Human Rights Commission of Pakistan, *State of Human Rights 2004 & 2015*(Lahore: HRCP, 2004 & 2015) available at http://hrcp-web.org/hrcpweb/ (last accessed at March 12, 2017).

[453]Ibid.

can be understood under these articles for the better protection of human rights.[454] There are articles 3 & 5 of the UDHR[455] related to the right to life and protection from torture respectively. Its Article 3 says that:[456] "Everyone has the right to life, liberty and security of a person."[457] Whereas, Article 5 states that,[458] "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." The person charged with a penal offence will be dealt under Article 11 of UDHR. The article says that, "everyone

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[454]Article 1:"Law enforcement officials shall at all times fulfill the duty imposed upon them by law, by serving the community and protecting all persons against illegal acts, consistent with the high degree of responsibility required of their profession."
Article 2:"In the performance of their duties, law enforcement officials shall respect and protect human dignity, and maintain and uphold the human rights of all persons."
Article 3:"Law enforcement officials may use force only when it is unavoidable and only to the extent it is absolutely necessary. Excessive force should not be used."
Article 4:"Law enforcement officials should keep confidential matters as strictly confidential, unless they are forced to disclose them in the discharge of their duties or in the interest of justice."
Article 5: "No law enforcement official should instigate or inflict or connive at torture or any other cruel, inhuman and degrading treatment of any person even during an internal turmoil or a threat to national security or in a state of war."
Article. 6:Law enforcement officials should take care of health of persons in their custody and secure medical treatment for them immediately, whenever necessary."
Article. 7:"Law enforcement officials should not be corrupt. They should put down corruption rigorously."
Article. 8:"Law enforcement officials should respect the law of the land and its code of conduct; they should also vigorously oppose and prevent any violations of law and the code of conduct." (International Human Standards for Law Enforcement: A Pocket Book on Human Rights for the Police, 1997. Available at:https://www.un.org/ruleoflaw/blog/document/international-human-rights-standards-for-law enforcement-a-pocket-book-on-human-rights-for-the-police/ (last accessed at May 1, 2017)

[455] UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III). Available at :http://www.unhcr.org/refworld/docid/3ae6b3712c.html (last accessed at May 2, 2017).

[456] Ibid. Article 3.

[457] Under the Quran, Sūra 17: Al-Isrā [verse 33] "Nor take life—which God Has made sacred—except For just cause. And if Anyone is slain wrongfully, We have given his heir Authority (to demand Qiṣāṣ Or to forgive): but let him Not exceed bounds in the matter Of taking life; for he Is helped (by the Law)." Sūra 2: Baqara [verse 191] "And slay them wherever ye catch them and turn them out from where they have turned you out; for tumult and oppression are worse than slaughter; but fight them not at the Sacred Mosque unless they (first) fight you there; but if they fight you slay them. Such is the reward of those who suppress faith" Sūra 7: A'rāf [verse 157]. "Those who follow the apostle the unlettered prophet whom they find mentioned in their own (Scriptures); in the law and the Gospel; for he commands them what is just and forbids them what is evil: he allows them as lawful what is good (and pure) and prohibits them from what is bad (and impure); He releases them from their heavy burdens and from the yokes that are upon them. So it is those who believe in him honor him help him and follow the light which is sent down with him it is they who will prosper." For the protection of fundamental rights of citizens, it urges to guarantee and to take necessary steps; Sūra 4: Nisāa [verse 75]: "And why should ye not fight in the cause of God and of those who being weak are ill-treated (and oppressed)? Men women and children whose cry is: "Our Lord! rescue us from this town whose people are oppressors; and raise for us from Thee one who will protect; and raise for us from Thee one who will help!."

[458]UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III).

charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence."[459]

Right to life has also been mentioned under ICCPR.[460] Its Article 6 (1) states, "every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."[461]Pakistan is signatory[462] and has ratified these conventions.[463] The responsibility of states to prevent torture has been clarified under "the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment" (CAT).[464] Article 2 says that:

> "Each state party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture."[465]

The clauses of international conventions and *Quranic* verses clarify that there is neither scope nor justification of torture in any situation by public authorities. In addition, there

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[459]UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III).
[460]UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations Treaty Series, vol. 999. 171.
[461]International Covenant on Civil and Political Rights, 16 December 1966.
[462]"**Signature** of a treaty is an act by which a State provides a preliminary endorsement of the instrument. Signing does not create a binding legal obligation but does demonstrate the State's intent to examine the treaty domestically and consider ratifying it. While signing does not commit a State to ratification, it does oblige the State to refrain from acts that would defeat or undermine the treaty's objective and purpose." *(The Concise Oxford Dictionary of Current English* (8th ed), Clarendon Press, Oxford, 1990 and United Nations Treaty Collection, *Treaty Reference Guide,* 1999.
[463]"**Treaty** is a formally concluded and ratified agreement between States. The term is used generically to refer to instruments binding at international law, concluded between international entities (States or organizations). Under the Vienna Conventions on the Law of Treaties, a treaty must be (1) a binding instrument, which means that the contracting parties intended to create legal rights and duties; (2) concluded by states or international organizations with treaty-making power; (3) governed by international law and (4) in writing."Ibid.
[464] UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol. 1465. 85.
[465]Ibid.

are some other significant principles that set out for the humane performance of law enforcement agencies.[466]

Under the above discussion it can be stated that the police enjoy great authorities over the precious lives and liberty of citizens in Pakistan. Police history shows that these powers are not, all the time, exercised to maintain the rule of law (as we narrated the incidents for example). In fact, these powers are exercised, sometimes, for a purpose and in a way that brings the rule of law into disgrace. Thus, whenever this happens, it destroys public confidence in the police as well as in the democratic system and its process, which the police are supposed to protect in a democratic system. For this reason, it is being, more and more, acknowledged in all the democratic states of the World that the police must be hold accountable for whatever they do and what they do not do. There are two aspects of police accountability in which, first is the accountability of the police at department to give a feeling of safety to all in the society whereas, the second is the accountability to assurance that complaints of citizens against negligence or misuse of powers by individual police servants are inquired into justly, and remedy given to the complainants speedily and fairly.[467] Though, there is law to deal with these two types of problems but is ineffective.[468]

In this regard, "Police Order, 2002" was an initiative in the right way, but its effectiveness was eroded before it could be implemented completely. If the leadership of Pakistan wants to reform in police department and for honest police, it must move

[466] For example, The UN Code of Conduct for Law Enforcement Officials along with the UN Standard Minimum Rules and the UN Body of Principles. See also www.unhchr.ch for referred human rights instruments.

[467] G.P Joshi, *The Government, the Police & the Community: A comparative Analysis of the Police Acts,* (Common Wealth Human Rights Initiative, Aug 2002), 10.

[468] Such as the Police Order, 2001.

beyond piecemeal and symptomatic steps. Except for minor adjustments that may be essential given the present state of affairs, "Police Order, 2002" provides model legislation that protects the fundamental idea of a politically neutral and accountable police and also provides a blueprint for effectual and honest policing. The question is whether there is political will to implement a reform agenda without reducing the integrity of the model's vision. Police reforms can be implemented effectively, as established by the successful model of the Motorway Police and National Highways (MP&NH) in Pakistan.[469]

2.8.5. Citizen' Rights and the Federal Investigation Authority (FIA)

'Federal Investigation Authority' (FIA) is a superior 'Law Enforcement Agency' in Pakistan.[470]"The FIA Act, 1974" makes clear in its preamble the strategic role of agency in leading the investigation of certain offences committed in connection with issues regarding the federal government and for issues connected therewith.[471]

It is fact that any anticorruption agency cannot be effective when it has to look to nonprofessional authorities for initiation of enquiries, registration of cases, and permission for prosecution sanctions, especially when these authorities take years to

[469]Hassan Abbas, Stabilizing Pakistan Through Police Reforms, Chapter Afzal Ali Shigri, Police Corruption and Accountability (Asia Society, New York: July 2012), 27-28.

[470]Its other names are Federal Police and Federal Anti Corruption Department which was established in January 1975. The main function of FIA is "to deal in the areas of smuggling, currency offenses, to oversee immigration functions, passports, and offenses with trans provincial and national consequences. The FIA also has functions of cybercrime and intellectual property rights. It has jurisdiction across Pakistan except Federally Administered Tribal Areas (FATA)." See further at: http://www.fia.gov.pk/; Federal Law Enforcement Agencies, FIA (National Public Safety Commission: Islamabad, 2006), 15. Further see at www.npg.org.pk.

[471] Federal Investigation Agency Act, 1974 (Act no. VIII of 1975), Preamble.

respond to such issues[472]. This practice of the agency has been criticized severely by the media and superior judiciary.[473]

There are also several incidents which reflect the negligence, corruption, torture, non-seriousness, harassment and abuse of power against its citizens. For example, recently a big theft happened in FIA treasury.[474] FIR was filed against unknown persons by the institute itself. Usually, officials are legally considered responsible in cases of irregularities in treasuries, but not a single official was nominated in FIR from the law enforcement agency. Similarly, there is another case of lame excuse by the DG FIA in which National Accountability Bureau (NAB), FIA and Anti-Corruption Establishment (ACE) were delaying action to take against 8 administrators and 65 other officials on high posts in cases of corruption and misuse of power in Karachi Metropolitan Corporation (KMC).[475]

Further, FIA and two top inquiry committees reported in which they identified 19 officials of criminal negligence and misconduct in result of billions of rupees loss to national exchequer in a project of the new Benazir Bhutto International Airport.[476]It seems that FIA authorities have decided to solve certain type of cases in their interests

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[472]Hassan Abbas, *Stabilizing Pakistan Through Police Reform* (New York: The Asia Society, July 2012). Available at: https://asiasociety.org/policy-institute/stabilizing-pakistan-through-police-reform (last accessed at May 21, 2017).

[473] The News, "SC Asks Secretary to Reappoint IGP GB to FIA," The News, June 11, 2011, http://www.thenews.com.pk/Todays-News-13-6628-SC-asks-secretary-to-reappoint-IGP-GB-to-FIA (last accessed at May 21, 2017)

[474]Dunya News, "Theft in FIA's treasury, case filed against unknown persons," Dunya News, 21 May, 2017, http://dunyanews.tv/en/Crime/389275-Theft-in-FIAs-treasury-case-filed-against-unknow (last accessed at September 9-2017). In February 2014, FIA had recovered Rs. 10 million from the person who leaked FPSC exam paper. The money was kept in the treasury of FIA office at FIA's office in Iqbal Town area of Islamabad.

[475] The Daily Times, "NAB & FIA are delaying action against corrupt KMC officials," the Daily Times, Sep, 1, 2016, http://dailytimes.com.pk/sindh/02-Sep-16/nab-fia-ace-delaying-action-against-corrupt-kmc-officials (last accessed at August 11, 2017).

[476] The News, "Public Accounts Committee (PAC) finds criminal negligence, irregularities in New Benazir International Airport," the News, March, 10, 2015, https://www.thenews.com.pk/print/143129-PAC-finds-criminal-negligence-irregularitiesin-New-Benazir-International-Airport (lst accessed at April-23-2107).

rather to follow law and to exercise their duties and responsibilities. This kind of situation, even, takes lives of innocent victim party when FIA or police commits negligence or do not take appropriate actions to help the victims. There was a miserable incident of Naila Rind who took her life due to blackmailing, harassing and further negligence of FIA and area police who failed to clue the incident.[477]

The above case was online harassment and blackmailing by other person. But there is another case of sexually assault and harassment by FIA official itself to an Afghan female national at Islamabad AirPort.[478] Similarly, a female immigration officer of the FIA was caught on camera torturing a Norwegian lady over a petty issue and got injury at the Benazir Bhutto International Airport.[479]This incident of torture was in front of public at AirPort, but situation becomes more critical when unlawful detention occurs and torture is committed by the FIA officials. Torture impacts on mental as well as physical capacity of the accused especially to innocent citizens. It happens normally in complex societies like Pakistan. Unlawful detention can facilitate the environment in which torture can flourish. In general, torture is inflicted to obtain information in the custody of the police.

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[477]Naila Rind killed herself because Pakistan's cybercrime laws failed her. Nighat Dad& Shmyla Khan Updated January 07, 2017, https://www.dawn.com/news/1306976(last accessed at June 1, 2017). Naila Rind, a student in her Masters class of University of Sindh in Jamshoro, allegedly killed herself in her hostel after the blackmailing became too much for her. Naila, was found hanging from a ceiling fan inside room No. 36 in Marvi hostel. Ibid.

[478] The Express Tribune, "FIA official arrested for sexual assault on foreigner at Islamabad Airport," The Express Tribune July 06, 2017, http://www.dnaindia.com/world/report-fia-official-arrested-for-sexual-assault-on-foreigner-at-islamabad-airport-2494673(last accessed at June 1, 2017).

[479] Pakistan Observer, "Two FIA Officials Suspended Maltreating Female Passengers," Pakistan Observer, April 19, 2017, http://pakobserver.net/2-fia-officials-suspended-maltreating-female-passengers-senate-told/ (last accessed at September 9, 2017). Noshila (accused) with help of two other female servants dragged her daughter to a room where they allegedly tortured her, Fouzia (victim), who got minor injuries to her head and neck during the brawl with FIA officials. She was given first aid by the Civil Aviation Authority and then was to the Benazir Bhutto Hospital for treatment. Ibid.

Along with the constitutional[480] and other statutes provisions,[481] the UN Convention Against Torture also prohibits the torture in detention.[482] Therefore, FIA should create environment of rule of law, accountability and liability without discrimination to comply these laws for the betterment of rights of citizens in the country. However, the Bill on "Torture, Custodial Death and Custodial Rape (Prevention & Punishment) Bill, 2014" (Pakistan) has been introduced before the National Assembly of Pakistan on 28 October 2014 by Ms Maiza Hameed from the PML-N. According to media reports the Bill has now been referred to a Parliamentary Committee.[483]

Further, to meet the growing challenges of crime and investigation in the twenty-first century, there is immediate need to take steps to ensure that the tireless efforts of servant of the FIA, coupled with the necessary structural, legal, and administrative improvements will produce even better results in the control of corruption and prevention of crime in Pakistan.[484]

2.8.6. Citizen' Rights and the Food Authority

Right to have food is a very basic right of every person which is necessary for a dignified life and is essential for the realization of certain other rights including right to health and life.[485] This right has been recognized in the Covenant,[486] wherein all states parties to the

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[480] The Constitution of the Islamic Republic of Pakistan, 1973, Article 10 (1&2); Article 14(2).

[481] The Pakistan Penal Code, 1860 (XLV of 1860), Article 337 (k): The *Qanun-e-Shahadat* Ordinance, 1984, Article 37.

[482] The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1987. Pakistan signed it in 2008 and ratified in 2010. Pakistan attached reservations to Articles 8, 28 and 30 of UNCAT upon ratification. The following reservation to Article 8 has been retained: "The Government of Pakistan declares that pursuant to Article 8, paragraph 2, of the Convention, it does not take this Convention as the legal basis for cooperation on extradition with other States Parties."

[483] *Torture, Custodial Death and Custodial Rape bill refers to Committee*, AAJ TV, 28 October 2014, http://www.aaj.tv/2014/10/torture-custodial-death-and-custodial-rape-bill-refers-to-committee/. Source: Commonwealth Human Rights Initiative, Nov 20014. See further at: www.humanrightsinitiative.org.

[484] Hassan Abbas, *Stabilizing Pakistan Through Police Reform* (New York: The Asia Society, July 2012).

[485] The Right to Food, International Network for Economic, Social & Cultural Rights. Available at https://www.escr-net.org/rights/food (last accessed November 9, 2107).

Covenant are duty bound to take appropriate measures to guarantee the realization of this right including the adoption of legislative measures.[487]Pakistan has also the legal and moral commitments to international authorities in every context of human rights.[488]Despite these international commitments and the responsibilities described in Article 38 of the Constitution, Pakistan lacks a legally binding mechanism through which people can claim their right to food.

In Pakistan, food security,[489]food safety and poverty remain major problems due to poor law and mismanagement by the authorities.[490] Some issues have emerged which are affecting it such as climate-related events[491]such as floods and drought, the recurring food price spikes and volatility, inequalities between those who can enjoy food security and those that are marginalized from it and non-accountability or irresponsibility of the responsible authorities.

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[486]The International Convent on Economic, Social and Cultural Rights, 1966, Article 11.

[487]Ibi,d. Article 2.

[488] Pakistan has signed and ratified following conventions such as: "signatory of the "UDHR, 1948," the ratification of "the Convention on the Rights of the Child, 1990,""ICCPR, 1966,""ICESCR, 1966,""the Convention on the Elimination of all Discrimination against Women, 1981". It is also participant of "Millennium Development Goals" (MDGs). Pakistan ratified it in April 2008. Pakistan ratified the Covenant with a general reservation that it will with a view to achieving progressively the full realization of the rights recognized in the present Covenant, shall use all appropriate means to the maximum of its available resource."

[489]'Food Security' is "the people's right to define their own policies and strategies for the sustainable production, distribution and consumption of food that guarantees the right to food for the entire population, on the basis of small and medium-sized production, respecting their own cultures and the diversity of peasant, fishing and indigenous forms of agricultural production, marketing and management of rural areas, in which women play a fundamental role. "(Final Declaration of World Forum on Food Sovereignty, 2001).

[490]Asian Food Security Network, *Right to Food Assessment* (Dhaka: Asian Food Security Network), 26. http://www.asfnsec.org/publications (last accessed September 10, 2017); Food insecurity is real problem in Pakistan, NNI, Nov 5, 2012. See at https://www.pakistantoday.com.pk/2012/11/05/food-insecurity-is-real-problem-in-pakistan/ (last accessed at September 9, 2017).

[491]"The flood in Pakistan, 2010 was a crisis of unprecedented proportions, submerging almost one-fifth of the country's total landmass and affecting 20 million people and resulting in a sharp decline in food security across the country. By 2010, almost 50 percent of the population, or 83 million people, were food insecure, up from 38 percent in 2003. In the aftermath of the 2010 flooding, it is believed that this figure may have risen to upwards of 90 million." http://www.foodsecurityportal.org/pakistan/resources (last accessed at October 9, 2017)

However, it is very alarming situation in Pakistan.[492] Hunger in Pakistan, resultantly, has killed many people and affected the lives of the children.[493] This happened in some cases in normal routine of life or due to natural disasters such as flood or drought incidents. For example, according to the media reports, a woman killed her two children, an eight-month-old baby boy and a two-year-old girl, in Johar Town Lahore, due to poverty.[494] In another incident, a mother killed her three children due to hunger.[495]Similarly, a poverty-stricken mother killed two daughters by poisoning them and afterwards attempted to commit suicide but was rescued. Mother claimed that she could not have seen her children in misery, and therefore took the extreme step.[496]All the players of the state are responsible for these deaths and further guaranteeing adequate food for the survived.[497]

The existence of a crisis also, paradoxically, provides an opportunity for action on right to food. In this context, Pakistan Government has taken various steps regarding right to food and food security throughout the country. These steps include legislations, policies

[492] As on Global Hunger Index, 2016, "Pakistan has been ranked as a country with 'serious' hunger level with 22% of its population undernourished and placed 107 in a ranking of 118 developing countries."www.ifpri.org/topic/Global-hunger-index (last accessed at October 9, 2017); According to FAO data, "it should be noted however that there were increases in the absolute number of people who were undernourished in Pakistan." See (State of Food Insecurity in the World, FAO 2014. Annex. 1. http://www.fao.org/home/en/ (last accessed at August 9, 2017);in a similar survey conducted by National Nutritional Survey (NNS) in 2011, 58% of people are food insecure with Sindh province being the worst off, .https://www.wfp.org/content/food-insecurity-pakistan-rises-58-national-nutritional-survey (last accessed at December 9, 2017).

[493]Hafsa Muhammad Hanif, "Status and Implementation of National Food," *Journal of the Dow University of Health Sciences Karachi* 4, no.3 (2010): 119.

[494]Rana Tanveer, "Driven by poverty, Mother kills her two children in Lahore," *the Express Tribune,* March 5, 2014, https://tribune.com.pk/story/679272/driven-by-poverty-mother-kills-her-two-children/) last accessed at Nov 9, 2017).

[495]A mother killed her three children due to hunger... Shame for rulers: The Tune.pk., https://tune.pk/video/2949906/pakistani-mother-kill-her-three-childs-due-to-hunger-shame-for-rulers (last accessed at Nov 9, 2017).

[496] Poverty drives women of South-Asia to suicide under the ugly rule of Capitalism, *The Khilafah,* 1st November 2014, http://www.khilafah.com/poverty-drives-women-of-south-asia-to-suicide-under-the-ugly-rule-of-capitalism/ (last accessed at November 9, 2017).

[497]Ibid.

and programs under social safety nets.[498] Food security measures were also incorporated in national legislation.[499] In spite of these improvements, Pakistan is still away from its defined goals.

In the backdrop of above situation, it is crucial that government adapt and implement a "Rights-Based Approach", one that integrates legal rights, integrative and rational frameworks and redress mechanisms to support its realization in true sense.[500]

2.8.7. Citizen' Rights and the Health Sector

Every person has right of quality preventive and curative healthcare for his healthy life. It is responsibility of every state, at national[501] and international level,[502] to provide them this important right.

In Pakistan, public healthcare infrastructure has expanded gradually with a network of health facilities, staff and services across the country which is quite inadequate.[503]

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[498] For example, "Pakistan Poverty Alleviation Fund (2000), Food Support Program (2002), *Zakat* and *Ushr* program (1980), Pakistan Bait-ul-Mal (1991), *Khushhal* Pakistan Program (KPP), Benazir Income Support Program (BISP) (2010), *Sasti Roti* Scheme (Punjab), Bacha Khan *Rozgar* Scheme (KPK)."(Asian Food Security Network, *Right to Food Assessment* (Dhaka: Asian Food Security Network), 9, 11.

[499] There is also legislation related to food availability which includes, "The Food Stuff Control Act, 1958, Agriculture Produce Market Act, 1939, Agricultural Pesticides Ordinance 1971, Land Reforms In Pakistan and Its Impact on Food Security, Seeds Related Legislations, National Seed Policy, Bait-ul-mal Act, 1991, Pure Food Ordinance, 1960, the Pure Food Ordinance of 1960, Pakistan Standards and Quality Control Authority Act of 1996, Pakistan Hotels and Restaurant Act of 1976 and The Cantonment Pure Food Act of 1966 deals with control of production, distribution and supply of food along with profiteering and hoarding." (Asian Food Security Network, *Right to Food Assessment.* (Dhaka: Asian Food Security Network), 14; Hafsa Muhammad Hanif, "Status and Implementation of National Food," *Journal of the Dow University of Health Sciences Karachi* 4, no.3 (2010): 119,120).

[500]Asian Food Security Network, *Right to Food Assessment* (Dhaka: Asian Food Security Network), 27; Hafsa Muhammad Hanif, "Status and Implementation of National Food," *Journal of the Dow University of Health Sciences Karachi* 4, no.3 (2010): 121.

[501] As in Pakistan, "the state shall secure the well-being of the people, irrespective of sex, caste, creed and race ... provide basic necessities of life, such as ... medical relief, for all such citizens, irrespective of sex, caste, creed or race, as are permanently or temporarily unable to earn their livelihood on account of infirmity, sickness or unemployment...." (The Constitution of the Islamic Republic of Pakistan, 1973, Article 38 (a) and (d)).

[502]"Everyone has the right to a standard of living adequate for the health and wellbeing of himself and of his family, including ... medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control." (Universal Declaration of Human Rights, 1948, Article 25 (1)).

According to "UN International Children's Emergency Fund" (UNICEF) report, in spite of important improvements over the past two decades, Pakistan ranks in infant and neonatal mortality towards the bottom.[504]

Treatment is made through medicines but the medicines industry has been badly regulated with the inspection method being defective and hardly reliable. Resultantly, substandard, counterfeit and fake medicines are available in the market and have consequence in the death of innumerable citizens.[505] There is need to tackle this menace by establishing a proper mechanism to stop manufacturing and sale of fake, substandard, counterfeit and smuggled medicines. The government must make sure the availability of genuine medicines in the market.[506]

The situation becomes more critical when precious lives end due to 'medical negligence'.[507] Negligence is a wide category of law of tort which is a careless conduct

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[503]For example, "the public health care system comprises 1167 hospitals, 5695 dispensaries, 5464 basic health units, 675 rural health centers, 733 mother and child health centers and allied medical professionals i.e. doctors, nurses, midwives and pharmacists. As of FY 2016, there are 184711 doctors, and 16652 dentists and 118,869 hospitals in the country. The ratio of one doctor is per 1038 person, one hospital bed for 1613 person and one dentist for 11513 persons." (HRCP, *State of Human Rights* (Lahore: HRCP, 2016), 234.

[504]As "Pakistan's ranking in the Maternal Mortality Ratio Index has slipped from 147 in 2014 to 149 in 2015, recording 276 deaths per 100,000 births. It also has the third highest rate of infant mortality in the world: 95 per thousand as compared to 60 in other countries. About 44pc of the children are stunted. About 9.6 million experience chronic nutrition deprivation. Pneumonia kills about 92,000 children annually in the country."Ibid.

[505]According to the Pakistan Pharmacist Association (PPA), "there are about 4,000 licensed pharmacies, but as many as 100,000 illegal merchants as well are selling medications in market."Ibid., 234).

[506] In this regard, "the action of the Punjab government is appreciable who has declared a non-bail able crime for selling and manufacturing of fake medicines, and has set up special teams to round up the offenders. Although, the federal government has launched a national health insurance programme but the government must focus on improving the conditions of the health facilities for an equal access to quality healthcare. A mere 0.9 per cent of the GDP is being spent on health, a ratio lower only than the ones in Bangladesh and Democratic Republic of Congo." Ibid., 234).

[507]'Medical Negligence' means that "any negligence by an act or omission of a medical practitioner in performing his/her duty is known as medical negligence. Medical negligence happens when the medical practitioner fails to provide the care which is expected in each case thus resulting in injury or death of the patient." (USLegal, s. v. "Medical Negligence," https://definitions.uslegal.com/m/medical-negligence/ (last accessed at April 12, 2018); Legal Dictionary, s.v. " Medical Negligence," https://legaldictionary.thefreedictionary.com/Medical+negligence (last accessed at April 12, 2018).

that puts an unreasonable risk of injury on another individual.[508] The concept of medical negligence is rather hazy in Pakistan. There are some reasons in this regard such as; unawareness by healthcare providers and general public, absence of medical malpractice litigation culture, societal norms, administrative and legal problems in this field.[509]Certain trends emerge from the reported incidents of medical negligence which includes technology lags, delay in response to emergency patients, greediness of the doctors, professional skills etc.[510]The case of Riaz Bibi is a combination of carelessness, incompetence and that of not following standard of surgical measures.[511]

In the absence of institutional mechanisms to help for the protection of their healthcare rights, there is needs a great deal of work to be done, urgently, and in many directions for the protection of the interests of the patients, reduce the incidents of medical negligence and maximize the availability and accessibility to health rights.[512]These directions which need to put in motion related to process involved therein are such as; health rights awareness campaign, need for reforming administrative and

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[508] Ibid.

[509]These have been identified by Hafiz Aziz-ur-Rehman in his research published by the Network Publication, Islamabad with the title of *"Medical Negligence: Tragedy Under Wraps* at 2006), 16.

[510]For example, "four patients died in Nishtar Hospital Multan in 2002, because of a reportedly defective anesthesia machine and negligence of the doctors. Similarly, there was a power failure during dialysis when Sajid was getting dialysis at the Liaqut National Hospital in Karachi on June 13, 2003. " Ibid.

[511] In this case, "RiazBibi was admitted to Cantonment General Hospital, Rawalpindi, as a gynae patient where she had a caesarean operation. A sponge was left in her body, which led to infection and gangrene all over her body. She was discharged from the hospital despite the fact that she was consistently complaining of pain in her abdomen. She was taken to PIMS in Islamabad, where an exploratory laparotomy was done. After a few weeks in coma, Riaz Bibi died." (*Riaz Bibi etc.* vs. *Dr. Ghazala etc.* 13.12.2005 (Rawalpindi)).

[512]These have also been identified by Hafiz Aziz-ur-Rehman in his research published by the Network for Consumer Protection, Islamabad with the title of "*Medical Negligence: Tragedy Under Wraps* at 2006) see at 16; Further, "judges should more frequently permit tort claims to proceed beyond the pre-trial dismissal stage to a full trial, in order to evaluate the policy concerns both for and against governmental liability with the benefit of a full evidentiary record. And judges should also more frequently permit health sector tort claims to proceed beyond the duty of care stage of the negligence analysis to an assessment of whether the government met the standard of care. While this approach would allow judges to scrutinize the reasonableness of the government's decisions, improving transparency and potentially motivating an improved decision-making process, it would not necessarily lead to widespread liability." See further for details the research of Lorian Hardcastle, "The Role of Tort Liability in Improving in Governmental Accountability in the Health Sector" (Phd diss., University of Toronto, 2013), 298-299.

judicial system, reforming Pakistan Medical & Dental Council (PMDC) procedures, improving curriculum of health and law professionals and clarification of law to doctors vis-à-vis emergency situation.[513]

2.8.8. Citizen' Rights and the Media

The media is considered to fight the battle of hearts and minds of the people.[514]In the current international political system, power, influence, and impact of media know no boundaries and it constantly shapes and reshapes attitudes, perceptions and opinions of the people.[515]In Pakistan, the media has most vibrant and diverse backgrounds. It, to a large extent, enjoys freedom of expression in spite of direct and indirect pressure from Government as well as other political stakeholders.[516] It has expanded an unprecedented since liberalization in 2002.[517]The media is resulting in accountability and policy advocacy, but is also causing an unethical breach of individual privacy and

[513] For details see recommendations given by Hafiz Aziz-ur-Rehman in his research published by The Network for Consumer Protection, *Medical Negligence: Tragedy Under Wraps* (Islamabad: Network for Consumer Protection, 2006), 15-16.

[514]The definition of 'Media is as, "communication channels through which news, entertainment, education, data or promotional messages are disseminated". (Business Dictionary Online, s.v. "Media," www.businessdictionary.com (last accessed at December 12, 2013). The traditional media comprises the narrowcasting and broadcasting medium for example, TV, radio, newspapers magazines and billboards.

[515] Muhammad Abbas, "Media and National Stability," *Pakistan Times*, 9th August, 2009.

[516] International Media Support, "*Media in Pakistan: Between Radicalization and Democratization in an Unfolding Conflict*," (Copenhagen: 2009), 14; Muhammad Ashraf and Muqeem-ul- Islam, " Media Activism and Its Impact on psychology of Pakistani Society," *I.S.S.R.A Papers* (2014): 54.

[517]For example, "around 117 television channels telecast entertainment programs, news & current affair political talk shows and satire round the clock. The television channels have a combined viewership of 124 million." (Gallup Pakistan, "Media and Television Audience Measurement Cyber letter," Gallup Pakistan, Gilani Weekly Cyber Letter Issue no. 203-Public Opinion Polls from Gallup Pakistan (22 December, 2014-26 December, 2014) (last modified December 31, 2014), http://www.gallup.com.pk/News/cyberletter (last accessed at November 1, 2017); Besides, 138 commercial and 40 non commercial radio channels are licensed by PEMRA. Pakistan Electronic Media Regulatory Authority, ,http://www.pemra.gov.pk/pemra/index.php?option=com_content&view (last accessed at November 13, 2017)

sensationalism, which in turn, is adversely affecting the psychology of people in Pakistan.[518]

In recent history of Pakistan, the media has played an effective role in the success of the socio-political movements for instance; in accumulate to the Long March of 16th March, 2009 and it succeeded in mobilizing support for the movement, culminating in the reinstatement of judiciary.[519]Similarly, media has been instrumental in rising transparency and accountability by exposing corruption scandals in the public sector.[520] In spite of its positive contribution as a watch-dog, it is doing irresponsibility sensationalism, non-professionalism and insensitivity as well.[521]Therefore, the media is considered in the society as media's failure to perform its responsibility in remaining within the boundaries of legal, cultural, ethical and customs of the society.[522]

The media has positive as well as negative influences on the public minds.[523] It also affects the psychology of governance in the country due to shallow and sensational

[518]Muhammad Ashraf and Muqeem ul Islam, "Media Activism and Its Impact on psychology of Pakistani Society," *I.S.S.R.A. Papers* (2014): 49.
[519]Ibid., 56.
[520] Malik Hasnaat, "SC Exposing Corruption of PPP Leaders Since March 2009,"*Daily Times*, 15 April, 2013, https://www.coursehero.com/file/p3rmg6p/16-15-Malik-Hasnaat-SC-Exposing-Corruption-of-PPP-Leaders-Since-March-2009/ (last accessed at November 14, 2017).
[521] For example, "in an online survey held by the Express Tribune, the results revealed that out of a sample of 1,025 Pakistanis and expatriates, 68% of respondents believed that media in Pakistan spreads negativity; 67% felt that the media is sensationalist in nature and 53% thought that the media is partisan i.e. sponsored by political parties." (The Express Tribune, "Pakistani Media is Partisan, Negative and Sensationalist," *Express Tribune*, April 9, 2012, https://tribune.com.pk/.../online-survey-pakistani-media-is-partisan-negative- and-sensationalist/ (last accessed at November 14, 2017).
[522]Shamshad Ahmad, "Media Power and Responsibility," *Daily the Nation*, November 14, 2013, https://nation.com.pk/07-Mar-2013/media-power-and-responsibility (last accessed at Dec 10, 2017).
[523]As, "the media affects people's opinions, perceptions and priorities. Media is exerting a profound impact on different aspects of life of people. It influences the way we relate our attitudes, values and beliefs about the world." (Stuart Fisch off, "Media Psychology: A Personal Essay in Definition and Purview," *American Psychological Association*, http://www.apa.org/divisions/div46/Fischoff%20Essay%20on%20Media (last accessed at November 15, 2017); (Sheila S.Coronel, the Role of the Media in Deepening Democracy" (pdf).

subjects discussed in talk shows.[524]When the media does not select the maters, which need policy reform, it will signal the policy-makers to neither reform nor create space for a debate on the matters that really matter.[525]Resultantly, these practices of media have adversely affected the country at national as well as international level.[526]

The purpose of media freedom can be realized only when public trust reposed in the media is respected by the media itself by acting as a true watchdog, keeping an eye on the government on behalf of the public.[527]The media can play its important role only if there is an enabling environment that allows them to do.[528]The media, as an institution and fourth estate, is accountable to the public and responsible for its actions and not above the law.[529] It should introduce an internal system of checks and balances which is, undoubtedly, an uphill task.[530] The media accountability is not possible under the disputed regulatory regime. This shift may assist purge the elements abusing the media powers in violation of the public mandate. A comprehensive plan to make sure the observance of media ethics by media monitoring and public debates is desirable to

[524]Nadeem-ul-Haq, "The Media, Society and Development," *Daily Times*, December 27, 2011. https://www.pakistanpressfoundation.org/the-media-society-and-development-2/ (last accessed at November 15, 2017).

[525]Muhammad Ashraf and Muqeem-ul-Islam, "Media Activism and Its Impact on psychology of Pakistani Society," *ISSRA Papers* (2014): 73; Nadeem ul Haq, "The Media, Society and Development," *Daily Times*, December 27, 2011. (last accessed at November 15, 2017).

[526]Mehvish Nigar Quraishi, "Role of Media in Statecraft: A case study of Pakistan," *I.S.S.R.A* papers (2010): 84.

[527]Media freedom and Responsibly, The Dawn News, November 24, 2009, https://www.dawn.com/news/843124 (last accessed at November 16, 2017).

[528]In this regard, "media needs the requisite skills for the kind of in-depth reporting that a new democracy requires. There should also be mechanisms to ensure they are held accountable to the public and that ethical and professional standards are upheld. Media independence is guaranteed if media organizations are financially viable, free from intervention of media owners and the state, and operate in a competitive environment. The media should also be accessible to as wide a segment of society as possible. Efforts to help the media should be directed toward: the protection of press rights, enhancing media accountability, building media capacity and democratizing media access." (Sheila S.Coronel, the Role of the Media in Deepening Democracy". 2. See also its section on Enhancing Media Accountability, 20.

[529]Ibid.

[530]Ibid. See also "Media freedom and Responsibility," The Dawn News, November 24, 2009, https://www.dawn.com/news/843124 (last accessed at November 16, 2017).

channelize the potential of the media for growth of a healthy and informed society and to bring sobriety and maturity in the media of Pakistan.[531]

2.8.9. Citizen' Rights and the Railways

A healthy functioning system of transport and communication is a crucial precondition for a sustainable economic growth of the country, and railway is one of them. Pakistan Railways (PR) had been the primary form of transport since seventies in the country. However, the performance of PR declined because of diversion of resources to extension of road system and "its share of inland traffic reduced from 73 % to 4 % for cargo traffic and from 41 % to 10 % for passengers".[532] Trains, it is ascertained, offer a safe mode of travelling across the world but why it is not the same for Pakistan.[533] It is because the PR, for several decades, has been passing through a deterioration process and most neglected area in the country.[534]There are manifold factors contributing for deterioration and the failure of the system. For example, usage of outdated technology, insecurity,

[531]Muhammad Ashraf and Muqeem-ul-Islam, "Media Activism and Its Impact on psychology of Pakistani Society," *I.S.S.R.A Papers* (2014): 76; "Media Freedom and Responsibility," The Dawn News, November 24, 2009,www.dawn.com.

[532] Economic Survey 2006-07 "Transport and Communications," chapter 14, 210.

[533] Source: Ministry of Railways. See at http://www.railways.gov.pk/ (last accessed at September 9, 2017).

[534] Dr. Aftab Afzal, "Railway Needs Attention," *Customs Today,* May 31, 2017, http://www.customstoday.com.pk/railway-needs-attention/ (last accessed at September 9, 2017).

corruption,[535] unmanned gates,[536] non-performance, non- seriousness of the employees, negligence and non-accountability of authorities and lack of investment.[537]

Special steps, as such, have not been taken for reducing the reasons of the grave accidents, as a result of these accidents, on one hand innocent people are killed whereas all train operations become to a halt causing millions of rupees to the nation exchequer on the other hand.[538] Their duties and liabilities, in general, comes under the concepts of tort law such as; occupiers of premises, railway level crossing, an invitation to alight at a railway station and persons professing skills.[539]

Currently there exists a lack of clarity and an overlap of roles and responsibilities of servants (liabilities) especially about their negligent activities of PR.[540] Therefore, amendment is desirable in existing laws for making the authorities liable and accountable for their negligent activities.[541] Further, implementation of these laws will not only

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[535]In this regard, "recently the National Accountability Bureau (NAB) has asked the Pakistan Railways to submit an inquiry report about 22 tons of missing coal." (The Nation, "NAB has asked the Pakistan Railways to submit an inquiry report about 22 tons of missing coal," *The Nation*, March 18, 2017,http://nation.com.pk/newspaper-picks/18-Mar-2017/nab-asks-railways-to-submit-inquiry-report (last accessed at August 29, 2017).

[536]For example, "there are a total of 1535 unmanned level-crossings in Railways system whereas 1306 are manned level-crossings in Railways system whereas 1306 are manned." (Dunya News, August 2017, www.dunya.com (last accessed at September9, 2017); The Dawn News, November 10th, 2016, ,www.dawn.com (last accessed at September 9, 2017); To close down all unmanned crossings, only the Punjab government had spent Rs. 610 million to close 75 spots. The Dawn News, November 10th, 2016, www.dawn.com) (last accessed September 9, 2017).

[537]Rabia Malik, "Railway accidents: who is responsible?," *the Dawn News*, November 3, 2016, https://www.outlookpakistan.com/railway-accidents-who-is- responsible/541/ (last accessed at September 1, 2017).

[538]For example, in addition to the maintenance of crashed trains, "there was in Millions of compensation which was awarded to those who lost their lives in train-related accidents in 2013 Rs. 200,000 from the ministry to the next of kin of deceased, while to 17 next kin in 2014 awarded Rs. 900,000. Similar cases amounted to awarded of Rs 30.4 million to 38 parties in 2015, and Rs 20.5 million to 34 parties in 2016."Ibid.

[539]These concepts have been observed in the following cases: *"H. Nawaz vs. Ghulam Muhammad:* (SCMR 1998 SC 225); *Roles vs. Nathan:* (1963) 1 WLR 1117; *Titcher vs. British Railways Board:* (1983) 3 All ER 770 (HL); *Revil vs. Newbery:* (1996) 1 All ER 291 (CA); *Krishan Goods Carriers (pvt) Ltd., vs. Union of India*: AIR (1980) Delhi 92."

[540]Dr. Aftab Afzal, "Railway Needs Attention," *Customs Today,* May 31, 2017, http://www.customstoday.com.pk/railway-needs-attention/ (last accessed at September 9, 2017).

[541]Ibid.

protect the precious lives of the citizens but also increase the economic growth of the country.

2.8.10. Citizen' Rights and the Natural Disasters Management Authority (NDMA)

The natural disasters occur almost every year in Pakistan.[542] The negligence of the concerned authorities and improper mechanisms to deal with them has put the lives of millions of citizens in danger for example, after the heavy rains (floods).[543] Due to flooding, there are other major crises, which have to face to poor such as; the scarcity of vital and edible things, destruction of the crops, roads, bridges and communication networks, loss of animals and non-availability of drinking water. The heavy rains and floods expose the poor management of the authorities who fail to take the floods seriously.[544]

The earth quake is another species of natural disastrous. In 2005, it was a great earth quake ever in history of Pakistan which destroyed thousands of people, their houses, animals, and other infrastructures of the whole of country.[545] Similarly, drought in Tharparker and other neglected areas in Pakistan take lives of the poor people every year.[546]Although, natural disasters cannot be stopped but destruction can be minimized

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[542]"Natural Disasters," includes "a sudden and terrible event in nature (such as a hurricane, tornado, or flood) that usually results in serious damage and many deaths." (Merriam Webster' Dictionary, s. v. "Natural Disasters,"https://www.merriam-webster.com/dictionary/natural%20disaster (last accessed at March 1, 2017).

[543] For example, "more than 1,600 people have been lost their lives by the floodwaters that swept away over 400,000 houses all over the country. Around 5000 villages were inundated and thousands of people are stranded with no hope of relief from the concerned authorities. According to the United Nations, the massive floods affected 14 million people in Pakistan." ("Pakistan: negligence of the authorities exposes the lives of millions to peril," (The Asian Human Rights Commission: Aug, 11, 2010). Available at: http//:www.humanrights.asia/.

[544]"Pakistan: negligence of the authorities exposes the lives of millions to peril," (The Asian Human Rights Commission: Aug, 11, 2010).

[545] Ibid.

[546] The Dawn News, "143 Thar children died in four months," *the Dawn News*, February 3, 2016 ,https://www.dawn.com/news/1237066 (last accessed May 12, 2017).

through earth quake proof infrastructures (before happening) and effective and efficient management to deal the issue in emergency situations (after happening).[547]

The absence of strong legal mechanism to deal with natural and man-made disasters has raised possibilities for the loss of the precious lives of the people and violations of other rights who survive.[548] The governments and concerned authorities depend on the local people to handle themselves. A serious political will is needed to take effective and efficient steps for this neglected area to protect the lives of the poor citizens and other basic rights of the citizens in Pakistan.[549][550]

2.9. Conclusion

This chapter finds that concept of liability has most importance for good governance. It reveals that different states firstly granted blanket immunity to the sovereign from lawsuits. They have, though, slowly retreated from this doctrine, dealing with this matter in a different way from the doctrine prevailing in India and Pakistan. This chapter concludes that due to abuse of executive powers, discretion, misfeasance, and maladministration of the state through its public servants, the existing state of rights is relatively depressing and presents a miserable picture of Pakistan. It also concludes that this alarming situation is increasing day by day which decreases public confidence on the state and undermines rule of law and contributes to rising violence and extremism in the country.

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[547]See further the steps taken by government , performance of the government, data on area development, availability of finance etc at www.ndma.gov.pk.

[548]"Pakistan: negligence of the authorities exposes the lives of millions to peril," (The Asian Human Rights Commission: Aug 11, 2010).

[549]Asian Food Security Network, *Right to Food Assessment* (Dhaka: Asian Food Security Network), 27.

[550] There are, however, certain steps taken by the government in this regard under Natural Disaster Management Authority, Government of Pakistan. See at: www.ndma.gov.pk.

CHAPTER 3

CONSOLIDATION OF TORTIOUS LIABILITY LAW IN INDIA AND PAKISTAN

The above chapter two discussed the concept of liability and state liability law. It also discussed the emergence and developments of state liability law in British India till 1947 as well as in other jurisdictions of the World to see the existing situation of the subject over there. It, further, summarized the current situation of the rights and the problems faced by citizens in Pakistan due to abuse of executive powers, discretion, misfeasance, and maladministration by the state.

This chapter deems the present legal position in India and Pakistan and discusses the nature of the liability law. This chapter takes a brief look at the efforts at law reform that have taken place in India as well as in Pakistan since their independence in, 1947. The main focus is on the point that both countries got independence at the same time from the same source then what developments and reforms have been made by both of the countries since 1947 to till date. This chapter does not make the comparison but identifies the reforms made by both of countries. So, tortious liability law in India is being discussed first as following.

3.1. Tortious Liability Law: An Indian Perspective

India was independent in August 15, 1947 from British India. Most of the laws previously applicable to British India had been allowed to follow in India, including law

of tort. The scheme to reform of the law related to vicarious liability of the state in tort was started as early as 1956. Though, this scheme has decayed after terminated efforts at reform through legislation. These efforts and the major reforms are being discussed as following.

3.1.1. First Report of the Law Commission of India, 1956 to Reform Tortious Liability Law

The first initiative to reform tortious liability law was taken by "the Law Commission of India" (LCI) in 1956.[551] The Commission recognized the uncertainty in its First Report that existed regarding the state liability for tortious acts committed by its servants.[552] It confirmed the judgment of the Madras High Court given in '*Hari Bhanji case*'[553]as laying down the accurate position on the extent of liability of the State, and it suggested further that subject to certain limits the extent of state liability should be similar as that of a private employer. Resultantly, in 1967 a draft Bill was introduced in the Lok Sabha, but it could not pass due to the dissolution of the Lok Sabha in 1971.[554]

In 2001, there was an important consultation paper by "the National Commission to Review the Working of the Constitution" (NCRWC) which reviewed the judgments of the courts from the pre-constitution and post 1950 era.[555] It pointed out that due to some reasons the current position was inadequate. Those certain causes are mentionable here as

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[551]"Law Commission of India" is "an executive body established by an order of the government of India. Its major function is to work for legal reform and motto is reforming the Law for maximizing Justice in society and promoting good governance under the Rule of Law. Its membership primarily comprises legal experts, who are entrusted a mandate by the Government." See further at: http://lawcommissionofindia.nic.in/ (last accessed at June 12, 2107).

[552] Law Commission of India, First Report: *Liability of the State in Tort* (Delhi: Law Commission of India, 1956); Debanshu Mukherjee & Anjali Anchayil, *Vicarious Liability of the State in Tort in India: A Case for Reform* (New Delhi: Vidhi Centre for Legal Policy, 2015), 25.

[553]*The Secretary of State for India vs. HariBhanji*: (1882) ILR 5 Mad. 273

[554] See this Draft Bill at: http://dspace.gipe.ac.in/xmlui/handle/10973/38162 (last accessed at June 12, 2107).

[555]A Consultation Paper on "Liability of the State in Tort" Vigyan Bhavan Annexe, New Delhi, 2001.

under :i) it was unjust that a state pardon itself of any liability for harm caused to the people due to its wrongful acts; ii) the vicarious liability on the state fixed under Article 300 of the Indian Constitution, taken up the position applied in British law and hence, should not form the base of subsequent legal growths; iii) provided the changing boundaries of states, it is very hard to determine the "Corresponding Province" or "Corresponding Indian State" as given in Article 300 of "the Indian Constitution, 1949"; iv) the verdicts given by the courts in post- constitution era on the extent of state liability in tort have taken up contradictory positions by making the difference between sovereign and non-sovereign functions. The general principles on the extent of liability of the state proposed in "the Report of Law Commission of India, 1956" were confirmed by the consultation paper with a few amendments to the exceptions to such liability.[556]

It is important to mention here that it has been frequently repeated by the Supreme Court the need for a comprehensive legislation on liability of the state in tort.[557]Along with the force of Supreme Court, the proposal has also been debated by the LCI and the NCRWC for the enactment of law on liability of the State for tortious acts committed by its public servants. The NCRWC in 2001 has presented its recommendations in the shape of notes on the proposal of the LCI, 1956. The LCI proposal and the NCRWC amendments are discussed as under to specify basic principles that should be reflected in upcoming enactment on the subject. There were two main aspects considered in it such as: i) Liability of the State and; ii) Exceptions to the state liability. It can be discussed one by one as under.

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[556] For the NCRWC's views on the proposals given in the LCI Report, see paper on "Liability of the State in Tort" Vigyan Bhavan Annex, New Delhi, 2001, 688-692.

[557] *Vadodara Municipal Corporation vs. Purshottam Murjani*: (2014) 10 SCALE 382; *Kasturilal Ralia Ram Jain vs. State of Uttar Pradesh:* AIR 1965 SC 1039.

3.1.1.1. State Liability

The LCI gave key proposal related to the extent of the vicarious liability of the state and a private employer. It proposed that the extent of the vicarious liability of the state and a private employer should be similar with certain exceptions. Thus, any defense available to the state must also be available to a private employer. This proposal was supported by the NCRWC and recommended for grounds for fairness and consistency. It was divided in to two categories as liability of the state in general and liability of the state for breach of statutory duties.[558] Both of these can be discussed as following.

3.1.1.2. State Liability (in general)

When employees and agents of the state commit wrong within the scope of their employment, the state should be liable. On this proposal of LCI, the NCRWC specified that there should be no exception from state liability for intentional torts committed by its employees or agents. As, there are no rational grounds to differentiate an intentional as well as an unintentional tort committed by a public servant.[559]

The liability of the state should be extended for the acts of independent contractors just in those situations in which common law held liable to a private employer for example i) non-delegable duties imposed on the employer by virtue of common law, ii) ratification of the tort of independent contractor by the employer etc.[560]As, the state by delegation now supplies a broad range of public services and operations to independent contractors, for example construction of highways, dams etc. The state should be held vicariously liable in tort where the employment of such independent contractors' outcomes in a

[558]A Consultation Paper on "Liability of the State in Tort" Vigyan Bhavan Annex, New Delhi, 2001. 25.
[559]Debanshu Mukherjee & Anjali Anchayil, *Vicarious Liability of the State in Tort in India: A Case for Reform* (New Delhi: Vidhi Centre for Legal Policy, 2015), 28.
[560]Clerk & Lindsell on Torts, 19th ed. A. M. Jones & M. A. Dugdale ed. (London: Sweet & Maxwell Ltd., December 2006), 6.

breach of duty owed by the state itself. The state should be held liable for that breach of duty which is owed to employees or agents as an employer; and for breach of duty under general law attached to the occupation, ownership, control or possession of immoveable property.[561]

3.1.1.3. State Liability (for Breach of Statutory Duties)

A master, as a general rule, is not liable and responsible for acts of its servants during performance of their statutory duty. The logic behind is that actions of servant are not subject to the control of the employer when he is performing his statutory duties. There should be pursued this position in those cases where the state is the employer of the servant. The state, however, should be held liable in certain cases for the tort committed by its servants. This proposal made in the LCI report was supported by the NCRWC for example the state, under statute containing to liability for breach, should be held liable for the breach of statutory duty imposed on the state or its employees which causes damage to the victim. The state should be held liable for the acts or omissions of its servants done negligently or maliciously during their statutory duties.[562]

It is not enough that the act be done in good faith in this regard. This principle also should be followed even in those cases where discretion is granted to the state or servants in discharge of the statutory duty.[563] The protection clauses in statutes providing immunity to the state for acts of its servants performed in good faith should be suitably limited. It pointed out that this would provide to avoid circumstances like '*Kasturilal*

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[561]Ibid.
[562]A Consultation Paper on "Liability of the State in Tort" Vigyan Bhavan Annexe, New Delhi, 2001.39; Debanshu Mukherjee & Anjali Anchayil, *Vicarious Liability of the State in Tort in India: A Case for Reform* (New Delhi: Vidhi Centre for Legal Policy, 2015), 28.
[563]Ibid.

case'[564]where though the seizure of property was in exercise of statutory authority but property was stolen because of the negligence of the servants/police officials of the state.[565]The next section considers the exceptions to state liability in tort.

3.1.1.4. Exceptions to State Liability

The LCI had made proposal related to exceptions to state liability in tort considering the position in the UK[566] and USA legislation.[567] The USA takes a very restrictive approach to the tortious liability of the state whereas the UK approach provides better guidance in this regard.

Some of the key exceptions are being discussed from the proposals of the LCI and the recommendations of the NCRWC for example: i) act of the state; ii) acts done by armed forces; iii) judicial acts; iv) acts relating to political functions of the state; v) discretionary functions or duties of government agencies or employees; vi) acts of employees of corporations owned or controlled by the state.[568] These exceptions are being discussed one by one as under.

3.1.1.4.1. Acts of the State

The important element is good governance for the good relations with another state. Therefore, an exception should be granted for executive acts exercised by the State in the way of its relations with another state or its subjects as suggested by the LCI.

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[564]*Kasturi lal Ralia Ram Jain vs. State of Uttar Pradesh:* AIR 1965 SC 1039.
[565]Debanshu Mukherjee & Anjali Anchayil, *Vicarious Liability of the State in Tort in India: A Case for Reform (*New Delhi: Vidhi Centre for Legal Policy, 2015), *28.*
[566]The Crown Proceedings Act, 1947.
[567]The Federal Tort Claims Act, 1946.
[568]A Consultation Paper on "Liability of the State in Tort" Vigyan Bhavan Annex, New Delhi, 2001. 25.

3.1.1.4.2. Judicial Acts

According to the Section 3 of "the Judges (Protection) Act, 1985" (JPA) judges are protected from criminal as well as civil liability for the acts done or words spoken in discharging or purported to discharge of his official or judicial duty or function.[569] Such immunity or protection expands to quasi-judicial powers that are empowered by law to present a binding judgment by virtue of Section 2 of the JPA.[570] So, an exception is necessary from tort liability in such cases.

3.1.1.4.3. Acts of Armed Forces

Important exceptions and its rules were suggested by the LCI related to the acts done by the armed forces during their duty as that: i) such an exception should cover claims regarding combatant acts exercised by armed forces during war time; ii) an exception should cover liability of the state for acts or omissions of servant of the armed forces which, in the course of his duty, causes death or injury to another servant of the force; iii) as it might not be possible in situations of war to impose a duty of care on the soldier or on the State therefore such immunity against his action is necessary; iv) and finally, such an exception should cover the acts done by the Union in exercise of their authority regarding the state defense as well as training of armed forces as given in Section 11 of "the Consumer Protection Act" 1986[571] and the LCI proposal.

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[569] The Judges Protection Act, 1985 (Act No. 59 of 1985).

[570]Definition:- "In this act 'Judge' means not only every person who is officially designated as a Judge, But also every person (a) Who is empowered by law to give in any legal proceeding a definitive judgment, or a judgment which, if not appealed against, would be definitive, or a judgment which, if confirmed by some other authority, would be definitive; or (b) Who is one of persons which body of persons is empowered by law to give such a judgment as is referred to in clause (a)."Ibid.

[571]The Consumer Protection Act, 1986 (68 0f 1986).

3.1.1.5. Discretionary Duties or Functions of Governmental Organizations or Servants

A limited exception for discretionary functions must be limited to prevent the state escaping liability for damage caused because of such discretion applied by its servants or employees in a negligent or malicious way.

3.1.1.6. Acts Concerning to Political Functions of the State

Immunity from state liability for acts done in relation to political functions of the state has been recommended by the LCI.[572] Such immunity or protection is warranted to make possible for the legislature as well as the executive to perform their functions and connect in policy-making effectively without any obstruction. This should be subject to liability of the state for acts performed in breach of statutory duties in these above-mentioned areas.[573]

3.1.1.7. Acts of Employees of Corporations Owned or Controlled by the State

The state must not be held liable for the acts done by the employees of corporation like any other private entity which sets up a corporation, provide that, cases where the corporate veil may be pierced. So, the corporation can be held liable in tort for the acts done by its employees in such type of cases.[574]

After discussing these initiatives, there is also Article 300 of "the Constitution of India, 1949" which deals with this field therefore it is important to discuss here.

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[572]These functions of the state are: "i)acts done by the President or Governor concerning their constitutional authorities to summon, prorogue or dissolve the Legislature or in exercise of power to issue proclamations under the Constitution; ii) diplomatic, consular and trade representation; iii) United Nations Organisation (UNO); iv) war and peace; v) negotiation, entry into and implementation of treaties, agreements and conventions with other countries; vi) participation in International conferences, associations and other bodies and the decisions taken there; vii) foreign jurisdiction; viii) and foreign affair."(A Consultation Paper on "Liability of the State in Tort" Vigyan Bhavan Annex, New Delhi, 2001, 26).

[573]Ibid.

[574]A Consultation Paper on "Liability of the State in Tort" Vigyan Bhavan Annex, New Delhi, 2001. 26.

3.1.2. Constitutional Law

Article 300 of "the Constitution of India, 1949" is the foundation of state liability for tortious acts committed by its servants in India.[575] The sub clause (1) of Article 300 allows for actions to be brought by and against the Government of India or the Government of a State in the name of the Union of India or the State in that order. It says as:

> "The Government of India may sue or be sued by the name of the Union of India and the Government of a State may sue or be sued by the name of the state and may, subject to any provisions which may be made by Act of Parliament or of the Legislature of such State enacted by virtue of powers conferred by this Constitution, sue to be used in relation to their respective affairs in the like cases as the Dominion of India and the corresponding Provinces or the corresponding Indian States might have sued or been sued if this Constitution had not been enacted."[576]

This article allows: (i) the imposition of civil liability on every state; (ii) explains the extent/scope of such liability to the same extent as the liability of the all Indian States; (iii) and also creates the extent/scope of liability prepared by the Parliament of India or the legislature of any it's State. The effect of this constitutional position is that the extent/scope of liability of the Government of all states of India is described as it placed prior to the constitution.

Consequently, reference must be made to "the Government of India Act, 1935" in turn to determine the extent/scope of such liability. Its Section 176(1) is the related provision which refers to Section 65 of "the Government of India Act, 1858"[577] which specifies that

[575] The Constitution of India, 1949, Article 300 & Article 300 (1).

[577] Section 176(1) refers to the legal position contained in Section 32, Government of India Act, 1935 thus: "the Federation may sue or be sued by the name of the Federation of India and a Provincial Government

the scope of liability of the Secretary of State for India would be the same as that of "the East India Company".[578]

The above-mentioned constitutional articles do not give substantive guidelines for the scope of liability of the state.[579] Therefore, reference must be made to certain relevant decisions of the courts which specifically recognized the scope of state liability related to the tortious acts of public servants.

In the following section, some important cases are being discussed which have been played important role in the development of tortious liability principles in India.

3.1.3. Role of Judiciary in the Development of Tortious Liability Law

In the absence of concrete principles regarding state liability and existence of immunity clauses on the same, the judiciary has played a great role to make the state liable for the torts committed by its servants. For this purpose, it is being mentioned the important cases decided by the Higher Courts of India as following.

The *State of Rajasthan* vs. *Vidhyawati* was first post Constitution decision by the Supreme Court on the issue of state liability for the tortious act of public servant.[580] In this case, a pedestrian was injured and later died due to his injuries by a government servant who negligently drove a government vehicle. The decision of Peacock C.J. in *P*

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may sue or be sued by the name of the Province...." (Government of India Act, 1935 (26 Geo. V & 1 Edw VIII Ch 2)).

[578] Section 65 says: "the Secretary of State in Council shall and may sue and be sued as well in India as in England by the name of the Secretary of State in Council as a body corporate; and all persons and bodies politic shall and may have and take the same suits, remedies and proceedings, legal and equitable, against the Secretary of State in Council of India, as they could have done against the said Company; and the property and effects hereby vested in Her Majesty for the purposes of to Government of India, or acquired for the said purposes, shall be subject and liable to the same judgments and executions as they would, while vested in the said Company, have been liable, to in respect of debts and liabilities lawfully contracted and incurred by the said Company." (Government of India Act, 1858).

[579] Debanshu Mukherjee & Anjali Anchayil, *Vicarious Liability of the State in Tort in India: A Case for Reform* (New Delhi: Vidhi Centre for Legal Policy, 2015), 7.

[580] The *State of Rajasthan vs. Vidhyawati*: AIR 1962 SC 933.

& O Steam Navigation Company was followed by the Supreme Court and hold that the Government of Rajasthan would be liable for the tortious acts of its servants same as any other private employer.[581] The verdict in *Vidhyawati* case did not engage in any effort to describe sovereign functions or to apply a definition of sovereign functions.

The Supreme Court analyzed the verdict of *Vidhyawati* case in a later decision in *Kasturi lal Ralia Ram Jain* v *State of Uttar Pradesh.*[582] In this case a police constable misappropriated a quantity of gold seized from the plaintiff by the police and reserved in police custody. The plaintiff making a claim against the Government of Uttar Pradesh argued that the loss was occurred due to the negligence of police officers. The claim was rejected by the Supreme Court and declared an expansive observation of sovereign immunity.[583]

The verdict in *Vidhyawati* case was not follow by the Supreme Court as it distinguished this verdict on the base of the facts concerned. It was noted that in *Vidhyawati case* the tortious acts could not be deemed as an exercise of sovereign functions as compared to tortious acts in *Kasturi lal* case.[584] In a result the verdict given in *Vidhyawati case* essentially had to be dissimilar from the verdict in *Kasturi lal case*. It noted as well that the verdict in *Vidhyawati* should have been basis on this definite aspect although this did not occur indeed.

It was held that liability of the state for tortious acts of public servants would not happen if the tortious acts were committed by the public servant during, "in discharge of

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[581]Ibid.

[582]*Kasturi lal Ralia Ram Jain vs. State of Uttar Pradesh*: AIR 1965 SC 1039.

[583]A Consultation Paper on "Liability of the State in Tort" Vigyan Bhavan Annex, New Delhi, 2001. 7.

[584] The Supreme Court specifically held that "the state was not vicariously liable as - (a) the power to arrest and search a person and seize his property were statutory powers conferred on the police officers; and (b) such powers could be characterized as sovereign powers."*Kasturilal Ralia Ram Jain vs. State of Uttar Pradesh:* AIR 1965 SC 1039, para 31.

statutory functions which are referred to, and ultimately based on, the delegation of the sovereign powers of the state."[585] This wide formulation of the description of sovereign functions resulted in a significant increase in the extent/scope of sovereign immunity. H.M. Seervai, a constitutional scholar, comments on decision *in Kasturi lal* doubting the soundness of the judgment that the Court to identify the primary difference between an act of the state has failed in its duty, which can be given shield under sovereign immunity and a wrongful act of a public servant purportedly done under the power of a municipal law. The reasons given by the Court in this regard erodes and widens the extent/scope of sovereign immunity away from rational limits.[586]

It is important to mention here the possibility to give rise to unjust situations created by the Supreme Court decision in *Kasturi lal.* The Court further opined that, the source of resolution of this trouble was through appropriate legislative interference rather judicial interpretation.[587]The description of sovereign functions articulated in *Kasturi lal* case was applied subsequently in numerous situations by making reference that whether the act under consideration could be followed by private individuals or not. If an act under consideration could be followed by private individuals, then such an act would not be a sovereign function and liability of the state would take place.[588]

The Government of Rajasthan was held liable vicariously in another case of *Shyam Sunder* vs. *State of Rajasthan,*[589]for the death of a person sent on famine relief of work. The court held that famine relief work could not be deemed as a sovereign function

[585]A Consultation Paper on "Liability of the State in Tort" Vigyan Bhavan Annex, New Delhi, 2001.17, para 23.
[586] H.M. Seervai, *Constitutional Law of India* vol. 2. 4th ed. (New Delhi: Universal Law Publishing-an imprint of LexisNexis, 2015), 2132.
[587]Ibid.
[588]H.M. Seervai, *Constitutional Law of India* vol. 2. 4th ed. (New Delhi: Universal Law Publishing-an imprint of LexisNexis, 2015), 2132.
[589]*Shyam Sunder vs. State of Rajasthan*: AIR 1974 SC 890.

as it could be performed as well by private individuals. Likewise, the founding of guest houses at railway stations was not considered as a sovereign function in the case of *Chairman, Railway Board* vs. *Chandrima Das.*[590]

Though, despite such wide judicial guidelines, distinction between sovereign and non-sovereign functions has remained rather complicated. Indeed, two judgments from the High Court on similar facts demonstrate this difficulty. In *Thangarajan* vs. *Union of India* decision,[591]it was held that an army driver moving carbon dioxide to a naval ship was doing a sovereign function. In other case of *Usha Aggarwal* vs. *Union of India* decision,[592]the court held that sovereign immunity would not be granted for a tortious act committed whilst moving arms from a railway station to a military camp by truck.

In the case of *State of Bombay* vs. *Memon Mahomed Haji Hasam*,[593]certain vehicles and goods seized by custom officials were disposed of due to the negligence of the police. The Supreme Court held that the Government of Gujarat was liable for tortious acts of public servants such as the police.[594]It further held that the judgment in *Vidhyawati* and *Kasturi lal case* was not related to the issues of state liability in such situations. The State of Mysore was held liable in the case of *Basava Dyamogouda Patil* vs. *State of Mysore*[595] for property which was misplaced while in the custody of the police on facts mostly alike to the facts in *Kasturi lal* case.

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[590]*Chairman, Railway Board vs. Chandrima Das*: AIR 2000 SC 988.
[591]*Thangarajan vs. Union of India*: AIR 1975 Mad 32.
[592]*Usha Aggarwal vs. Union of India*: AIR 1982 P & H 279.
[593]*State of Bombay (Now Gujarat) vs. Memon Mahomed Haji Hasam*: AIR 1967 SC 1885.
[594]Basically, it was held after comparing the position of the Government of Gujarat to that of a bailee.
[595]*Basava Dyamogouda Patil vs. State of Mysore*: AIR 1977 SC 1749.

The above discussed important cases were general in nature, but Indian Higher Courts also gave an innovative approach for the violations of constitutional rights, which is called as constitutional tort remedy. It is being discussed shortly in the following section.

3.1.4. Constitutional Tort Remedy: An Innovative Approach

The idea of constitutional tort remedy has been discussed in detailed in a separate chapter four of this research. In this section, over all developments of state liability is being discussed, therefore constitutional remedy is considered to mention here shortly.

There was a vital growth in the field of constitutional law that bore particular relevance to this matter while uncertainty prevailed related to the test for state liability for tortious acts of public servants. This growth was the recognition of state liability for tortious acts of public servants by the tool of fundamental rights. In certain landmark judgments[596]the Supreme Court considered state liability for acts of public servants that violated the fundamental rights. A petition filed under Article 32 or Article 226 of the Constitution was the proper remedy in such situations.

In an important case of *Nilabati Behera* vs. *State of Orissa*[597]liability was imposed by the Supreme Court on the State of Orissa and awarded compensation followed to a petition filed for remedy against the violation of fundamental rights. The Court held that such a remedy was available in public law based on strict liability for breach of fundamental rights to which the doctrine of sovereign immunity does not apply although it may be available as a protection in private law in tortuous acts.[598]

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[596]*Rudul Shah vs. State of Bihar*: (1983) 4 SCC 141; *State of Andhra Pradesh vs. Challa Ramkrishna Reddy*: (2000) 5 SCC 712; *D K Basu vs. State of West Bengal*: (1997) 1 SCC 416.
[597]*Nilabati Behera vs. State of Orissa:* (1993) 2 SCC 373.
[598]Ibid. This case is also followed in Sanjay Gupta & Ors *vs. State of U.P. &Ors* on 31 July, 2014.

Taking into consideration the new trend in constitutional jurisprudence succeeding decisions sought to revisit the matter of state liability for tortious acts of public servants. For example, in the case of *N. Nagendra Rao & Co.* vs. *State of Andhra Pradesh,*[599]the question before the Supreme Court was whether the State could be liable for the loss caused because of the negligence of its servants in handing over goods seized from him under "the Essential Commodities Act, 1955". The court held liable vicariously to the State for the negligence of its officials to comply with the sections of the Act. Besides this precise ruling, an adverse observation was also stated by the Supreme Court related to the principle of sovereign immunity and commented that the doctrine of sovereign immunity has no relevance in the present-day context when the concept of sovereignty itself has undergone drastic change. The principle of sovereign immunity was restricted by the Supreme Court only to those claims in which the issue in question relating to a "function for which it cannot be sued in court of law."[600]These functions incorporated the "administration of justice, maintenance of law and order and repression of crime etc. which are among the primary and inalienable functions of a constitutional Government."[601]

In the case of *Common Cause (A Registered Society)* vs. *Union of India,*[602]the judgment in *Nagendra Rao* was followed. The court held liable the Government of India for loss in associated with the allocation of a petrol outlet and such function could not be deemed as a sovereign function.[603] Further, in the case of *Vadodara Municipal*

[599]*N. Nagendra Rao & Co. vs. State of Andhra Pradesh:* AIR 1994 SC 2663.
[600]Ibid., para 25.
[601]Ibid., para 24.
[602]*Common Cause (A Registered Society) vs. Union of India*: AIR 1999 SC 2979.
[603]Ibid.

Corporation vs. *Purshottam V Murjani,*[604] the Supreme Court holding the municipal corporation liable vicariously, did not rely upon *Kasturi lal* or *Nagendra Rao* in any way and held that the municipal corporation was performing its statutory duty and acting as a service provider by its agent.[605] The Court further stated that Constitutional Courts have to maintain just and fair claims against public authorities due to loss of life or liberty in relation to violation of statutory duties of public authorities and compensation awarded in tort law.[606]

It emerges from the whole scenario that although the judiciary has broad agreement on the distinction between sovereign and non-sovereign functions which is archaic/out dated but the judiciary has not moved away from this distinction or from the principle of sovereign immunity. Anyhow, the Supreme Court, to mitigate unjust findings, has been continuously trying to restrict the extent/scope of the principle of sovereign immunity as tried in the judgment in *Nagendra Rao* and later judgments.[607] Along with constitutional provision and judiciary role, there are also some statutes on private actions providing liability of the state, which are being discussed in the following section.

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[604] *Vadodara Municipal Corporation vs. Purshottam V Murjani*: 2014 (10) SCALE 382.
[605] The question before Supreme Court was "whether the municipal corporation which was responsible for the management of the Sursagar Lake, was liable to pay compensation under the Consumer Protection Act, 1986 for the death of 22 persons who drowned in the lake during a boat ride due to negligence in plying the boat. The Corporation had outsourced the activity of plying boats for joyrides to an agent."Ibid.
[606] *Ibid.* para 19.
[607] Ibid., ; see also *State of Maharashtra vs. Kanchanmala Vijaysing Shirke*: AIR 1995 SC 2499;*Achutrao Haribhau Khodwa vs. State of Maharashtra*: AIR 1996 SC 2377; *Common Cause (A Registered Society) vs. Union of India:* AIR 1999 SC 2979.

3.1.5. Private Actions under Statutes (Private Law)

There are several statutes which impose liability to pay compensation for the tortious acts of persons which cause death or injury to the person or property of others. These actions are allowed in private law under "the Motor Vehicles Act, 1988", "Consumer Protection Act, 1986" and "Fatal Accidents Act, 1855". An assessment of the cases dealt under these Acts demonstrates that general principles of law of tort are relevant in recognizing the liability of the defendant in tort.[608] The state can be sued under these Acts same as any private person. Hence, under these Acts vicarious liability of the state can take place for tortious acts or omissions of its employees during their employment.[609]Though, the lines of vicarious liability of the state under these Acts are drawn in conformity with Article 300 as well as the precedents thereon. The cases brought under these Acts have also relied on the distinction between sovereign and non-sovereign functions of the state to decide whether the state was liable vicariously in tort.

In *Pushpa Thakur* vs. *Union of India*[610]case the question before the Supreme Court was whether sovereign immunity existed as a protection to claims against the state under "the Motor Vehicles Act". The court left the point unclear and did not explicitly exclude the applicability of sovereign immunity to claims taking place against the state under the Act.

An important issue to deal came before high court considering the state liability to pay compensation for deaths caused because of negligent driving of its employees in

[608]For example, *Municipal Corporation of Delhi vs. Subhagwanti*: AIR 1966 SC 1750; *Achutrao Haribhau Khodwa vs. State of Maharashtra:*AIR 1996 SC 2377; *Vadodara Municipal Corporation vs. Purshottam V. Murjani:* 2014 (10) SCALE 382. As discussed above.
[609]*State of Maharashtra vs.Kanchanmala Vijaysing Shirke*: AIR 1995 SC 2499.
[610]*Pushpa Thakur vs. Union of India:* AIR 1986 SC 1199.

Union of India vs. *Ashok Kumar* case.[611]The Allahabad High Court noted the nonexistence of a section in "the Motor Vehicles Act" negating the state liability for acts of its servants performed in the exercise of sovereign authorities.[612] Ultimately the court held that transportation of ration for armed forces in that case was not a sovereign function. Likewise, the state was held liable vicariously in a medical negligence case under "the Consumer Protection Act, 1986", to pay compensation considering that maintaining and running a hospital was not a sovereign function.[613] Hence, even when remedy is sought under these Acts, it looks obvious that the individual looking for relief would be left with no any remedy against the state where the negligent act or omission of its servant is identified as being done in the performance of a sovereign function.

Now it is important to point out the statutory provisions existing in Indian laws, therefore these are being discussed in the following section.

3.1.6. Statutory Provisions (Immunity Clauses) In Indian Laws

The lawmaker has option to make an Act providing a right of suit against the state in cases in which such a right is not available, or removing or restraining an available right of suit.[614]There are a lot of provisions in several Acts which provide immunity to the state and its officials from liability. The common method is used in these words, "no suit, prosecution or other legal proceeding shall lie for anything in good faith done or intended

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[611]*Union of India vs. Ashok Kumar:* 2011 ACJ 2708.

[612] "In addition, the Legislature in enacting Motor Vehicles Act, 1988 has not taken this aspect that act done in exercise of sovereign function would not fall within the purview of provisions of this Act." (Ibid., para 35).

[613]*Achutrao Haribhau Khodwa vs. State of Maharashtra:* AIR 1996 SC 2377. This decision has been followed in *State of Haryana vs. Smt. Santra:* AIR 2000 SC 1888, to hold the state vicariously liable for the negligence of the doctors in a government hospital in performing a sterilisation operation. (Debanshu Mukherjee & Anjali Anchayil, *Vicarious Liability of the State in Tort in India: A Case for Reform* (New Delhi: Vidhi Centre for Legal Policy, 2015), 13).

[614]The Constitution of India, 1949, Article 300.

to be done under this Act". And further, "a thing is deemed to be done in good faith where it is in fact done honestly, whether it is done negligently or not."[615]

These immunity provisions are framed differently related to the realm of immunity. Some Acts expand immunity to all persons; some extend protection to the state and its servants, whereas certain extend immunity to its servants only. It is hard to clarify why immunity has been provided in certain cases to the government but not in others. There may be two likely clarifications to exclude the government from the extent of immunity for example: (i) the function concerned is a sovereign function and therefore immunity or protection exists to the state and; (ii) as the function has been given on a specific servant by the Act; in such case state is not liable under legal position as it places at present.[616]

An immunity provision cannot save the state from liability when the authority is applied in a bad faith.[617]It shields acts done in good faith even if done negligently. Thus, the Law Commission of India has been correctly indicated that such 'protection provisions' should not be formed to extend to negligent acts however done honestly.[618]Protection clauses or statutory provisions which provide that a suit shall not lie against the public servants for anything which is done or intended to be done under a particular statute. There are several verbal variations. A list of statutes and their related provisions are being identified here as a sample.[619]

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[615]General Clause Act, 1897 (10 0f 1897), Section 3 (22).
[616]Chidananda Reddy S. Patil "Liability of the State for the Torts Committed by its Servants" (PhD diss. Karnatak University, 2002), 177.
[617]*Prem Lai vs. U.P. Government:* AIR 1962 All 233; *Bhiwandi Municipality vs. K.S. Works:* AIR 1975 SC 529.
[618]Law Commission of India, First Report: *Liability of the State in Tort* (Delhi: Law Commission of India, 1956), 39.
[619]These also have been mentioned by the Law Commission of India, in its 1st Report in 1956.

The immunity clause has been incorporated through Section 84 of "the Information Technology Act, 2000 (21 of 2000)," it states that:

> "No suit, prosecution or legal proceeding shall lie against the Central Government, the Controller or any person acting on behalf of him, the presiding officer, adjudicating officers and staff of the Cyber Appellate Tribunal, for anything which is in good faith done or intended to be done in pursuance of this Act or any rule or regulation or order made there under."[620]

In "the Drugs and Cosmetics Act, 1940," Section 37 gives protection in these words:"no suit, prosecution or other legal proceeding shall lie against any person for anything which is on good faith done or intended done under this Act."[621] "The Chit Funds Act, 1982" includes immunity under Section 88 which provides as:

> "No suit, prosecution or other legal proceeding shall lie against the State Government, the Registrar or other officers of the State Government or the Reserve Bank or any of its officers exercising any powers or discharging any functions under this Act in respect of anything which is in good faith done or intended to be done in pursuance of this Act or the rules made thereunder."[622]

Thus, the immunity clause also has been provided in "Consumer Protection Act, 1986". Its Section 28 states that:

> "No suit, prosecution or other legal proceeding shall lie against the members of the District Forum, or the State Commission or the National Commission or any officer or person acting under the direction of the District Forum, the State Commission or the National Commission or executing any order made by it or in respect of anything which is in good faith done or intended to be done by such member, officer or person under this Act or under any rule or order made thereunder."[623]

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[620]The Information Technology Act, 2000 (Act no. 21 of 2000).
[621]The Drugs and Cosmetics Act, 1940 (XXIII of 1940).
[622] The Chit Funds Act, 1982.
[623]Consumer Protection Act, 1986 (no. 68 of 1986).

"The Insurance (Regulation and Development) Act, 1999" in its Section 22 gives immunity in these words:

> "No suit, prosecution or other legal proceedings shall lie against the Central Government or any officer of the Central Government or any member, officer or other employee of the Authority for anything which is in good faith done or intended to be done under this Act or rules or regulations made thereunder."[624]

"The Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985)" incorporates protection to the public servant. Its Section 68 reads as:

> "No suit, prosecution or other legal proceeding shall lie against the Central Government or a State Government or any officer of the Central Government or of the State Government or any person exerting any powers or discharging any functions or performing any duties under this Act, for anything in good faith done or intended to be done under this Act or any rule or order made thereunder."[625]

"The Protection of Human Right Act, 1993 (10 of 1993)" also provides immunity to the public servants under Section 38 which provides as:

> "No suit or other legal proceedings shall lie against the Central Government, State Government, State Commission or any member thereof or any person acting under the direction either of the Central Government, State Government, Commission or the State Commission, in respect of anything which is in good faith done or intended to be done in pursuance of this Act or of any rules or any order made there under or in respect of the publication, by or under the authority of the Central Government, State Government, the Commission or the State Commission, of any report, paper or proceedings."[626]

[624]The Insurance (Regulation and Development) Act, 1999 (no. 41 of 1999 dated 29th December, 1999).
[625]The Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985 dated 16th September, 1985).
[626]The Protection of Human Right Act, 1993 (Act no. 10 of 1993 dated 1st January, 1993. As amended by Protection of Human Rights (amendment) Act, 2006-no. 43 of 2006).

There are also statutory provisions related to privileges the government that is kind of protection and hinder the rights of citizens. In this regard, the basic principle in India is included in "the Evidence Act, 1872". Its section 123 provides as:

> "No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, except with the permission of the officer at the head of the department concerned who shall give or withhold such permission as he thinks fit."[627]

"The Code of Civil Procedure, 1908" under section 80 also provides as, "no suit can be instituted against the government until the expiration of two months after a notice in writing has been given."[628]Thus, "the Code of Civil Procedure, 1908" gives privilege which states in section 82 that, "when a decree is passed against the Union of India or a State, it shall not be executed unless it remains unsatisfied for a period of three months from the date of such decree."[629]"The Limitation Act, 1963" in its article 112 says about the privilege that, "any suit by or on behalf of the Central Government or any State Government can be instituted within the period of 30 years."[630]

The above-mentioned sample list of immunity clauses is by no way exhaustive. Such categorical immunity clauses are incorporated in several statues which protect the public servants from torts committed by them. The protection in favor of judicial acts is well known amongst the statutory constraints on liability. The judicial officers and other officials giving assistance in judicial procedure are not liable for their acts done in the course of their official duty. The immunity has been codified in "the Judicial Officers

[627]The Evidence Act, 1872 (Act no. 1 of 1872 Dated 1st September, 1872).
[628]The Code of Civil Procedure, 1908 (Act no.5 of 1908 dated 1st January, 1909).
[629]Ibid.
[630]The Limitation Act, 1963 (Act no. 36 of 1963 dated 1st January 1965).

In this regard, Pakistan has not amended except that the government has been held vicariously liable.[641] The government frequently had escaped from its liability related to torts committed by its servants under the guise of the act of sovereign. However, some provisions have been made for the protection of employees working in factories. Amendments also have been made in the copy right law to facilitate the people in educational institutions as text books by the federal government. The NEPA has been established for the protection of environment in Pakistan. Still, the tort law has not been codified in Pakistan and legislatures have not given much intention for this purpose.[642] Although, the tort law is scattered in different statutes (private law) and in case laws but some Acts consist of considerable part of the wrong and compensations. These enactments are mentionable here for instance, "Fatal Accidents Act, 1855," "Patent and Design Act, 1911," "Patents and designs (amendment) Ordinance, 1983," "Trade Marks Act, 1940," "the Employers Liability Act, 1938" and "the Provincial Employees Social Security Ordinance, 1965".[643]Along with private law, constitutional provision is also needed to discuss here.

3.2.1. Constitutional Position

The constitutional provision also deals with the liability of the state. In this regard, Article 174 of the Constitution of Pakistan is the foundation of state liability for tortious acts committed by its servants in Pakistan.[644]It is important to mention here that the law

[641]Ibid., Article 136 & 174.
[642]Muhammad Naeem, "Scope and Application of Law of Tort in Pakistan" (PhD diss., University of the Punjab, 1991). 35.
[643]Ibid., 37; Warda Yasin, "Tort Liabilities of Multinational Corporations in the Perspective of the Principles of Separate Legal Entity &Limited Liability" (PhD diss., International Islamic University Islamabad, 2016), 39.
[644] According to it "The Federation may sue or may be sued by the name of Pakistan and a province may sue or may be sued by the name of the province". (The Constitution of the Islamic Republic of Pakistan, 1973).

of state liability was applied under section 176 of "the Government of India Act, 1935"[645] till the enactment of "the Constitution of the Islamic Republic of Pakistan, 1956".[646]In this regard, article 136 of "the Constitution of the Islamic Republic of Pakistan, 1956" stated: "The Federal Government may sue and be sued by the name of Pakistan and the Government of Province may sue and be sued by the name of the Province."[647]

There are general words used in this article that cover the tort as well as other claims by the victims. The terminology of limitation has not been used in this article as had been used in article 176 of "the Government of India Act, 1935". These referred articles lead towards "the Crown Proceedings Act, 1947" of United Kingdom. The activities of Government regarding sovereign and commercial have not been mentioned in this law and in judgments as well till late fifties and thereafter. However, the question of sovereign immunity has been addressed seriously for the first time in the *'P' and 'O' Navigation Company* Case[648]by the Supreme Court of Calcutta.[649]Since then the extent of tort liability of public servants has been elaborated in many judgments sporadically by the courts in Pakistan.[650]

As there is no specific codification on the liability of the state in tort therefore it is need to move towards the case laws on state liability to understand the position. In the

[645] It states that, "All persons and bodies politic shall and may have and take the same suits, remedies and proceedings, legal and equitable against the Secretary of State for India as they could have done against the said Company." (The Government of India, 1935).

[646]The Indian Independence Act, 1947.

[647] The Constitution of the Islamic Republic of Pakistan, 1956. Article 136 of this Constitution was re-enacted in the 1962 Constitution as Article 213, 1962 Constitution (interim) as Article 265 and in 1973 Constitution as Article 174. (Hafiz Aziz-ur-Rehman, *Citizens versus State: Public Servant Liability and Tort Reforms in Pakistan* (Islamabad: the Network for Consumer Protection, 2005), 22).

[648] See for further study Chohan, *Law of Tort in Indian Subcontinent* (Delhi: Eastern Book Company, 1997).

[649]The court held that: "the Government will be liable for the action done by its servants while doing non-sovereign functions but it won't be liable for injuries caused while pursuing sovereign functions."('P' and 'O' *Navigation Company* vs. *Secretary of State for India*: (1861) 5 Bom. H.C.R. App.I,1.

[650] Such as: "PLD 1968 [AJK] 48; PLD 1981 [Karachi] 673; *Government of West Pakistan* vs. *Muhammad Yaqoob Butt*: PLD 1963 SC 627; PLD 1961 [Karachi] 612; PLD 1968 [Karachi] 88."

following section, some important cases are being discussed which have been played important role in the development of tortious liability principles in Pakistan.

3.2.3. Role of Judiciary in the Development of Tortious Liability Law in Pakistan

In the absence of concrete principles and codification on state liability, the higher courts started to take brave steps to make the state liable in tortious acts committed by its servants. For this purpose, the important cases decided by the Higher Courts of Pakistan are being discussed as following.

Abuse of executive discretion is the basis of most of the grievances of citizens against public servants. Luckily, this aspect of liability of public servants has refined by the judiciary therefore, guiding principles can be inferred from the case laws in this regard.

The High Court has clarified the abuse of executive discretion of the public servant in the case of *Messrs Nooni Traders* vs. *Pakistan Civil Aviation Authority*[651] and it observed that "all executive actions/discretion have to be measured on the touchstone of reasonableness and fairness, and should display complete transparency and bona fides."[652] But question arises here that how such discretion can be exercised and what is the extent of tort liability in case of any breach or infringement of rights. In this regard, the Supreme Court has prescribed the test of reason vis-à-vis discretion such as: "a public official, who undertakes to perform an act, even if it is discretionary, must do so reasonably and in

[651] *Messrs Nooni Traders vs. Pakistan Civil Aviation Authority*: (P L D 2002[Karachi] 83).
[652] Ibid.

complete good faith without such delays as would frustrate its ultimate objective , (it means there must be) diligence and fidelity."[653]

The liability of servants through the state was recognized by the court with some conditions in the case of *Muhammadi Steamship Co, Ltd* vs. *Federation of Pakistan*,[654]the court held that:

> "the state would be liable for the torts committed by its servants if such: (i) acts committed were not acts of the state but conferred by municipal law; (ii) acts consisted in the detention by the state of land or goods belonging to the subjects; (iii) acts were empowered by the state or the State took profit from them."[655]

Similarly, government was also hold liable to its servants in the case of *Pakistan* vs. *M. Maqbool Butt &Ors,*[656] with same conditions discussed in above case as, "Government would be liable if, (i) it gets the benefit from illegally detained property by its servants; (ii) if the State ratifies the acts committed by its servants."[657] In other case of *Muhammad Zubair Qureshi* vs. *Munir Hussain Shirazi*, 1999,[658] it was held that "Government is liable for tortuous act of its officers and employees of such acts either ratified by the government or the government if benefited by the acts performed by its office."[659]

The important issue of absolute immunity rule was settled in the case of *M. Ali* vs. *Pakistan.*[660]It was observed that, "absolute immunity was on the old doctrines that (i): "king can do no wrong"; (ii) that it would be no wrong if sovereign does an act personally; (iii) that would be no wrong if he does by command to his servant."[661] The

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[653] 1992 SCMR 1998.
[654] *Muhammadi Steamship Co, Ltd vs. Federation of Pakistan*: (PLD 1959 (W.P) [Karachi] 232).
[655] Ibid.
[656] *Government of West Pakistan vs. Muhammad Yaqoob Butt*: (PLD 1963 SC 627).
[657] Ibid.
[658] *Muhammad Zubair Qureshi vs. Munir Hussain Shirazi*: (1999 YLR 955 (a)).
[659] Ibid.
[660] *M. Ali vs. Pakistan*: (PLD 1961 (W.P) [Karachi] 88.p. 99) & *Tobin vs. The Queen*: 16 CB (N.S) 310, 354
[661] Ibid.

acting for its citizens; (ii) being available to acts committed related to other states. In former case the municipal law will be applied by the state to deal the matter".[668]In Pakistan, the state can be sued under state liability law at central and provincial level by its citizens, alien friends as well as alien enemy.[669]

Judiciary has attempted to settle the principles related to tortious liability of the state and its scope and extent in different ways as: absolute immunity, act of state or sovereign, discretionary powers, liability law of state and private person, vicarious liability of the state and government.[670]As judiciary has made efforts to balance out the citizens' grievances and the immunity of public servants but they could not prepare concrete principles related to tort liability of public servants under the interpretations of immunity provisions as included in various laws. This leads towards the existing confusion about the law and policy on public servant's immunity. On the one hand there are overwhelming immunity provisions along with strange definitions of good faith, which on the other hand do not match with some very encouraging verdicts as discussed above.[671]

3.2.4. Tort Liability and the Immunity Clauses in Pakistan Law

In the backdrop of abovementioned situation, it is important to mention here the method used by the legislature to protect the state from liability for the tort committed by state servants which is called immunity, protection or statutory clause. Similar in Indian jurisdiction, the common method is used in Pakistani law as well in these words, "no suit, prosecution or other legal proceeding shall lie for anything in good faith done or intended

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[668] The Constitution of the Islamic Republic of Pakistan, 1973. Article 174.
[669] Civil Procedure Code (Act no. V of 1908 dated 1st January, 1909). Section 83.
[670]Hafiz Aziz-ur-Rehman, *Citizens versus State: Public Servant Liability and Tort Reforms in Pakistan* (Islamabad: the Network for Consumer Protection, 2005), 15.
[671]Ibid.

to be done under this Act". And further, "a thing is deemed to be done in good faith where it is in fact done honestly, whether it is done negligently or not."[672]

These immunity provisions are framed differently related to the realm of immunity. Some Acts expand immunity to all persons; some extend protection to the State and its servants, whereas certain extend immunity to its servants only. Where a citizen has suffered loss or harm due to a public servant's failure to exercise proper care and attention, he is deemed to have exercised the requisite 'good faith' where it is done honestly irrespective of whether it is done negligently. This means that so long as an act is done honestly, the citizen cannot pursue the matter on the basis of negligence, as a tort action, thus denying him an important legal remedy.

Furthermore, the legal 'shield' of 'good faith' has been almost consistently included into statutes of different public bodies to grant immunities and specifically protect their servants from tortious liabilities. Before proceeding to make recommendations by this study, a few models of protection clauses are extracted here which one finds, on a random survey of the Pakistan statute books. Some of these clauses are being identified as a sample in the following.[673]

The 'Good Faith' principle is included in "the Capital Development Authority (CDA) Ordinance, 1960" as a protective shield against the liability of public servants for their negligence and all kinds of other wrongdoings. Its section 40 describes that:

> "No suit, prosecution or other legal proceedings shall lie against the CDA, the Chairman, any member, officer, servant, expert or consultant of the Authority in

[672] The definition of 'good faith' is provided by General Clauses Act, 1956, Section 2 (27).
[673] As pointed out by Hafiz Aziz-ur-Rehman, *Citizens versus State: Public Servant Liability and Tort Reforms in Pakistan* (Islamabad: the Network for Consumer Protection, 2005), 15.

respect of anything done or intended to be done, in good faith under this Ordinance."[674]

Likewise, under "Control of Narcotics Substances Act 1997," public servants enjoy immunity for their acts committed 'in good faith or intended to be done in pursuance of this Act. Even legally dubious acts intended to be done in good faith are covered under this Act.[675]

The immunity is provided by "the Ombudsman Order, 1983" to the *Wafaqi Mohtasib*[676]and any person appointed under him/her from all kinds of prosecutions. The office assigned with protecting the rights of citizens needs to be protected from the public for its acts or omissions. There is variation of the immunity clause under the 'good faith' cover in "Companies Act, 2017". It provides that:

> "no suit, prosecution or other legal proceedings shall lie against the Government or the authority or any officer of Government or the Authority or the registrar...any other person in respect of anything which is in good faith done or intended to be done in pursuance of this Ordinance or any rules or orders made thereunder or in respect of the publication by or under the authority of the Government, Authority or such officer...."[677]

Illegal acts of the servants have not been covered under these clauses but their negligent acts are well guarded. Immunity clause is incorporated in "Income Tax Ordinance, 2001" for prosecution and legal proceeding against the officials acts done in good faith. It states that:

> "no suit or other legal proceedings shall be brought in any civil court against any order made under this Ordinance, and no prosecution, suit or other proceedings shall be made against any person for anything which is in good faith done or

[674] Capital Development Authority Ordinance, 1960 (Act no. XXIII of 1960 dated 27th June, 1960).
[675]Hafiz Aziz-ur-Rehman, *Citizens versus State: Public Servant Liability and Tort Reforms in Pakistan* (Islamabad: the Network for Consumer Protection, 2005), 15.
[676]Wafaqi Mohtasib (Ombudsman) Order, 1983 (P.O.No.1 of 1983 dated 24th January, 1983), Section 30.
[677]Companies Act, 2017 (dated 30th May, 2017), Section 491.

> intended to be done under this Ordinance or any rules or orders made thereunder."[678]

Under "Oil and Gas Regulatory Authority (OGRA) Ordinance, 2002" immunity is provided to the public servants. It states that, "no court shall take cognizance of an offence punishable under the ordinance except on a complaint in writing made by the authority or a person authorized by it in this behalf."[679]

Immunity is also provided under "Pakistan Telecommunication Act, 1996," it states that, "no court shall take cognizance of any offence punishable under this Act except on a complaint in writing by an officer authorized by the Authority or the Board."[680]Similarly, "NWFP Consumer Protection Act, 1997"incorporates immunity which says that:

> "No suit, prosecution or other legal proceedings shall lie against the Council or any member thereof or any functionary under the direction of the Council or Government for anything which is done in good faith or intended to be done under this Act."[681]

Furthermore, "the Islamabad Consumer Protection Act, 1995" provided that:

> "no suit, prosecution and other legal proceedings shall lie against the Council, its members, the Authority and other officers and authorities acting under the directions of the Council or, as the case may be, the Authority in respect of anything done under the provisions of this Act or any rules or orders made there under."[682]

Immunity is also provided in shape of legal sanction to the public servants under "the Code of Criminal Procedure, 1898".The Code provides that: "Acts done by them in course of performance of their duties should not be subject to prosecution until a superior

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[678]Income Tax Ordinance, 2001(Act no. XLIX of 2001), Section 227.
[679]Oil and Gas Regulatory Authority Ordinance, 2002(Ordinance no. XVII of 2002), Section 29.
[680]Pakistan Telecommunication (Reorganization) Act, 1996 (Act no. XVII of 1996, Part. I, dated 17th October, 1996), Section 31(5).
[681]N.W.F.P Consumers Protection Act, 1997 (Act no. VI of 1997). Section 21. Now the NWFP Consumer Protection (Amendment) Act, 2005. Notification 29th January, 2005. No. PA/NWFP/Legis: 1/2005/18.
[682]Islamabad Consumers Protection Act, 1995(Act no. III of 1995, dated12th October, 1995), now the Islamabad Consumers Protection (Amendment) Act, 2011.

authority, after due consideration, is of the opinion that certain acts may constitute an offence and sanction such prosecution."[683]

The same kind of exemption is also granted to the public servants by "the Civil Procedure Code 1908," which states that, "no Judge, Magistrate or other judicial officer shall be liable to arrest under civil process while going to presiding in, or returning, from the Court."[684]The limitation period provided for the suits against a public officer in respect of any act purporting to be done by such public officer in his official capacity after the expiration of two months...after notice in writing has been delivered.

The problem related to immunity does not stop here. "The Police Order, 2002" describes that:

> "no police officer shall be liable to any penalty or payment of damages on account of an act done in good faith in pursuance or intended pursuance of any duty imposed or any authority conferred on him by any provision of this Order or any other law for the time being in force or any other rule, order or discretion made or given therein."[685]

The limitation granted for the prosecutions or suits in respect of acts done under performance of official duties says that, "The prosecution or suit shall not be entertained, or shall be dismissed, if instituted after more than six months from the date of the action complained of."[686]It further provides that, 'if a suit is intended to be referred for prosecution, two months prior notice is required as prescribed in Section 80 of "Civil Procedure Code, 1908".[687]

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[683]Criminal Procedure Code, 1898(Act V of 1898 dated 1st July, 1898). Section 197(1).
[684]Civil Procedure Code, 1908(Act no. V of 1908 dated 21st March, 1908), Section 135(1).
[685]Police Order, 2002 (C.E. Order no. 22 of 2002 dated 14th August, 2002), Section 171.
[686]Ibid., Section 172.
[687]Ibid.,

The same line is followed by the proposed "Punjab Criminal Prosecution Service (Constitution, Functions and Powers) Act, 2004". Its Section 15 provides that:

> "A public prosecutor who takes a decision material to prosecution on the grounds other than bona fides which has caused grave harm to person or the interest of the state shall be punishable with imprisonment which may extend to 6 months. No court shall take cognizance of an offence under this section except upon the complaint of the government."[688]

The list of immunity clauses does not stop here; hence "Civil Services Act of 1973" incorporates the expression "indemnity" instead of "immunity". The Section 23-A states that, "no suit, prosecution or other legal proceedings shall lie against a civil servant for anything done in his official capacity which is in good faith done or intended to be done under this Act or the rules, instructions or directions made or issued there under."[689]

The above-mentioned sample list of immunity clauses is by no way exhaustive. Such categorical immunity clauses are incorporated in several statues which protect the public servants from torts committed by them.[690] In Pakistan, it has become a standard drafting practice to insert an extensive immunity and non-prosecution clause in every statutes involving public servant.[691] This extensive practice to protect and immune public servants against tortious liability is the major reason of violation of rights of citizens,[692] hurdle in access to justice for the poor and impediment in the growth of law of tort in Pakistan.

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[688] Punjab Criminal Prosecution Service (Constitution, Functions and Powers) Act, 2004 (Act no. III of 2004 dated 8th April, 2004). Section 15.

[689] Civil Servants Act, 1973(Act no. LXXI of 1973 dated 26th September, 1973), Section 23-A.

[690]Hafiz Aziz-ur-Rehman, *Citizens versus State: Public Servant Liability and Tort Reforms in Pakistan*(Islamabad: the Network for Consumer Protection, 2005), 18.

[691]Ibid

[692]These violations have been discussed in a separate chapter 3of this research in details.

3.3. Conclusion

This chapter took a brief look at the present legal position and efforts made at law reform that have taken place in India and Pakistan since their independence in, 1947. It reveals that in Pakistan, same like in India, liability law exists as piece meal in different statutes such as constitutional provision, private statutes and constitutional tort remedy. But both countries had not been codified the law which governs the tortiouse liability of public servants. It concludes that on the one hand both countries have overwhelming immunity provisions along with strange definitions of good faith, which on the other hand do not match with some very encouraging verdicts. It further concludes judiciary has made efforts to balance out the citizens' grievances and the immunity of public servants but they could not prepare concrete principles related to tort liability of public servants under the interpretations of immunity provisions as included in various laws. This situation leads towards the existing confusion about the law and policy on public servant's immunity.

CHAPTER 4

DOCTRINE OF CONSTITUTIONAL TORT REMEDY: EVOLUTION AND EVALUATION

The above chapter three discussed the efforts made at law reforms that have been taken place in India as well as in Pakistan since their independence in 1947. This chapter, whereas, discusses the constitutional tort remedy jurisprudence developed by the Indian Higher Courts. It also, following India, discusses constitutional tort remedy jurisprudence in Pakistan. As this section is related to the judgments of the courts therefore it mentions the case laws decided by the Higher Courts in both jurisdictions. The constitutional tort remedy jurisprudence developed by the Indian Higher Courts is being discussed first as following.

4.1. Constitutional Tort Remedy: An Indian Perspective

In general, liability takes place from breach of duty but, in the ancient era liability was based more on a wish by the victim, in taking revenge on the offender. [693] It was transformed later on to the idea of refinements i.e. compensation for the prevention of crime, for the wrong or injury caused, which made help the development, peace and

[693]The relevant research on the topic has been made by Chidananda Reddy S. Patil "Liability of the State for the Torts Committed by its Servants" (PhD diss., Karnatak University, 2002), Chapter 5. 184-256; P. K. Jayakumari, "Liability of the State in Torts: With Special Reference to Human Rights Violations" (Mahatma Gandhi University Kottayam, 2006), Chapter 3. 18-70; Jamshed Ansari, "Tortious Liability of State: A New Judicial Trend in India," *Researcher* 6, no. 5 (2014): 43-51.

prosperity of the society. This method was accepted by most of the civilized societies but compensation or satisfaction had to be in proportion to the damage or injury caused.[694]

Under private law, there are some remedies which can be sought by the victim from the courts for the non-performance of duties such as declaration of rights, ordinary action or injunctions.[695] It is essential to protect the rights of the victim by compensating, if any of the above mentioned remedies is not available to him.[696] In general, the wrongdoer himself is liable for the act done by him but there are certain situations in which a person will be liable for the wrong committed by another person, which is called as vicarious liability.[697] The victim can file a suit against the state in the civil court if a wrong is committed by the state. Likewise, civil suit may be resorted to if any fundamental right is infringed.[698] It starts in the lowest courts so the victim can come up to the court without spending much cost and time. Elaborated or detailed trial is performed to observe the fact after taking evidence. So, compensation for the injury suffered by the victim is awarded if the injury or wrong is established in the court. The compensation must be equivalent to the damage caused to the victim which is awarded by the court by using its discretion.[699] The instant process is followed in the private remedy under the tort law.[700]

The state is also liable for infringement of a duty sought to it. The state is an artificial person and can perform its duty through its servants or agents. Liability of the

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[694]C. K. Rameshwara Rao, *Law of Damages and Compensation* (Allahabad: Law Publishers Pvt Ltd., 1996), 1.
[695] Ibid.
[696]Ibid.
[697]Vicarious liability has been discussed in previous chapter 2 of this research in details.
[698]C. K. Rameshwara Rao, *Law of Damages and Compensation* (Allahabad: Law Publishers Pvt Ltd., 1996), 1.
[699]Ibid.
[700]Ibid.

state which arises out due to the wrong by its agent and servant is a kind of vicarious liability, in which one person can be made liable for the tort committed by another person.[701]A welfare state has multifarious functions of it and it involves into various activities, therefore it is hard to define its obligations or responsibilities. It is possible that state may not be completely conscious about the nature of the actions, and it may not get advantage from the actions done by its servants.[702]

Process followed for remedy in the private law as mentioned above, is followed in the case of violation of human rights by the servants of the state. The victim can institute a suit against the wrong doer to get compensation from him if the wrong is committed by the servants of the state.[703] In India, however, the higher courts began providing compensation additionally asserting the state actions void by relying on the flexible terminology employed in the constitution.[704]The category of 'Constitutional Torts' has been added by this welcome growth to protect the interest of the individual.[705]

4.1.1. Birth of Constitutional Tort Remedy. An Innovative Approach

The great efforts have being made since last three decades by the Supreme Court of India to develop an innovative constitutional jurisprudence based on the need to provide new

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[701]Salmond and Heuston, the *Law of Torts, 1998.* 444.

[702]Ibid.

[703]C. K. Rameshwara Rao, *Law of Damages and Compensation* (Allahabad: Law Publishers Pvt Ltd., 1996), 1.

[704] **Writs in the nature of Article 32 and 226.** Article 32 (2): "The Supreme Court shall have power to issue direction or writs including writs in the nature of habeas corpus mandamus prohibition quo warranto and certiorari which ever may be appropriate, for the enforcement of any of the rights confirmed by this part. Article 226 (1) Not withstanding anything in Article 32 every High Court shall have power throughout the territories in relation to which it exercise a jurisdiction, to issue to any person and authority including in appropriate case any Government within those territories directions , orders or writs including writs in the nature of Habeas corpus. Mandamus, prohibition, quo warranto and certiorari or any of them, for the enforcement of any of the rights conferred by Part III and, for any other purpose." (The Constitution of India, 1949); for further details see Vikram Raghawan, "Compensation through Writ Petitions," *Student Advocate* vol 6: 97.

[705]Chidananda Reddy S. Patil "Liability of the State for the Torts Committed by its Servants" (PhD diss., Karnatak University, 2002), 217.

connotation to fundamental rights of the people of India.[706]The state is duty bound to protect the rights that are assured under constitution and these must be compensated if these rights are violated even by the state itself.[707] The Supreme Court began to make new remedies and wholesome rules of compensation for violation of fundamental rights by the government authority.[708]

In this context, ever in history of India, *Khatri* vs. *State of Bihar*[709]and *Veena Sethi* vs. *State of Bihar*[710]were two important cases in which the question was raised before the Supreme Court related to award of compensation for the violation of fundamental rights of citizens by the State functionaries but unanswered. But, this question was answered by the Supreme Court in land mark case of *Rudul Sah* vs. *State of Bihar*.[711]It needs to discuss in some detailed as under.

In this case, *Rudul Sah* the petitioner, was released from jail after 14 years by filing himself a petition of habeas corpus under 'Article 32'[712]in the Supreme Court. The petitioner prayed to release from unlawful detention and compensation for his illegal confinement in addition to ancillary reliefs for example, rehabilitation and refund of expenditures incurred during this period.[713] The reason given by the jail administration for illegal detention was that the petitioner was not sound mind. But, this reason of insanity was not accepted by the court and felt that the illegal detention for such a long

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[706] Krishnan Venugopal, "A New Dimension to the Liability of the State under Article 32,"11 *Ind. Bar. Rev*(1984): 399.
[707] P. Leela krishnan, "Compensation for Governmental Lawlessness," 16 *C.A.A..R.*52 (1992): 54.
[708]Ibid., see also Jamshed Ansari, "Tortious Liability of State: A New Judicial Trend in India," *Researcher* 6, no. 5 (October, 2014):43-51.
[709] *Khatri vs. State of Bihar*: (A.I.R. 1981 S.C. 928).
[710]*Veena Sethi vs. State of Bihar*: (A.I.R. 1983 S.C.339).
[711]*Rudul Sah vs. State of Bihar*: (A.I.R. 1983 S.C. 1086).
[712] ***Right to Constitutional Remedies: Article 32.*** "(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part(III) is guaranteed..."(The Constitution of India, 1949).
[713] K. C. Joshi, "Compensation through Writs: *Rudul Sah* to *Mehta*," 30 *J. I. L. I.* (1988): 69.

time comprised a blatant violation of the fundamental right of the petitioner guaranteed under Article 21 of "the Constitution of India, 1949".[714]The order was made by the court for an interim compensation to the victim.[715]

Further, the court observed that not to give compensation to the petitioner will be doing mere lip service to his fundamental right to liberty which had been violated by the jail administration (the state).[716]

Up till now the practice of the Supreme Court has been barred to pass order in petition of *habeas corpus* merely immediate release of the detenue from unlawful detention and not to pass order pecuniary relief in the character of compensation.[717]

The petitioner had to seek a remedy by filing a suit in the competent court to get compensation against the state or public servant. The court, before awarding damages, will have to make a decision first regarding the issue of sovereign and non-sovereign function of the state. But the Supreme Court has adopted a new judicial technique in this case[718]therefore; the decision taken is a path breaking that imposed the liability to pay compensation to the sufferers of lawlessness by the state.[719]

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[714] Under this Article: "No person shall be deprived of his life or personal liberty except according to procedure established by law". (The Constitution of India, 1949. Article 21).

[715]"Article 21 which guarantees the right to life and liberty will be denuded of its significant content if the power of this Court were limited to passing orders of release from illegal detention. One of the telling ways in which the violation of that right can reasonably be prevented and due compliance with the mandate Article 21 secured, is to mulct its violators in the payment of monetary compensation... the state must repair the damage done by its officers to the petitioner's rights" (*Veena Sethi vs. State of Bihar:* (A.I.R. 1983 S.C.339)).

[716] It is evident under this observation of the Court that "the state will be liable vicariously to pay damages to the victims of unlawful arrest/ detentions by its enforcement agencies." K. Narayana Rao, "Right to compensation for unlawful detentions in India," (Editorial Comment) 26 *I. J. I. L.* (1986): 516. Ibid., at 1089.

[717] K. I. Vibhute, "Compensatory Jurisdiction of the Supreme Court-A Critique," 10 *C.U.L.R.* 83 (1984): 83-84.

[718]Ibid., 85.

[719]P. Leela krishnan, "Compensation for Governmental Lawlessness," 16 *C.A.A..R.*52 (1992): 55.

The distinction between sovereign and non-sovereign functions has been indirectly eliminated for the purpose of state liability due to this compensatory jurisprudence.[720]By awarding compensation under Article 32 of the Constitution, the Court clarified its jurisdiction.[721]

If traditional remedy emerges inadequate, Supreme Court is quite capable to forge innovative tools and to formulate new remedies being the highest Court of the land and guarantor of the fundamental rights of the citizens.[722]

The basis for awarding compensation for the violation of a fundamental right under Article 32 is that the right has been violated by the government officials whose affirmed duty is to sustain the right. Therefore, the Supreme Court is duty bound to protect and enforce the fundamental rights, to award compensation if no other efficient remedy is available and if the remedy required is within the authority fixed to it by clause (2) of Article 32.[723]A very care full explanation of the approach adopted by the Supreme Court can be that the fundamental rights are in the type of limitations over 'state action' and therefore state cannot use 'sovereign immunity' as a shelter to violate said rights when their enforcement is required from the state.[724]

It is evident from the case of *Rudul Sah* that the state is liable vicariously to pay damages to the sufferers of illegal detentions especially by its enforcement

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[720] P. S. Soman, "Police Atrocities: Liability to Pay Compensation," 15 *C.U.LR.* (1991):455 at 458.

[721]"It is true that article 32 cannot be used as a substitute for the enforcement of rights and obligations which can be enforced efficaciously through the ordinary process of courts, civil and criminal. ...The petitioner was detained illegally in the prison for over fourteen years after his acquittal in a full-dressed trial.... He contends that he is entitled to be compensated for his illegal detention and that we ought to pass an appropriate order for the payment of compensation in this habeas corpus petition itself.... We cannot resist this argument." (*Veena Sethi* vs. *State of Bihar,* A.I.R. 1983 S.C.339).

[722]K. I. Vibhute, "Compensatory Jurisdiction of the Supreme Court-A Critique," 10 *C.U.L.R.* 83 (1984): 85.

[723]Krishnan Venugopal, "A New Dimension to the Liability of the State under Article 32,"11 *Ind. Bar. Rev*(1984):386.

[724]K. I. Vibhute, "Compensatory Jurisdiction of the Supreme Court-A Critique," 10 *C.U.L.R.* 83 (1984): 85.

authorities,[725]it is allowed judicial legislation and it is an example of a judge made change in the law.[726] In this case the Supreme Court has given notice that it has right under Article, 32 of the constitution in its original jurisdiction to make new remedies which are central to the enforcement of the fundamental rights of the people in India.[727] The outlines regarding this newly established compensatory remedy have been laid down by the court such as: (i) there must be 'gross violation' related to fundamental right to life and liberty under Article 21 to get compensation; (ii) it is not a full compensation or damages; (iii) it is merely a kind of interim relief to the petitioner; (iv) it can be awarded merely in claims those are not factually controversial; (v) the compensation given under Article 32 cannot be made an alternate for a regular suit.[728]

Under the above discussion, it can be said that the case *Rudul Sah* gave birth to a new remedy in India and changed the scenario in the field of state liability law.

4.1.2. Evolution of Constitutional Tort Remedy in Indian Courts

The doctrine articulated in *Rudul Sah,* above mentioned, was intended to develop into the compensation jurisprudence of the Court in days to come and eventually shape up in to the notion of constitutional torts remedy.[729]This notion was developed subsequently by Courts in series of cases which are being discussed as following.

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[725]Ibid.

[726]See the studies Prof. Y. R. Haragopal Reddy, "Compensation to the Victims of State Lawlessness New Trends," (paper presented at the second Biennial Conference of the Indian Society of Victimology, National Law School of India University. Bangalore, Oct 4-6, 1996); G.L.Wagir, "Right to Compensation under Public Law in India: A Basic Human Right and an International Commitment," *Legal News & Views* (July 1997): 13.

[727]Rabindra Hazari, "Right to Claim Compensation by Victims of State Negligence," 5 *The Lawyers* (1985): 33 to 34.

[728] Dr. Anupa V. Thapliyal, "Compensation in Writ Jurisdiction: A Few Basic Questions," 25 *Ind. Bar Rev* (1998): 95 at 97.

[729]A.G. Noorani, "Compensating the Wronged," 18 *Eco & Pol. Weekly* 336 (1983): 10; I.P. Massey, "Dialectics of Sovereign Immunity and Dynamics of Welfare Society: Need for an Independent Public Law of Tort,"26 *J.I.L.I.* (1984): 156.

A writ of *mandamus* was not performed by the government authority for 12 years in the case of *Devaki Nandan Prasad* v. *State of Bihar.*[730] The petitioner finally approached the Supreme Court under article 32 of the Indian Constitution. In this case the arrears of salary had not been paid by the government authority as stated by a previous judgment of the court. Therefore, another writ of '*mandamus*' was issued by the court directing the government authority to accomplish its orders along with award of damages to him for the intentional harassment by the government authority. The amount was quantified by the Court and qualified the damages as 'exemplary costs'.[731] However, the situation was different in *Sebastian Hongray* v. *Union of India*[732]in which a petition was filed to seek the writ of *habeas corpus* under Article 32 to produce two persons who were beaten by the 21th Sikh Regiment and afterwards were found missing.[733]

A *habeas corpus writ* was issued by the court to produce these missing persons before it on the specific date. The respondents misled, disobeyed the writs and therefore treated as a civil contempt.[734]There is imprisonment as well as fine for a civil contempt. Neither of them imposed by the court and instead 'exemplary costs' to the wives of the victims.

4.1.3. Principles for Constitutional Tort Cases

The principle to consider for constitutional tort remedy is that the case must be appropriate. An appropriate case is one where the infringement of the fundamental right must be gross, patent, and incontrovertible and its magnitude must be such so as to shock

[730]Devaki *Nandan Prasad vs. State of Bihar:* (A.I.R. 1983 S.C. 1134).
[731]Krishnan Venugopal, "A New Dimension to the Liability of the State under Article 32,"11 *Ind. Bar. Rev* (1984):372.
[732]*Sebastian Hongray vs. Union of India*: (A.I.R. 1984 S. C. 1026).
[733]Ibid.
[734]Civil Contempt under section 2 (b) of the Contempt of Courts Act, 1971.

the conscience of the court.[735] Some cases are being discussed in which the principle of appropriate case has been advocated by the courts. It was an important case of *Bhim Singh* vs. *State of J. & K*[736]in which a *habeas corpus* petition was filed under Article 32 to observe the question of detention of a member of the Legislative Assembly. The Supreme Court became more coherent in this case and held that the detention was a gross violation of the right under Articles 21 & 22 (1) of Indian Constitution. Although the member was already released from detention when the verdict was announced but the court opt to award "monetary compensation by way of exemplary costs"[737]by the government authority.[738]In this regard the court observed:

> "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."[739]

The principle of 'appropriate cases' was supported by the court in this case to award monetary compensation due to violation of fundamental rights of the people.[740] The Supreme Court set the law in motion in these three cases as, *Rudul Sah, Sebastian* and

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[735]Chidananda Reddy S. Patil "Liability of the State for the Torts Committed by its Servants" (PhD diss., Karnatak University, 2002), 227.

[736]*Bhim Singh* vs. *State of J. & K*: (A.I.R. 1986 SC 494). See also Chidananda Reddy S. Patil "Liability of the State for the Torts Committed by its Servants" (PhD diss., Karnatak University, 2002), 228.

[737] In a result, the court directed the State of J. & K. to pay Rs.50, 000 to Shri Bhim Singh. Ibid.

[738]Ibid, at 499.

[739]*Bhim Singh vs. State of J. & K*: (A.I.R. 1986 SC 494) emphasis supplied.

[740]See further Prof. Y. R. Haragopal Reddy, "Compensation to the Victims of State Lawlessness New Trends," (paper presented at the second Biennial Conference of the Indian Society of Victimology, National Law School of India University. Bangalore, Oct 4-6, 1996); G.L.Wagir, "Right to Compensation under Public Law in India: A Basic Human Right and an International Commitment," *Legal News & Views* (July 1997): 13.

Bhim Singh by recognizing the liability of the State to pay monetary compensation to the victims.[741]

The principle of 'appropriate cases' was repeated by the Supreme Court in another case of *M. C. Mehta* vs. *Union of India*[742]in which the Court declared its right to award compensation for violation of fundamental rights of the people. It was observed by the court that: "its jurisdiction under Article 32 is both preventive and remedial and that the remedial relief may include the power to award compensation in 'appropriate cases'."[743]

In this case a great attempt was made by the court to clarify the principle of appropriate cases by demonstrating where compensation can be awarded for violation of fundamental rights of the people.[744]The expression of 'appropriate cases' defined in this case is not a conclusive one but is inclusive in character because it is discretion of the court to judge every case on its own merits to decide the appropriateness to award 'monetary compensation' to the sufferers of State lawlessness.[745]

The Supreme Court awarded the Compensation in the cases of P.U.D.R. v. *Police Commissioner, Delhi,*[746] and *Saheli* vs. *Police Commissioner, Delhi,*[747] for breach of fundamental rights taking into account both of them to be 'appropriate cases'.

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[741]P. Leela krishnan, "Compensation for Governmental Lawlessness," 16 *C.A.A..R.*52 (1992): 58.
[742] *M. C. Mehta vs. Union of India:* (A.I.R. 1987 SC 1086)
[743]Ibid.
[744]See also Prof. Y. R. Haragopal Reddy, "Compensation to the Victims of State Lawlessness New Trends," (paper presented at the second Biennial Conference of the Indian Society of Victimology, National Law School of India University. Bangalore, Oct 4-6, 1996); G.L.Wagir, "Right to Compensation under Public Law in India: A Basic Human Right and an International Commitment," *Legal News & Views* (July 1997): 13.
[745]Ibid.
[746]*P. U. D. R. vs. Police Commissioner, Delhi:* (1989 4 SCC 730).
[747]*Saheli vs. Police Commissioner, Delhi:* (A.I.R. 1990 SC 513).

For example, in the case of P.U.D.R. v. *Police Commissioner, Delhi,* police hired ten persons to the police station to make some work whereas on demand of payment they were beaten and one of them given way to his injures. The court directed the Delhi Administration to pay compensation to the victims.[748]The court affirmed in this case that the state can recover the sum paid as compensation from the salaries of servants responsible for guilty after the proper investigation and inquiry. In fact, the Court took a minor departure from the former position.[749]

In the second case of *Saheli* vs. *Police Commissioner Delhi,* a woman was beaten by the police at the instigation of her flat owner; police threw her nine-year old son to the ground that died later. The court awarded compensation to woman considering an 'appropriate case' [750] and the court further observed that the Administration may recover the sum so paid from the salary of guilty police officials.

The Supreme Court recognized the function of the High Courts in awarding compensation in *State of Maharastra* vs. *Ravi Kant S. Patil* case.[751]In this case compensation was awarded by high court for infringement of the fundamental right of a person who was paraded by the police in the streets with handcuffed without any reasonable grounds.

The court further ordered that police official is personally liable to pay the compensation and government should make an entry in the service record of the police official responsible for infringement of fundamental rights.[752]The verdict of the High

[748] To pay "a sum of Rs.50, 000/- to the family of the deceased, Rs.500/- to the woman whose modesty had been outraged and also a sum of Rs.25/- each to those eight persons who were seriously beaten up by the police."(*Saheli* vs. *Police Commissioner, Delhi,* A.I.R. 1990 SC 513).
[749]P. S. Soman, "Police Atrocities: Liability to Pay Compensation," 15 *C.U.LR.* (1991): 460.
[750] The Court awarded compensation a sum of Rs.75, 000 to his mother. Ibid.
[751]*State of Maharastra vs. Ravi Kant S. Patil:* (1991 2 S. C. C. 373).
[752]*Ravikant Patil vs. D. G. P. Maharastr:* (1991 Cri. L. J. 2344).

Court was endorsed by the Supreme Court in appeal before it apart from the personal liability of police official to pay compensations and to make entry in the service record of the police official. The Supreme Court stated that: "the police official done acts just as an official and even assuming that he go beyond his limits he cannot be made liable personally to pay compensation to the injured party."[753]

The approach of the Supreme Court in this case is a conservative one which demonstrates a departure from the cases *P.U.D.R*[754]and *Saheli*[755]in which recovery of the sum paid in compensation from the official was authorized by the Court.[756]Further, the role of the High Courts in awarding compensation against the state officials in violation of fundamental rights of the people has been recognized by the Supreme Court.[757]

4.1.4. Sovereign Immunity & Constitutional Tort

There has been recognized the right of the victim in all discussed cases to claim damages against the state for the tortious acts of the public servant affecting life and liberty of the people which is evident from a conspectus of all these verdicts.[758]It has become a regular characteristic for the claim of compensation under Article 32 as well as under Article 226[759]of the constitution and they have been invariably endorsed since the case of *Rudul Sah*. This practice was being done without any modifications of the doctrine of liability or structure of remedy in this regard.[760]

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[753]Ibid.
[754]*P. U. D. R. vs. Police Commissioner, Delhi: (1989) 4 S.C.C. 730.*
[755]*Saheli vs. Police Commissioner, Delhi:*(A.I.R. 1990 S.C. 513).
[756]P. S. Soman, "Police Atrocities: Liability to Pay Compensation," 15 *C.U.LR.* (1991): 461-62.
[757]Ibid.
[758]T. Ch. Surya Rao, "Doctrine of Sovereign Immunity-Need for Legislation," *Legal News & Views (*July 1986): 26 at 28.
[759]Power of High Courts to issue certain writs: Article, 226. The Constitution of India, 1949.
[760] M. P. Singh, "Constitutional Liability of the State: Erosion of Sovereign Immunity," *The Lawyers (*May 1994): 15.

In the case of *Nilabati Behera vs. State of Orissa,*[761]however, the Supreme Court felt it essential to formulate definite explanations in view of the observations made in *Rudul Sah.*[762]The Court found it appropriate to make clear doubts raised by the observations that the remedy under Article 32 may not be available if the claim was factually contentious. So, the distinctions were made by the Court related to state liability for breach of fundamental rights from the liability for payment of compensation in private law for tortuous acts of the state. Important proposition was laid down as under, it may be mentioned straightway that award of compensation in a proceeding under Art.32 by this Court or by the High Court under Art.226 of the Constitution 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 in an action based on tort. This is a distinction between the two remedies to be borne in mind which also indicates the basis on which compensation is awarded in such proceedings.[763]The Court further added to advocate the public and private law distinction by relying on an English precedent.[764]

There was an important case of *Nilabati Behera* related to public interest litigation in which Suman Behera, a boy of 22 years, was killed in police custody and case was filed by his mother to claim compensation breaching Article 21 of the Constitution.[765] The Supreme Court ordered the State of Orissa to pay compensation to the mother of

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[761]*Nilabati Behera vs. State of Orissa: (*A. I. R. 1993 S.C. 1960).
[762]That "(i) the petitioner could have been relegated to the ordinary remedy of a suit if his claim to compensation was factually controversial (ii) Article 32 cannot be used as a substitute for the enforcement of rights and (iii) obligations which can be enforced efficaciously through the ordinary process."Ibid.
[763]Ibid., 1966) emphasis added.
[764]*Maharaj vs. Attorney-General of Trinidad and Tobago*: (1978) 3 All E.R. 670.
[765]Vikram Raghawan, "Compensation through Writ Petitions," *Student Advocate* vol. 6: 97.

deceased.[766] The reference was made by the Court giving its decision to Article 9(5) of the *(ICCPR),* 1966 which has direct impact on the legal system of India.[767]

The following important propositions appear from the ruling such as: (i) award of compensation under Articles 32 and 226 is a public law remedy distinct from private law action in tort; (ii) the distinction between the two types of remedies is also the source for compensation; (iii) the doctrine of sovereign immunity does not applicable to the public law remedies; and finally (iv) the liability of the state in these procedures is strict liability.[768]These propositions were supported by the court with special reference to its authorities and responsibilities under Articles 32 and 142 of the constitution. The verdict in the case of *Nilabati Behera* has been appreciated to be (i) 'of remarkable importance',[769] (ii) 'an authoritative pronouncement',[770] and (iii) 'an important decision'.[771]

Though, it also reveals from the verdict that the principle of sovereign immunity has not become obsolete. In fact it is vastly available as a protection in public law remedy for breach of fundamental rights as well as in cases of tortious acts committed by public servants during the exercise of their statutory functions.

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[766]The compensation was Rs. 1, 50,000/ in *Nilabati Behera* case. Ibid.

[767]India acceded to the Convention on 10th April, 1979. See at: http://docstore.ohchr.org/SelfServices/FilesHandler.ash.

[768] M. P. Singh, "Constitutional Liability of the State. Erosion of Sovereign Immunity," *The Lawyers (*May 1994): 16.

[769] G. L. Wagir, "Right to Compensation under Public Law in India; A Basic Human Right and an International Commitment," *Legal News & Views (*July 1997): 13.

[770] T. Ch. Surya Rao, "Doctrine of Sovereign Immunity - Need for Legislation", *Legal News & Views.* (1986): 26, at 28.

[771] M. S. V. Srinivas, "Compensation under Arts.32 and 226 for Violation of Human Rights and Fundamental Freedoms," A. I. R. *Jour* (1997): 167.

The dictum of *Kasturi lal* has merely been distinguished rather overruled or set aside.[772] So the Supreme Court has repeated its verdict in *Kasturi lal* case in a modified type. This modification is such as that, the state is liable vicariously for the tort acts of the public servants committed during the performance of the statutory functions and breach of fundamental rights of the people.[773]

It reveals that the principle of sovereign immunity protection does not apply in proceeding in public law to claim compensation for violation of fundamental rights. It does not appear to be proper for making distinction of *Kasturilal* in *Nilabati Behera* case. As it was a writ for infringement of fundamental rights in *Nilabati Behera* case while, in *Kasturi lal* the suit was to recover the sum as compensation for the loss of property. It is mentionable here that when the case of *Kasturi lal* was decided, property right was a fundamental right under Article 31 and distinction between ordinary civil suit or writ for enforcing of fundamental rights were not made by the court. Thus, the distinction made out is merely a later invention of the judiciary.[774] However, the principle articulated in *Rudul Sah* and repeated in *Nilabati Behera* has been applied by the courts in later cases.

Although most of the cases mentioned above relate to fundamental rights under Article 21 and 22 in which compensation has been awarded whereas compensation is also awarded for breach of other fundamental rights, for instance Article 19 (1) (g) of the

[772] T. Ch. Surya Rao, "Doctrine of Sovereign Immunity-Need for Legislation," *Legal News & Views* (1986): 26, at 30.
[773] Vikram raghawan, "Compensation through Writ Petitions," *Student Advocate*, n. 6: 98; Alic Jacob, "Vicarious Liability of Government in Tort," *Journal of the Indian Law Institute,* no.7 (1965): 247.
[774] T. Ch. Surya Rao, "Doctrine of Sovereign Immunity-Need for Legislation," *Legal News & Views* (1986): 26, at 175.

constitution.[775]The other cases such as *Assam Sillimite Ltd.* vs. *India*[776]and *Gajanan Vishweshwar Birjur* vs. *India*[777]present the picture in this regard.[778]

A strange situation emerged due to distinction made in the case *of Nilabati Behera* between Public Law or Constitutional Remedy and Private Law or Civil Law remedy by the Apex Court. As in this case the Court had stated that award of compensation under Arts.32 and 226 of the constitution was a remedy existed in public law and the doctrine of sovereign immunity did not applicable to it whereas it may be available for a defence in private law in tortuous act. It is submitted that this distinction does not emerge appropriate. The issue of applicability or non-applicability of the principle of sovereign immunity should be in consideration to the character of rights infringed rather the type of remedy.[779]

In this regard a path breaking decision delivered by High Court in the case of *C. Ramakonda Reddy,* vs. *State of A.P* is to be appreciated.[780]In this case the accused was killed in judicial custody due to hand bomb thrown in sub jail. The plaintiff took plea of malfeasance and misfeasance of the state and damages suffered by them was estimated at ten lac rupees. The state taking the plea of sovereign function of the state denied its liability for any damages and the suit was dismissed by the learned subordinate judge.

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[775]Protection of certain rights regarding freedom of speech etc., Article 19 (1) "All citizens shall have the right- (*g*) to practice any profession, or to carry on any occupation, trade or business." (The Constitution of India, 1949).

[776] *Assam Sillimite Ltd. vs. India*: (1990) 3 S.C.C.182.

[777]*Gajanan Vishweshwar Birjur vs. India*: (1994) 5 S.C.C. 550.

[778]Dr Usha Ramanathan, "Law of Tort in India," *Annual Survey of Indian Law*," (2001) 615-628; also mentioned by Chidananda Reddy S. Patil in "Liability of the State for the Torts Committed by its Servants" (PhD diss., Karnatak University, 2002), 230.

[779] G.I.S. Sandhu, *Monetary Compensation for violation of Human Rights its Developments and Prospects in India,* (New Delhi: Deep & Deep Pub, 1995), 414.

[780] *C. Ramakonda Reddy vs. State of A.P*: (A.I.R. 1989 A.P. 235).

The High Court of Andhra Pradesh held in appeal that the principle of sovereign immunity cannot become impediment to get compensation in private law suit for infringement of the fundamental right to life.[781]

Further the court stated regarding the fundamental rights that they are indefeasible, sacrosanct, basic and inalienable.[782] Consequently the court decreed the suit with compensation[783] and stated that this is the merely manner in which the right to life assured under Art.21 can be enforced. This approach of the court has been also appreciated by the academicians. For example, during the pendency of the appeal Prof. M. P. Singh wrote important note on the issue.[784]

In this appeal the Supreme Court endorsed the path breaking decision of the High Court, dismissed the appeal and the Court observed that the maxim "King can do no wrong" or that the Crown is not accountable in tort has no place in Indian jurisprudence[785] where the authority vests, not in the Crown, but in the people who elect their representatives to run the government, which has to do something in conformity with the constitutional provisions and would be accountable to the people for any infringement thereof.[786]

Since this important decision, trial courts can award compensation as well in suits a civil law or private law remedy for infringement of fundamental rights. It is important to mention here that this situation justifies the fundamental rights of billions poor people in India who do not have access to approach the High Courts and Supreme Court to get

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[781]Ibid., 247).
[782]*C. Ramakonda Reddy vs. State of A.P*: (A.I.R. 1989 A.P., at 247).
[783] The compensation was amount of Rs. 1, 44,000/. Ibid.
[784] See at: M. P. Singh, "Constitutional Liability of the State: Erosion of Sovereign Immunity," *The Lawyers* (May 1994): 16-7.
[785]Justice U.C. Srivastava, "Tortious Liability of State under the Constitution,". 1. (pdf).
[786]Chidananda Reddy S. Patil "Liability of the State for the Torts Committed by its Servants" (PhD diss., Karnatak University, 2002), 245.

the public law remedy.[787] Along with civil law remedy to award compensation in Criminal appeal is another innovation held in *State of A.P* v *Challa Ramakrishna Reddy.*[788] For instance, in *Jwata Devi* vs. *Bhoop Singh*[789]the Supreme Court awarded compensation under article 136 to an old woman for alleged police official misbehavior in a criminal appeal. In another case of *Daulat Ram* vs. *Haryana*[790]the Supreme Court held the state liable to pay compensation to the appellants.[791]

Under the above discussion, it can be stated that the Indian Supreme & Higher Courts can award of compensation in result of violations of fundamental rights of the citizens by the state functionaries.[792]

4.2. Constitutional Torts Remedy in Pakistan

In Pakistan, same like in India discussed above, the Supreme Court under Art 184(3) and the High Courts under Art 199 of the constitution are also awarding the damages in writ applications in violation of fundamental rights of the citizens by the state/public servants. To explore this situation, we need to move towards case laws decided by higher courts of Pakistan. There are certain cases in which the compensation as a remedy has been awarded in result of violation of fundamental rights of the citizen by the public servants of the State. These cases are being discussed as following.

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[787]Ibid.
[788]Ibid., 245.
[789]*Jwata Devi vs. Bhoop Singh*: (A.I.R. 1989 S.C. 1441).
[790]*Daulat Ram vs. Haryana:* (1996) 11 S.C.C. 711.This case raises certain basic questions: "1). Can the State be made liable in the cases where a person in acquitted? 2). Should the persons concerned not be required to prove in a separate civil suit that there was malicious prosecution?". Ibid.
[791] Dr. Anupa vs. Thapliyal, "Compensation in writ jurisdiction few Basic Questions," 25 *Ind. Bar. Rev.* 95(1998): 102.
[792]See further Vikram raghawan, "Compensation through Writ Petitions," *Student Advocate*, vol 6: 97-104.

4.2.1 Award of Compensation in Violations of Fundamental Rights: A Survey of Judgments

In Pakistan, this kind of concept has been given in an important case of *Nizam Din* vs. *Azad Government* in which compensation to landowners of their land acquired was not provided.[793]The important proposition discussed in this case by the court is that the appellants have continuously been pursuing to get the compensation but when they felt that there is no other forum except to knock the door of the Supreme Court, they filed the writ petition for the enforcement of their fundamental right, therefore, this is a fit case in which fundamental right guaranteed by the Constitution should be enforced.[794]

This is basically principle of 'appropriate cases' which has been developed by the Indian courts for the constitutional tort as discussed above in detailed. The meaning of 'appropriate cases' is that when there is no any plate form to get damages against the violation of the fundamental right of the citizen, he can invoke the writ petition in Higher Courts. The principle of 'appropriate cases' was supported by the court in this case to award compensation due to violation of fundamental rights of the people. Though, it was not elaborated by the court the case which can be considered as 'appropriate' to compensate the victims of illegal actions by the state.

As to be an 'appropriate case' there must be gross violation of right to life and its dependents. Under this concept, there was very important constitutional petition under Article 199 related to Article 9 (right to life) *State* vs. *M.D., WASA and Ors*[795] in which public functionaries had to pay compensation to the petitioner whose 9 years old daughter

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[793]*Nizam Din vs. Azad Government* :(2013 Y L R 1489 SC [AJ&K]).
[794] In view of the above discussion, this appeal was accepted. Ibid.
[795] *State vs. M.D., WASA and Ors:* (2000 C L C 471[Lahore]). (Discretion to use compensation rather diyat).

died because of an open manhole of sewerage in Multan, Punjab (Pakistan). High Court showed its great concern over such negligence and, to prevent the recurrence of such tragedy in future 1, 00000/ was awarded as compensation to the petitioner and, further the court ordered public authorities to take action against concerned public officials.

The court was persuaded to take up the matter: i) on account of the socially and economically disadvantageous position in which the bereaved family was placed; ii) the lack of development of law of tort in this country; iii) the absence of civic consciousness on the part of the public at large; iv) the apathy and inefficiency of the functionaries of the state and; v) the inspiring precedents set by the Honorable Supreme Court in the field of public interest litigation.[796]

The importance to the incident has been given in this case by saying that, the heartbreaking incident (the death of Alooba) is just the tip of an iceberg in a huge incidence of human suffering and public wrong which goes unredressed due to ignorance of the victims, their poverty and their lack of courage to raise these problems with the State functionaries. This situation has led to a new form of dispensation of justice which is called public interest litigation.[797]

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[796] The honorable court summoned the Managing Director, WASA, District Magistrate and S.S.P. Multan. Further, the M.D., WASA submitted that "as soon as he got to know about the tragedy he visited the bereaved family. He admitted that the manhole was uncovered; that the father of the girl had lodged a complaint about it and he deputed a Sewerage Man who did visit the place but came back to bring the necessary tools to clear the sewerage drain which had been choked and according to the father of the minor girl the sewerage man left the hole uncovered, did not come back in time and while the father was away from home the girl fell into the said hole, never to come back again." The M.D., WASA further submitted that "the father of the girl considered that to be an act of the God and did not want to proceed in the matter. He, however, added that an inquiry had been ordered to fix the responsibility."(*State vs. M.D., WASA and Ors:* (2000 C L C 471[Lahore]).

[797] Some conditions may be as for the incitation of the PIL petition:

"i). It is a litigation where a person filing the petition may not have suffered a personal wrong himself but has brought a matter of public interest before the Court as a citizen and points out a right which has been violated by an organ or functionary of the State.

ii). the wrong for which the relief is sought must be due to a breach of some public duty which emanates from the Constitution/Law.

It has been strengthened by Tassaduq Hussain Jilani, then the judge in the same case, who shed the light on the situation that is mentionable here as: the case in hand[798]reveals a severe violation of the fundamental right to life. These uncovered holes[799]are death traps which have been laid not by enemy forces, this is not an act of terrorism, and this is the doing of an authority which has been entrusted with the duty of the development of water and sewerage in the city of Multan.

The words used 'severe' and the 'heartbreaking incident' (the death of Alooba) show the gross violation of fundamental right which leads towards the condition given by Indian courts an 'appropriate case' which is basic requirement to consider for action and remedy/compensation in Public Law/Constitutional Law.

There was another important case of violation of fundamental rights of the citizen. In which a gross violation of right to life due to drone attacks happened such as *Foundation for Fundamental Rights* vs. *Federation of Pakistan and 4 Ors*[800]. This case was brought before the Peshawar High Court. The High Court took jurisdiction to deal the matter under Article 199 of the Constitution and placed the court under tremendous obligation to safeguard and protect the life and property of the citizens of Pakistan and any person for the time being in Pakistan, consequently court ordered to pay the compensation.[801]

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iii). No formal procedure for tiling such a petition is required. The matter may come to the notice of the Court through a formal petition, a letter or a newspaper clip. The only requirement is that the subject matter should be of general public concern violating the Constitutional or legal right." Ibid; Human Rights Commission of Pakistan, *Public Interest Litigation Scope and Problems,* 2010.

[798] Particularly the admission made by the Managing Director, WASA, Multan and the report of the District Magistrate.

[799] It is shocking to know that in 1997 the year of 20th century and in the historic city of Multan, there are 2056 manholes, which are uncovered. A detailed report submitted by the District Magistrate, Multan. *State vs. M.D., WASA and Ors: (*2000 C L C 471[Lahore]).

[800] Foundation *for Fundamental Rights vs. Federation of Pakistan and 4 Ors*: (P L D 2013 [Peshawar] 94).

[801] Ibid.

The important proposition emerged in this case is that; it is the duty of the state to protect the 'right to life' of its citizens against itself as well as wrongful act from other states. If there is any violation of fundamental right or extrajudicial killings with drones it must stop these violations of basic rights and if causes loss then it must provide compensation for the victims, destruction of moveable and immoveable properties. Although, the court has not given the name as 'an appropriate case' to deal in this sphere as mentioned in the case of Indian jurisdiction but, as these attacks were blatant breaches of absolute right to life, therefore it can be considered to an 'appropriate case, for the constitutional tort remedy, because it fulfills the conditions mentioned by Indian Courts. There was also important case in which a widow had no source of income for her and her children to live life except compensation of her deceased husband which were not dispersed by the employer and, commissioner had also exploited her through lengthy process. In this violation, a petition under Article 199 in *Wackenhut* vs. *Malik Zafar Iqbal* was filed but the same was dismissed with the cost of Rs.5000 to be paid to the widow/respondent.[802] In this case two important matters were considered such as, i) speedy disposal, justice for poor victims and needs of her life and her children, and ii) the procedural technicalities were not considered as hurdle.[803]

Observation of this court is considerable. No doubt, such types of matters require special attention not for speedy disposal but speedy justice as well. Further, the courts should also, like in this case, move towards speedy disposal and speedy justice generally for all and especially for poor victims.

[802] *Wackenhut. vs. Malik Zafar Iqbal:* (2011 P L C 196 [Islamabad High Court]).
[803] Ibid.

Same kind of constitutional petition titled as *Musarat Bano* vs. *Additional District Judge, Lahore &Ors*[804]was filed under Article 199 for compensation and the petition was partially allowed. The court allowing the petition partially observed: "the legal heirs of deceased are facing difficulties in the disposal of the suit being widow and minor sons and daughters and as such the learned trial court is directed to decide the suit within 2 months from the date of receipt of certified copy of this order."[805]

As discussed above that speedy disposal and speedy justice is back bone of every society in which time is spot light. Same like, justice is important for rule of law same as arbitrary exercise of authority is dangerous for rule of law. If it happens, then rule of law damages, which is gross violation of fundamental rights of citizens. This kind of arbitrary authority was exercised in *Shoukat Ali Qureshi vs. the State &Ors.*[806]

In this petition, order of judicial officer (ASJ) dismissed the bail application of accused by considering F.I.R different from F.I.R for which accused sought the bail. The High Court denounced the order of judicial officer with the observation that orders of such sort brought mortification, hopelessness, distress, disappointment and sadness to the common litigants. It was arbitrary exercise of authority[807]against the rule of law and dictum set down by the' Honorable Supreme Court, so court gave grace and declared the impugned order as a result of some misunderstanding amalgamation of facts of two different cases and not of any other consideration.[808] Although compensation was not awarded in this

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[804]*Musarat Bano vs. Additional District Judge, Lahore and others*: (2010 M L D 1656 [Lahore]).
[805]Ibid.
[806]*Shoukat Ali Qureshi vs. the State and Ors*: (P L D 2012 [Islamabad High Court]) 65).
[807]Admittedly; offences under sections 353, 337-H (ii), 186/34, P.P.C. in which petitioner sought bail before arrest according to Schedule-II of Cr.P.C. are bailable. Through impugned order, learned ASJ declined the request by discussing case registered vide F.I.R.No.1106 dated 27-10-2011, offence / under sections 324; 427, 148, 149 and 337-F(ii), P.P.C. and not a single word/reason about the F.I.R. in which bail was sought. Ibid.
[808] In the case titled *Muhammad Ayub vs. Muhammad Yaqoob & Ors:* (PLD 1966, SC 1003).

case but court constrained to call in person to learned ASJ who put appearance in order to confront and to know the causes of departure.

It is humbly submitted that this instant court itself has not exercised his authority within the four corners of law and has opened the doors of criticism and question marks on its own judgment because the instant court has showed the grace to ASJ even he advanced explanations unsatisfactorily. It is humbly suggested that the instant court must not had showed the grace to ASJ but order to pay the compensation to the victim. The instant High Court also gave the views that "the judicial officers are custodian of the rights of the people, rule of law and administration of justice therefore they are duty bound to perform their duty accordingly."[809]

In the case of *Sabz Ali Khan v IG Police, KPK*[810]the scope of jurisdiction of the high court under Article 199 has been described by the court itself as; "this court has always exercised jurisdiction to review those proceedings, decisions or actions of police officials which suffer from defects of jurisdiction. In the present case, it is apparent from bare reading of FIR that prosecution has built the entire case on erroneous and wrong foundation."[811] It means that the High Court has jurisdiction under Article 199 when the Article 4 of the Constitution is violated,[812]because, it is the inalienable right of every citizen to enjoy the protection of law and to be treated according to law. Thus where an

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[809]*Muhammad Ayub vs. Muhammad Yaqoob & Ors*: (PLD 1966, SC 1003).
[810]Sabz Ali Khan *vs.* IG Police, KPK: (2016 Y L R 1279 [Peshawar]).
[811]Ibid.
[812]**Right of individuals to be dealt with in accordance with law, etc.-**
"(1) To enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen, wherever he may be and of every other person for the time being within Pakistan.
(2) In particular-
(a) no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law;
(b) no person shall be prevented from or be hindered in doing that which is not prohibited by law; and
(c) no person shall be compelled to do that which the law does not require him to do." (The Constitution of the Islamic Republic of Pakistan, 1973).

order has been passed, or action taken against him by any platform, executive or judicial, which is clearly illegal particularly the express provision and the essence of statute, which if permitted to continue intact tantamount to, and shall cause serious violation of the right of the citizen, the High Court can come for his rescue in its constitutional jurisdiction.

Some illustrative cases have been mentioned above. Under this situation, it is humbly submitted that this expression is very subjective. Here an important question, borrowed from Indian jurisdiction, arises 'whether the rights in question really do form a substantive basis for such course of action'.[813]

The Court in India made distinction in the 'public law' and 'private law' remedy in the case of *Nilabati Behera* to developed concrete principles of compensation jurisprudence. The court awarded compensation for constitutional torts and observed that sovereign immunity defense is not available in the field of public law, whereas, in Pakistan judiciary has not given clear principles regarding new remedy. One other feature is that as the growth of law is based on public law for the infringement of Fundamental Rights in which judicial discretion performs a key role, the Pakistan Courts could not succeed to make effective jurisprudence as to the state liability. The best way the Court could have assumed is by overruling the law, which has made by the judiciary in order that the remedy can be attained from the lower courts as given in common law so that any error in ruling can be cured. This, however, has been attained by the Supreme Court of India in its innovatory judgment in *Challa Rama krishna Reddy case.* Due to it, the tort liability law and compensation was released from the control of the old notion of sovereign immunity

[813]Krishnan Venugopal, "A New Dimension to the Liability of the State under Article 32,"11 *Ind. Bar. Rev*(1984): 373.

vis-à-vis the fundamental rights. However, a great development has been made from *Rudul Sah* to *Challa Ram krishna Reddy* through *Nilabati Behera* cases by providing remedy for infringement of fundamental rights of the people.[814]

However, due to absence of concrete and clear principles the existing situation is not up to the mark in Pakistan. There is no express provision in the constitution to grant compensation in case of violation of fundamental rights. Therefore, it is most required to integrate in the Constitution an express enforceable right

It is, thus, evident that the fragmented legal framework providing for compensation by an offender to his victims for loss suffered or injury caused by commission of the offence is inadequate.[815] It does not provide for a comprehensive legislative scheme for either compensating victims of crime (for any 'loss' and physical, mental, or psychological 'injury') or the payment of 'compensation' and 'specified amount' awarded to them. It neither mandates courts to compensate the victims nor creates any legal right in their favor. It is entirely left to their (courts') discretion to compensate victims of crime as well as to initiate legal action to recover the fine, out of which compensation is ordered, or the specified amount of compensation from the offender to pay it to crime victims.[816] The whole scheme of award and payment of compensation in Pakistan thus solely depends upon the sweet will of courts.

The courts have mostly awarded compensation on irrationality basis for example, in number of cases; it is awarded from Public Funds which gives moral boosting to erring or corrupt officials such as in *State* vs. *M.D. Wasa* case (Alooba case) the Court ordered

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[814]Chidananda Reddy S. Patil "Liability of the State for the Torts Committed by its Servants" (PhD diss., Karnatak University, 2002), 255.
[815]C. K. Rameshwara Rao, *Law of Damages and Compensation* (Allahabad: Law Publishers Pvt Ltd., 1996).1.
[816]Ibid.

to (WASA) to pay of Rs. 1, 00,000/ compensation. Due to this reason, the order for compensation must be made from their own salaries not by public exchequers. The appreciable decision was given by the Sindh High Court in the case of *Zahid Ahmed* v. *Province of Sindh.*[817]In which the court awarded compensation by using technical mind and held that current salary of the petitioner be paid on regular basis by deducting 50% of it from the salary of the E.D.O. and the other 50% from the salary of the Head Master. The court protected the petitioner from exploitation, forced labour and his right to life by awarding the exemplary damages to the petitioner. Again, in *State* vs. *M.D. WASA* case (Alooba case) the Court ordered to (WASA) to pay compensation rather the concerned area officer.[818]

Almost in all illustrative cases regarding the award of compensation on the basis of differentiation is not clear. Even, if common law 'notions' require the compensation to be victim-based (i.e. poor lives getting less than rich live), the Jurisprudence of Supreme Court needs to be violation of rights based. The purpose of compensation is not just to restore the victim life. It is also 'exemplary' in nature without obviating its discretion to individuate principles and recommendatory sums, some thresholds have to be set.[819] In fact such arbitrary compensation looks more like a charity. For example, in *State* vs. *M.D. WASA* case (Alooba case) the Court ordered to (WASA) to pay compensation 'a cheque of Rs.1, 00,000/'to the father of the girl (alooba).

Broadly speaking even in the cases where compensation matters has been left at state governments remain pending for years in the absence of judicial monitoring of the

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[817]*Zahid Ahmed vs. Province of Sindh*: (2012 PLC (C.S) 124 [Sindh High Court]).
[818]*State vs. M.D., WASA and Ors: (*2000 C L C 471[Lahore]).

[819]C. K. Rameshwara Rao, *Law of Damages and Compensation* (Allahabad: Law Publishers Pvt Ltd., 1996).1.

proceedings like *Wakenhut* vs. *Malik Zafer Iqbal* case. The court has moved through judicial activism one step forward but two steps backward in the compensatory jurisprudence for public wrong. The criteria to quantify the compensation creates problem for the courts especially in the field of constitutional tort remedy.

4.2.2. Criteria to Quantify the Compensation by the Higher Courts in Constitutional Tort Cases in Pakistan

As compensation for fundamental rights infringements is a creative jurisprudence developed by courts but there is no any effective criteria which has been adopted by the courts in quantifying the compensation. In this regard there are two issues to deal such as: i) there is no yardstick to determine the compensation and; ii) the compensation awarded is not just. The Supreme Court has explained related to award of compensation for the violation of fundamental rights but it could not draw specific criteria to determine the compensation. The Court gave emphasis on the compensatory rather on punitive element and further observed that the quantum of compensation depends upon the peculiar facts of each claim and therefore any straight-jacket formula cannot be developed in this regard. For example, in *State* vs. *M.D., Wasa*[820] only Rs.1, 00,000/ was awarded as compensation to the father of the girl and the commission of a cognizable offence was neglected. The court has not used any parameter to determine and award of compensation. It does not come under the category of *diyat* therefore seems arbitrary exercise of authority by the court.

[820] *State vs. M.D., WASA and Ors:* (2000 C L C 471[Lahore]).

In Karachi tragedy case,[821] about 2000 people in Karachi died of dehydration and heat stroke and, over 40,000 people treated in the hospitals for heatstroke. A fine of Rs 10 million on KEC was imposed by the NEPRA for failure to supply uninterrupted electric power services and intentional under-utilization of its generation ability. Is fine of Rs 10 million justifiable where 2000 people died and 40,000 people treated in the hospitals for heatstroke, of course not.[822]

The Supreme Court enhanced the amount of damages in *Azizullah* vs. *Jawaid a. Bajwa*,[823] case and included loss of profit and mental torture in decretal amount for the petitioner who suffered mental torture and agony, physical injury and financial loss by the public functionaries (custom officers) such as the amount of damages from Rs.3,00,000/ to Rs.10,00,000/ as compensation for travelling expenses, loss of profit and mental torture which was to be paid to the petitioner in addition to Rs.1,00,000/ the sale price of watches payable to him in terms of the judgment of the trial Court.[824] As there is no any yardstick to determine the compensation, so it is up to the Court to determine the proper damages keeping in view the nature of wrong done and loss caused especially in mental torture cases.

The important issue also arises when other state is involved to pay the compensation. Is there any system to determine and receive the compensation from other

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[821] It was filed by the PILER, along with Shahzad Roy, Nazim Fida Hussain Haji, Urban Resource Centre, National Organization for Working Communities and Workers Education and Research Organization. **PILER** is the Pakistan Institute of Labour Education & Research (**PILER**) was founded on 1 May 1982 by a group of concerned individuals from the trade union movement, academia and various other professions. It has been registered as a 'not for profit' company under Section 42 of the Companies Ordinance. Further see at: http://piler.org.pk/.

[822] Ibid..

[823] *Azizullah vs. Jawaid a. Bajwa:* (2005 S C M R 1950 SC). This petition under Article 184(3) of the Constitution of Islamic Republic of Pakistan was directed against the judgment dated 12-11-2003 passed by a Division Bench of High Court of Sindh, at Karachi, in H.C.A. No.177 of 2002 arising out of a suit for damages.

[824] Ibid.

state? Some detail has been given in the case of *Foundation for Fundamental Rights* vs. *Federation of Pakistan & 4 Ors*[825] which was brought before the Peshawar High Court under Article 199 against the drone attack, to provide compensation for the victims, destruction of moveable and immoveable properties and to order the respondents to use its 'right to reparation' for the wrongful act.[826]

The court held that in view of the established facts and figures with regard to civilians' casualties and damage caused to the properties, livestock of the citizens of Pakistan, the US Government is bound to compensate all the victims' families at the assessed rate of compensation in kind of US Dollars. Further, the Government of Pakistan shall also file a proper complaint, giving complete details of the losses sustained by the Pakistani civilian citizens both to life and properties due to drone strikes, making a request to the UN Secretary General: to constitute an independent "War Crimes Tribunal" which shall have the mandate to investigate and enquire into all these matters and to give a final verdict as to whether the same amounts to War Crime or not and in the former case to direct the US Authorities/Government to immediately stop the drone strikes within the airspace/territory of Pakistan and to immediately arrange for the complete & full compensation for the victims' families of the civilians both for life and properties at the rate and ratio laid down under the international standards.[827]

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[825] *Foundation for Fundamental Rights vs. Federation of Pakistan and 4 Ors:* (P L D 2013 [Peshawar] 94).
[826] This single judgment was also decided connected W.P. No. 3133/2011 entitled "F.M. Sabir Advocate Peshawar High Court Peshawar v. Federation of Pakistan through Ministry of Defence and 5 others", W.P. No. 1550-P/2012 entitled "Malik Noor Khan v. Federation of Pakistan through Governor Khyber Pakhtunkhwa and 5 others" and W.P. No.3134/2011 entitled "Defence of Pakistan Council through its Provincial Convenient Syed Yousaf Shah and 6 others vs. Federation of Pakistan through its Secretary Interior and 4 others" because in all these petitions identical questions of law and facts are involved. Ibid.
[827] *Foundation for Fundamental Rights vs. Federation of Pakistan and 4 Ors:* (P L D 2013 [Peshawar] 94)

There was a similar case in India, to award of compensation in the Bhopal Gas Tragedy; the Government passed "the Processing of Claims Act, 1985"[828] that invoked the '*Parens Patria* Doctrine'[829] to allow it to represent the victims. The case then moved before the District Court in America and was dismissed primarily on the grounds of *forum non conveniens*,[830]a ruling confirmed on appeal.[831]Finally, the Indian Supreme Court ordered both sides to come to an agreement and start with a clean slate in November 1988.[832] Eventually, Union Carbide agreed to pay $ 470 million for damages caused in the Bhopal disaster, 15 per cent of the original $ 3 billion claimed in the suit.[833]The average amount to families of the dead was $ 2,200.[834]

The survey of the above cases reveals that there is no adequate scientific criterion to assess the quantum of compensation in constitutional tort remedy. There are disparities among the judgments of the higher courts, therefore, it is suggested that an adequate scientific criterion to assess the quantum of compensation must be developed by the Supreme Court on the bases of well accepted doctrines. To assess the damages caused in constitutional tort the 'voting rights model' applied in the jurisprudence of America may

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[828] The Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985 (Act 21 of 1985).

[829] "*Parens Patria* Doctrine" is "a doctrine that grants the inherent power and authority of the State to protect persons who are legally unable to act on their own behalf." (Legal Dictionary, s.v. "Parens Patria Doctrine" https://legal-dictionary.thefreedictionary.com/parens+patriae (last accessed at July 1,2017)).

[830] The "*Forum non conveniens*" is "a judicial doctrine that allows a trial judge to dismiss a case, even though parties have satisfied jurisdictional and venue requirements, when trial in another forum is more convenient and just. It is a doctrine that is becoming increasingly obsolete in a world in which markets are global and in which ecologists have documented the delicate balance of all life on this planet." (Merriam Webster' Legal Dictionary, s.v. "*Forum non conveniens,* "https://www.merriamwebster.com/legal/forum%20non%20conveniens (last accessed at July 1,2017).

[831] *In re Union Carbide Corp. Gas Plant Disaster at Bhopal India,* Dec. 1984, 634 *F. Supp.* 842 (S.D.N.Y. 1986).

[832] *Union Carbide Corp.* vs. *Union of India:* (A.I.R. 1990 S.C. 273).

[833]See Kenneth F. McCallion, "International Environmental Justice: Rights and Remedies," 26 *Hastings Int'l & Comp. L. Rev.* 427 (Spring 2003).

[834]Unfortunately, "the disaster resulted in an estimated 5,000 deaths in the immediate aftermath. By 2001, exposure-related diseases raised the death toll to 16,000 and those injured to half a million. Still today, nearly a dozen people die every month as a direct result of this incident."See further for facts about the Bhopal Gas Disaster at: http://zope.greenpeace.org/z/gpindia/bhopal-factsheet.

be followed, as the victim may not constantly suffer actual damages.[835]Further, in number of cases, compensation is awarded from Public Funds which gives moral boosting to erring or corrupt officials. Due to this reason, it is submitted that the order for compensation must be made from their salaries and not by public exchequers.[836]

4.3. Conclusion

In this chapter, the researcher discussed the constitutional tort remedies jurisprudence a concept fairly developed by the Indian courts and subsequently imported in Pakistan. It reveals that Higher Courts in both jurisdictions, by applying an innovative approach, have been awarding compensation in result of violations by the state functionaries against the fundamental rights of the citizens. It concludes that Higher Courts in Pakistan do not exercise their statutory powers as freely and liberally as Indian courts are doing. Indian courts, whereas, have made many liberal and encouraging judgments for constitutional tort remedy.[837]It also concludes that, although it is a good development, there is no adequate scientific criterion to assess the quantum of compensation in constitutional tort remedy. It further concludes that, due to non-existence of specific article in the constitution, there are disparities among the judgments of the Higher Courts in both of the countries. Having these short comings, this new remedy is thus to be welcomed as it

[835]This kind of suggestions also has been made in Indian jurisdiction by the research of Chidananda Reddy S. Patil "Liability of the State for the Torts Committed by its Servants" (PhD diss., Karnatak University, 2002), 256.

[836]Ibid. For constitutional tort remedy concepts, please also see a very comprehensive study by James J. Park, "the Constitutional Tort as Individual Remedy," *Harvard Civil Rights-Civil Liberties Law Review*, no.38 (2003): 393-453.

[837] As discussed above such as *Radul Sah vs. State of Bihar*: (AIR 1983 SC 1086); Sebastian M. Hongray *vs.* Union of India: (1984) 3 SCR 544; Bhim Singh *vs.* State of J & K: (1985) 4 Se.c. 677. (AIR 1986 SC 494); *Saheli vs. Union of India:* (AIR 1990 SC 513).

would go a long way in providing relief to victims of violation of fundamental rights.[838]It is an effective remedy to apply balm to the wounds of the family members of the deceased victim. This innovation can help in reducing backlog, multiplicity of litigation, providing speedy and less expensive justice to the victim in the both jurisdictions especially in Pakistan.[839]

[838]James J. Park, "the Constitutional Tort as Individual Remedy," *Harvard Civil Rights-Civil Liberties Law Review*, no.38 (2003): 453. This research concludes that: "We must recognize the fact that the actions taken under constitutional tort protect the interests, the right of the individual to be free from some type of damage caused by government. These actions have had an active role in constitutional norm growth irrespective that inertly compensation and deterring infringement of rights. They have facilitated the courts translating general constitutional provisions in to rights of individuals. They also uniquely put in to articulating structural norms that regulate the discretion of individual government official to cause injury. It is hope that society, by a greater understanding of these actions, will be less quick to judge those who bring such actions. We can challenge the government's infliction of injury upon individuals through new gates of constitutional tort actions. Even, history shows, individuals in a free state must maintain such channels limiting the government authorities to cause injury." As for as qualified immunity is concerned, another study suggests that "claimants of constitutional tort should be allowed to avoid the qualified immunity defense by pursuing claims for nominal damages alone." (Pfander James E., Resolving the Qualified Immunity Dilemma: Constitutional Torts Claims for Nominal Damages," *Faculty Working Papers*. Paper no 13: 32-33).

[839]V.K. Sirkar, "Compensation for Violation of Fundamental Rights A New Remedy in Public Law Distinct from Relief of Damages in Tort," *J.T.I.R Journal* (April-June, 1995): 5.

CHAPTER 5

A COMPARATIVE ANALYSIS OF LIABILITY OF THE STATE IN TORT LAW REFORMS: AN INDO-PAK PERSPECTIVE

In the previous chapters (one to four), the researcher tried to establish a frame work on state liability in tort law. The research started to explore historically the origin and developments of tort law and tortious liability of the state in England and after wards their emergence and developments in British India. It highlighted the current situation of the citizen's rights in Pakistan on one hand and negligence/ carelessness by the state to perform their duties/ responsibilities on the other hand. For this purpose, it discussed the practices of state organs such as judiciary, legislator and executive, as well as it also considered to discuss important institutions of the state including, Police, FIA, Railways, Food, Health, Natural Disaster Management and Media because these have direct interactions to the citizens and it possible to violate the rights of the citizens by these institutions.

As rights cannot be protected without the involvement and good governance in the state therefore along with tort law it also considered the public law to discuss here to some extent. So, it included constitutional tort remedy, developed by Indian courts and later imported in Pakistan as well, which can be claimed in violation of citizen's fundamental rights. The intention of the researcher to include constitutional tort was on this

presumption that perhaps state take serious steps to protect rights and make laws in this perspective, because when fundamental rights are violated state gets pressure on it nationally as well as internationally. Finally, the researcher examined the judiciary role which is playing in the absence of state liability law to interpret and hold liable to the state especially its public servants in violation of the citizen's rights. This research found that on the one hand there is immunity to state servants the courts are holding liable to them in their judgments creating a big confusion on the subject on the other hand.

In the backdrop of the above established framework of the research, the instant chapter makes a comparison between the both jurisdictions, as India and Pakistan, to get findings/results of this research. As both countries inherited similar legal and social legacies and subsequently developed into two distinct streams. Being primarily common law jurisdictions, their social setups, level of developments and institutional strengths are broadly comparable. This chapter compares only some important factors which have been discussed and identified in previous chapters of this research. These factors include: i) nature and scope of constitutional provisions; ii) post-constitutional judicial rulings; iii) constitutional torts and; iv) immunity clauses. The main objective to make a comparison is to high light the gapes and short comings in state liability laws in tort and, further to suggest concrete recommendations on our findings to improve the same for the access to justice to the poor especially in Pakistan.

5.1. Nature & Scope of Constitutional Provisions

Constitution is supreme law of the land which gives the basic idea of law. Therefore, it needs to discuss the relevant constitutional provisions on the state liability law. So, it is

being discussed the nature and scope of constitutional provisions of the both jurisdictions as under.

5.1.1. Article 300 & 174 of the Constitutional Law

The law in India with respect to the liability of the state for the tortious acts of its servants has become knotted with the nature and character of the role of "the East India Company" prior to 1858. The Clause (1) of Article 300 of the Constitution of India provides first that:

> "the Government of India may sue or be sued by the name of the Union of India and the Government of a State may sue or be sued by the name of the State; secondly, that the Government of India or the Government of a State may sue or be sued in relation to their respective affairs in the like cases as the Dominion of India and the corresponding Provinces or the corresponding Indian States might have sued or be sued, if this Constitution had not been enacted, and thirdly, that the second mentioned rule shall be subject to any provisions which may be made by an Act of Parliament or of the Legislature of such state."[840]

It is important to mention here that although more than 60 years have gone since the commencement enacted by virtue of powers conferred by the Constitution, neither the legislature of the states nor the Parliament has made any law as contemplated by clause (1) of Article 300 of the Constitution of India, despite the fact that the legal position emerging from the article has given rise to a good amount of confusion.[841] Resultantly, judgments of the Supreme Court have not been uniform and have not helped to remove

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[840] The Constitution of India, 1949, Article 300 (1).

[841] A Consultation Paper on "Liability of the State in Tort" Vigyan Bhavan Annex, New Delhi, 2001. 2; See also Justice U.C. Srivastava, "Tortious Liability of State under the Constitution,"1; "The Extant of Liability of State under Article 300" chapter 3 which describes the subject very comprehensively. 69-114.

the confusion on the subject.[842]Thus, Article 300(1) relates back through successive Government of India Acts to the legal position immediately prior to the Act of 1858. In each case, therefore, the question arises whether a suit would lie against "the East India Company" had the case arisen prior to 1858. If it did, the state can be sued, while if it did not, the state is not liable for the tort committed.[843]

Keeping apart the injustice, in point of substance, of the existing law, there are several other serious defects in the present position which can be discussed as under:

i. The foundation of the present law is article 300 of the Constitution. Its language necessarily takes one, through successive steps of (what may be called) tracing back of the genealogy of the law, to a moment of time residing in the 19th Century that too, to a moment when the country was governed or dominated by alien rulers. The law is, in effect, based upon archaic provisions. In this sense, article 300 has turned out to be a weak foundation, on which to build up an edifice of the law on the subject.[844]

ii. Article 300 of the Indian Constitution is not clear in providing principles to fix the liability and immunity of the state.[845] The change in the concept of tortuous liability in India is reflected by judicial activism.[846]But, it refers back to "the Government of India Act, 1858," 1915 and 1935 for example "the Government of India Act, 1858"says that the liability of the state would be like that of the liability of "the East India Company".[847]

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[842]A Consultation Paper on "Liability of the State in Tort" Vigyan Bhavan Annex, New Delhi, 2001. 2; See also Justice U.C. Srivastava, "Tortious Liability of State under the Constitution,"1; "The Extant of Liability of State under Article 300" chapter 3 which describes the subject very comprehensively. 69-114.
[843]Ibid., 24.
[844]Ibid.
[845]Ibid., 25.
[846]*Rudul Sah vs.State of Bihar:* (AIR 1983 SC 1086).
[847]The relevant provisions of these Acts have been discussed in state liability law developments part of this research.

iii. This Article, however, does not give rise to any cause of action, but merely says that the state can sue or be sued, as a juristic personality, in matters where a suit would lie against the government had not the constitution been enacted, subject to legislation by the appropriate legislature. No such legislation has, however, been undertaken so far. For the substantive law as to the liability of the state, therefore, we have to refer to the law as it stood before the commencement of the constitution.[848]

iv. In another respect, a test resting on article 300 has become unworkable. In so far as the article incorporates the test of the law of "corresponding Province" or "corresponding Indian State", the test has become practically unworkable, for the following reasons: **(a)** the political map of India, as drawn in 1950, has been re-drawn again and again the post 1950 period;[849] **(b)** the areas comprised within the erstwhile princely States of India present yet another difficulty;[850]**(c)** thus, the law in the areas concerned becomes inaccessible, not only to the common man, but (perhaps) also to an ordinary lawyer.[851]

The situation in Pakistan is better than in India to some extent. As discussed above, in Pakistan, Article 174 of the Constitution of Pakistan is the foundation of state liability for tortious acts committed by its servants. It states that, "the Federation may sue or may be sued by the name of Pakistan and a province may sue or may be sued by the name of the province."[852]This Article practically takes us back to "the Government of India Act

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[848]A Consultation Paper on "Liability of the State in Tort" Vigyan Bhavan Annex, New Delhi, 2001. 23.
[849] The process began in 1953. As a result of the enactment of "The States Reorganization Act," it assumed greater importance in 1956. It was continued when the 'State of Bombay' was bifurcated. Ibid., 24.
[850] For example, "these States had varying grades of political development. So far as is known, none of them had a statutory provision on the subject of State liability in tort. Thus, in the absence of availability of satisfactory material, having its source either in statute or in case law, it is difficult to find out what was the legal position in a particular Indian State, on the subject under consideration."(A Consultation Paper on "Liability of the State in Tort" Vigyan Bhavan Annex, New Delhi, 2001), 24.
[851]Ibid., 25.
[852] The Constitution of the Islamic Republic of Pakistan, 1973.

1858," which, in its turn, leads us to a consideration of the nature and extent of the liability of "the East India Company".[853]

The terminology used in this Article is general in nature rather specific that covers the tort as well as other claims by the victims. The terminology of limitation has not been used in this article as had been used in article 176 of "the Government of India Act, 1935 and 1858" respectively. The effect of this constitutional position is that the extent/scope of liability of the state is described reference to Section 65 of "the Government of India Act, 1858"[854] which specifies that the scope of liability of the Secretary of State for India would be the same as that of "the East India Company".[855]

This Article, however, gives rise, in general, to any cause of action, which merely says that the state can sue or be sued, as a juristic personality, in matters where a suit would lie against the government. Further, the article does not give any substantive or concrete guidelines for the scope of liability of the state. Therefore, it reflects from certain relevant decisions of the courts which specifically recognized the scope of state liability related to the tortious acts of public servants (the cases have been mentioned in

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[853]Hafiz Aziz-ur-Rehman, *Citizens versus State: Public Servant Liability and Tort Reforms in Pakistan* (Islamabad: the Network for Consumer Protection, 2005), 2.

[854] Section 176(1) of Government of India Act, 1935 "refers to the legal position contained in section 32, Government of India Act, 1935 thus: The Federation may sue or be sued by the name of the Federation of India and a Provincial Government may sue or be sued by the name of the Province, and, without prejudice to the subsequent provisions of this Chapter, may, subject to any provisions which may be made by an Act of the Federal or a Provincial Legislature enacted by virtue of powers conferred on that Legislature by this Act, sue or be sued in relation to their respective affairs in the like cases as the Secretary of State in Council might have sued or been sued if this Act had not been passed." S 32, Government of India Act, 1915 "refers to the position contained in Section 65, Government of India, 1858."(A Consultation Paper on "Liability of the State in Tort" Vigyan Bhavan Annex, New Delhi, 2001); Hafiz Aziz-ur-Rehman, *Citizens versus State: Public Servant Liability and Tort Reforms in Pakistan* (Islamabad: the Network Publications, 2005), 22.

[855] It states that: "The Secretary of State in Council shall and may sue and be sued as well in India as in England by the name of the Secretary of State in Council as a body corporate; and all persons and bodies politic shall and may have and take the same suits, remedies and proceedings, legal and equitable, against the Secretary of State in Council of India, as they could have done against the said Company; and the property and effects hereby vested in Her Majesty for the purposes of to Government of India, or acquired for the said purposes, shall be subject and liable to the same judgments and executions as they would, while vested in the said Company, have been liable, to in respect of debts and liabilities lawfully contracted and incurred by the said Company." (Government of India Act, 1858).

previous sections of this research). As judiciary has made efforts to balance out the citizens' grievances and the immunity of public servants but they could not prepare concrete principles related to tort liability of public servants under the interpretations of immunity provisions as included in various laws. This led towards the existing confusion about the law and policy on public servant's immunity.[856] On the one hand Pakistan laws has overwhelming immunity provisions along with strange definitions of good faith, which on the other hand do not match with some very encouraging verdicts as discussed above. This constitutional provision provides the opportunity to institute a suit against the state by the citizen but at the same time state becomes immune due to the immunity clauses in specific or relevant statute on the subject.[857]

The significant rule emerged in this intersect is state and its public servants' immunity. In effect, the law is based upon archaic provisions.[858] In this aspect, article 174 has turned out to be a weak foundation, same as in India being same source, on which to build up an edifice of the law on the subject.[859]

Under the above discussion, the important issue to analyze here is that, the old and archaic doctrine of "Sovereign Immunity,"[860] "King can do no wrong" still haunts us, where the state claims immunity for its tortious acts and denies compensation to the aggrieved party. This concept can be analyzed as under.

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[856]Hafiz Aziz-ur-Rehman, *Citizens versus State: Public Servant Liability and Tort Reforms in Pakistan* (Islamabad: the Network Publications, 2005), 22.

[857] Ibid. These immunity clauses have been mentioned in chapter 3of this research.

[858]A Consultation Paper on "Liability of the State in Tort" Vigyan Bhavan Annex, New Delhi, 2001, 24.

[859]Hafiz Aziz-ur-Rehman, *Citizens versus State: Public Servant Liability and Tort Reforms in Pakistan* (Islamabad: the Network for Consumer Protection, 2005), 22.

[860]"The Doctrine of Sovereign Immunity is based on the Common Law principle borrowed from the British Jurisprudence that the King commits no wrong and that he cannot be guilty of personal negligence or misconduct, and as such cannot be responsible for the negligence or misconduct of his servants. Another aspect of this doctrine was that it was an attribute of sovereignty that a State cannot be sued in its own courts without its consent." (Legal Dictionary, s.v. "Sovereign Immunity,"https://legal-dictionary.thefreedictionary.com/Sovereign+Immunity (last accessed at December 1, 2018)).

The maxim *"the King can do no wrong" ("Rex non potestpeccare")* is very old and basic principle of the British Law, the meaning of which is that if the king or its servant committed a tort during his performance of his duty, the victim, under the vicarious liability, has no right to institute a suit against the king.[861]This immunity to the king was criticized in different judgments by the courts by observing that it was against the principles of equity, good conscience and justice. Nevertheless, the situations have been changed in contemporary societies of the world.[862] So, to tackle this principle in contemporary times, the maxim 'king can do no wrong' was abolished by enacting "the Crowns' Proceeding Act" by the British Parliament in 1947. Now, under this Act the victim can sue to the crown for the tortious acts of its servants during the performance of their duties same as a private individual under the doctrine of *'Respondent Superior'*.[863] It is mentionable here that the crown is liable to wrongs committed by its agents or servants only and not to the servants of statutory corporations and are not in ministerial control.[864]

Similarly, "the Federal Torts Claims Act, 1946" in USA provides the principles, which substantially decides the question of liability of state (which has been discussed in

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[861]*Rex non potestpeccare,* Duhaime Legal Dictionary, s.v. "*Rex non potestpeccare,* "http://www.duhaime.org/LegalDictionary/R/RexNonPotestPeccare.aspx (last accessed at December 1, 2018).

[862]Debanshu Mukherjee & Anjali Anchayil, *Vicarious Liability of the State in Tort in India: A Case for Reform* (New Delhi: Vidhi Centre for Legal Policy, 2015), 26.

[863]*Respondent Superior,* Wex Legal Dictionary, s.v. "*Respondent Superior,*" https://www.law.cornell.edu/wex/respondeat_superior (last accessed at December 1, 2018).

[864] The Act provides that "the crown shall be subject to all liabilities to which a private person of full age and capacity would be subject. in respect of (a) torts committed by its servants; (b) any breach of those duties which a person owes to his servants at common law by reason of being their employer; and(c) any breach attaching at common law to ownership, occupation or possession of property. The crown will also be liable in respect of a failure to comply with any statutory duty which is binding upon it as well as upon persons other than the crown and its officers. The expectations to this liability are, No proceeding will lie in respect of- (i) any act or omission by any person discharging judicial functions; (ii) death or personal injury caused by or suffered by members of the armed forces on duty and acting in the discharge of their duties; (iii) anything properly done or omitted in exercise of the prerogative or statutory powers of the crown." (The Crown Proceedings Act, 1947).

detailed in previous chapter of this research).[865] Further, in Australia, the court observed in the case of *Parker* vs. *the Commonwealth of Australia* that the plea of defense on the basis of old and archaic idea of sovereignty immunity, as borrowed from English jurisprudence prevalent in Colonial Rule, is on the basis of old feudalistic ideas of justice the "King can do no wrong".[866] These examples show that immunity does not have place in the welfare states and is contradictory to the contemporary jurisprudence where there is no any distinction between sovereign or non-sovereign authority and the state is liable same as any ordinary citizen for the torts committed by its servants. In India, this kind of observations also has been ruled by the Supreme Court and High Courts in their several judgments (which have been discussed above).[867]

Under the above changing in British as well as USA law on the subject, it is ironical that Pakistan still relies on the English maxim "the King can do no wrong" to claim immunity for any tort arising from the exercise of its 'sovereign power' when the maxim is no longer in existence in England where from Pakistan inherited. Therefore, it would not be appropriate for the state in these circumstances to continue to raise the plea of 'sovereign power' or of 'sovereign immunity' to escape its liability in tort. In this regard, in Indian jurisdiction, the court in the case of *Chairman Railway Board* rightly observed that allowing immunity in nature of sovereign functions may result in misuse of the said powers.[868]In the same jurisdiction, the step taken by the court in *Nagendra Rao* is

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[865] Further, "this Act largely waived sovereign immunity of the U.S. government in tort law, while also partially preserving it through several significant statutory exceptions to the general waiver." For details see Jonathan R. Bruno, "Immunity for Discretionary Functions: A Proposal to Amend the Federal Tort Claims Act," *Harvard Journal on Legislation* 49 (2012): 211-450.

[866] *Parker vs. the Commonwealth of Australia*, 112 CLR 295 (Aus).

[867] Chapter four of this research mentioned these cases.

[868] In this case, the court further stated that: "Law is not static but dynamic, in the modern world having a complex society the encounters between the people and state have become frequent in number and relevant in nature. Hence these encounters often result in legal mishaps demanding redressal. Also, most of these

also appreciable in which the Supreme Court observed that no civilized system can permit an executive to play with the people of a state and claim to be sovereign. To place the state above the law is unjust and unfair to the citizen.[869]

However, the issue of immunity in Pakistan law needs further consideration to be analyzed. As discussed above, India is taking steps to reform the subject in consideration through judiciary, for example new constitutional tort remedy and other brave decisions taken in different judgments which have been discussed in our previous sections of this research. When UK and USA (discussed above in chapter 2 liability section) have attempted to deal the immunity by making laws on state liability in tort, then why Pakistan, being an Islamic state, is not taking effective steps to mitigate the problem? This issue can be analyzed further considering the present system of law in Pakistan. Principally, both state (India and Pakistan) are common law jurisdictions but one should not overlook the dual tradition of legal system in Pakistan i.e. common law and *Shariah* (Islamic Law). Pakistan is an Islamic State[870]and its religion is Islam[871]which requires being followed and implemented in state affairs. It emphasizes on accountability and prevents the concept of sovereign immunity [872](it has been discussed in detailed in accountability section chapter 2 above) hence; it reveals that immunity destroys the principles of equity, good conscience, justice and accountability therefore it is against the teachings and essence of Islam which must be regularized accordingly.

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cases fall under the ambit of tort law because of the fact that to seek redressal through civil court tort law is the one branch which appears most feasible owing to fact of its vastness. So, it's evident that tort law being still in its evolving stage owes a great importance and state liability being its part can be a genuine tool for redressal against the violations committed by the state officials." (*The Chairman, Railway Board &Ors vs. Mrs. Chandrima Das & Ors*: (2000 2 SCC 465)).

[869]*N. Nagendra Rao* vs. *State of AP* (AIR 1994 SC 2663).

[870]According to Article 1 (1), "Pakistan shall be Federal Republic to be known as the Islamic Republic of Pakistan". (The Constitution of the Islamic Republic of Pakistan, 1973).

[871] Article 2 says, "Islam shall be the State religion of Pakistan." Ibid.

[872] According to preamble, "Sovereignty over the entire universe belongs to Allah Almighty Alone." Ibid.

Pakistan, whose successive constitutions have required laws to be compatible and harmonize with "Injunctions of Islam".[873] The *Shari'ah* Courts of Pakistan may rule on the Islamic legitimacy of policies, but merely on matters that the High Court, which has been dominated by modernist judges trained from Western, deems it fit or competent.[874]To the extent that they produced variations in interpretation, they made it harder to reach a consensus later, in new situations. An in-depth review of the recent jurisprudence of the *Shariat* Courts in Pakistan reveals that these courts more often than not adopt the more progressive positions. The regular High Courts and the Supreme Court occasionally pronounce more retrogressive rulings on Islamic law related matters than the *Shariat* Courts.[875]The *Shariat* Court needs to consider it as serious issue and must play its role retrogressively to comply the contradictory issues like immunity with Islamic injunctions through its judgments.

As it has been discussed above that the sovereign immunity ("*King can do no wrong*") gives the idea that the state is above the law, is also against the rule of law concept. 'Rule of Law' includes government accountability, equal access to justice and the political process, efficient judicial and political systems, clear laws, generally stable laws, and the protection of fundamental human rights.[876]Further, 'Rule of Law' includes

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[873] Article 227says, "All existing laws shall be brought in conformity with the injunctions of Islam as laid down in the Holy *Quran*... and *Sunnah* and no law shall be enacted which is repugnant to such injunctions." The Constitution of the Islamic Republic of Pakistan, 1973. For further explanation see Dr Richard Blue & Ors, *Pakistan Rule of Assessment Final Report* (Washington, DC: United State Agency for International Development, 2008), 6.

[874] Muhammad Qasim Zaman, *The Ulama in Contemporary Islam: Custodians of Change* (Princeton: Princeton University Press, 2002), 88-93.

[875]Dr Richard Blue & Ors, *Pakistan Rule of Assessment Final Report* (Washington, DC: United State Agency for International Development, 2008), 9.

[876] Each of these appears within the rule of law definition of the World Justice Forum. See Dam (2006) for accounts of what the principles entail, https://worldjusticeproject.org/sites/default/files/documents/World%20Justice%20Forum%20I%20Program%20Book_0.pdf. (last accessed at December 25,2017).

not only the supremacy of the law, but a democratic basis for law that makes the law legitimate.[877]

The important feature of *Shari'a* is that it subjects all human beings to the same rules. It makes no exceptions, not even for rulers. For example, if a person who is earning is to submit an annual tithe, so must he. If it is wrong to make discrimination among Muslims on the base of relationship with a tribe, rulers, too, must pursue tribe-blind rules. If an employer must pay his worker a fair salary, ruler is also bound to obey the same standards of fairness in respect of government servants.[878]Because, a fundamental idea in Islamic political thought is that an Islamic ruler must not only enforce Islamic law in his concerned state but also follow it firmly himself. The legitimacy of this rule depends seriously on his devotion and obedience to the *Shari'a*. But he must be deposed in case he fails to maintain *Shari'a* through his policies as well as his personal life.[879]

Centuries before the issue of "the English Charter of Liberties (Magna Carta) in 1215,"[880] the law, in Islamic thought, was considered a force above government and independent of the whims of individual ruler. Muslim rulers, in principle, were accountable and responsible for their actions.[881]

Islam has firmly belief in the 'Rule of Law'. In the Islamic state, even the ruler himself, no one is above the law or has immunity from prosecution in any court.

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[877]Dr Richard Blue & Ors, *Pakistan Rule of Assessment Final Report* (Washington, DC: United State Agency for International Development, 2008), 7.

[878]For the concepts of accountability of ruler in Islam, see the studies such as: Bernard Lewis, *The Political Language of Islam* (Chicago: University of Chicago Press, 1988); Fazlur Rahman, *Islam* 2nd ed., (Chicago: University of Chicago Press 1979); Knut S Vikor, *Between God and Sultan: A History of Islamic Law* (Oxford: Oxford University Press, 2005); Bernard G Weiss, *the Spirit of Islamic Law* (Athens: University of Georgia Press, 1998).

[879]Ibid.

[880]See further details at:https://www.bl.uk/magna-carta/articles/magna-carta-an-introduction (last accessed at December 25, 2017).

[881] Timur Kuran, "The Rule of Law in Islamic Thought and Practice: A Historical Perspective" (paper presented at the World Justice Forum Vienna, Austria, July 2-5, 2008). 3.

Advantage and harm or damage is not excusing the Islamic state can use to violate this principle. The principle of rule of law was firmly established by the Prophet (PBUH) in His era when a lady from *Bani Makhzum* committed a theft. He (PBUH) said:

> "...What destroyed the nations preceding you were that if a noble amongst them stole, they would forgive him, and if a poor person amongst them stole, they would inflict *Allah's* legal punishment on him. By *Allah*, if *Fatima*, the daughter of *Muhammad* stole, I would cut off her hand."[882]

The practice in this '*Hadith*' is a comprehensive example of 'Rule Law'. This practice is a complete code of conduct to eradicate the crime of theft in the Islamic state. It is submitted that the ratio of theft crime can be decreased if this principle is applied in true sense. The example of Saudi Arabia can be mentioned here in this regard.[883]

It is also important to mention here the issue of compatibility of existing laws with the "Injunctions of Islam". This fact has been articulated in Article 227 of the Constitution of Pakistan as a state obligation which states as, "all existing laws shall be brought in conformity with the injunctions of Islam as laid down in the Holy *Quran*... and *Sunnah* and no law shall be enacted which is repugnant to such injunctions."[884] As the immunity concept in different provisions in consideration is against the basic concept of Islamic teachings and is prevailing still in Pakistan law therefore, it needs to review to comply with the injunctions of Islam and rule of law. Along with this fact, it also violates the rights of the poor to get justice which are happening frequently in Pakistan especially by law enforcement agencies and organs of the state, as we discussed some critical incidents in previous chapter therefore example related to police atrocities, food, health, justice

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[882] Imam Muhammad al-Bukhari, *Sahih Bukhari, Hadith* no. 3475, vol 4, 175.
[883] See details at: https://knoema.com/atlas/Saudi-Arabia/topics/Crime-Statistics (last accessed at December 27, 2017).
[884] The Constitution of the Islamic Republic of Pakistan, 1973.

delayed, media, natural disaster management and media. As the concept of speedy justice has been incorporated in constitution but there is need to make the compatibility between theory and practice.[885] To remove the old conception from this provision would also be an initiative in this regard. Ultimately, it will help to provide the justice to the poor people in Pakistan in true sense.

As mentioned above that Pakistan is following dual system such as common law and Islamic law. This dichotomy creates confusion and contradicts in various concepts. But, considering the issue of immunity in first case, if Pakistan wants to follow common law, even then immunity has been regularized and law has been made on state liability in British(in common law) especially and in other jurisdictions generally. And in the second case, Islamic teachings also prevent immunity and promote accountability. In either case, immunity has no place in Pakistan laws and therefore it needs to make law on liability or accountability of the state by regularizing the concept of state immunity. This dichotomy of law in Pakistan is also challenge for legislature because he has to keep in mind during law making process. This dichotomy has strong implication on nature and extent of tortious liability which has been discussed above. India, whereas, follows only common law system which has no much challenges for it like in Pakistan. India is not confused during making new laws such as Pakistan faces. Therefore India is at a good position as compare to Pakistan.

By concluding this section, it traced its source to an archaic provision, which has essence almost two centuries old and based on the doctrine "King can do no wrong" as well as it is general rather than specific. It is found to be suffering from conflicting views, owing to the loose and imprecise criteria that have come to be adopted. Therefore, it

[885]The Constitution of the Islamic Republic of Pakistan, 1973, Article 38.

deserves a close second look in the present century, in the larger interests of society. In this regard, higher judiciary has played/playing a great role to deal with the issues of liability of the state in tort in both of the jurisdictions.

5.2. Role of Judiciary on State Liability

As it has been discussed above that there is still an archaic and unclear provision in the constitutions of both the countries, which is almost two centuries old and based on the doctrine 'king can do no wrong'. And, further, there is no any specific codification or clear law on state liability in tort in India as well as in Pakistan. In this context, in the absence of state liability law, how courts are dealing with the issue at this position in both countries? Or how/what jurisprudence has been developed by the higher judiciary for state liability in both countries? is important issue to be analysed.

To analyse this issue in this section, it examines some of the important judgements that dealt during the post-constitution period on the subject under consideration. The survey is not intended to be exhaustive (as these have been already discussed in previous chapters). But it is hoped, that the representative decisions illustrating the principal conflicting approaches, will find adequate reflection in this section. For example, in India, the distinction between sovereign and non-sovereign functions was considered at some length in *N. Nagendra Rao* vs. *State of AP.*[886]

It is important to indicate that from a deep reading of the judgment in *Nagendra Rao* case, one can discern the strand such as:

i. The distinction between sovereign or non-sovereign functions does not exist in the modern sense;

[886] *N. Nagendra Rao* vs. *State of AP* (AIR 1994 SC 2663); (1994) 6 SCC 205.

ii. One of the tests is, whether the State is answerable for such actions in courts of law. instances of non-liability are functions which are related to political in nature as well as are external sovereignty such as defence, foreign affairs;

iii. Immunity ends with political acts. Because no legal or political system can place the state above the law, as it is unfair and unjust for a person to be deprived of his property illegally by the negligent act of servants of the state without providing any remedy, statutory authority is to be viewed as a statutory duty;[887]

iv. The demarcating line between 'sovereign' and 'non-sovereign' authorities has mostly disappeared.[888]

Therefore, barring functions for example maintenance of law and order, administration of justice and repression of crime which are among the key and inalienable functions of a constitutional government, the state cannot claim any immunity. Vicarious liability of the state is linked with the negligence of its servants. The misfeasance law in fulfill of public duty having marched ahead, there is no underlying principle for the proposition that even if the servant is liable, the State cannot be sued.[889]

Another important case to consider here is *Kasturi lal*, which was related to powers of arrest, search etc. As the power to search and apprehend a suspect under the Criminal Procedure Code is one of the inalienable powers of the state.[890]However, the Supreme Court itself struck a different note in *Kasturi lal* vs. *State of UP*,[891]in which the Supreme Court rejected the plaintiff' claim, on the ground that "the act of negligence was

[887]"The Extant of Liability of State under Article 300," chapter 3 which describes the subject very comprehensively. 113.
[888] Differences also have been made in A Consultation Paper on "Liability of the State in Tort" Vigyan Bhavan Annex, New Delhi, 2001. 20.
[889]A Consultation Paper on "Liability of the State in Tort" Vigyan Bhavan Annex, New Delhi, 2001. 20.
[890] The Code of Criminal Procedure, 1898 (Act no. V of 1898), Section 51 & 52.
[891]*Kasturi lal vs. State of UP*: AIR (1965) SC 1039

committed by the police officers while dealing with the property which they had seized in exercise of their statutory powers."[892]

Reverting to the basis of the decision in *Kasturi lal* case, it comes across that the basis was dual in nature as: i) the act was done in the purported exercise of a statutory power and; ii) the act was done in the exercise of a sovereign function. The decision taken in this case (*Kasturi lal*) is totally different than the above discussed case (*Nagendra Rao).*[893]

5.2.1. Uncertainty of the Law

It is evident from the *Nagendra Rao* and *Kasturi lal* on the subject that:

i. Definiteness of the precise form and certainty of principles of universal application are lacking;

ii. There is substantial obscurity as to the method in which the distinction between sovereign and non-sovereign functions is applied in practice. While holding that the distinction between sovereign powers and non-sovereign functions has become academic in the modern times in any Welfare State, in *Nagendra Rao* case the court again affirms and accepts the theory of 'primary and inalienable functions'.[894]

In a result, the picture is equally confusing in India. There is a manifest conflict of judicial decisions.[895] In theory, the dividing line between sovereign and non-sovereign functions is the criterion of liability. But there are serious disparities in the stance adopted by courts in this regard. Courts themselves have expressed their uneasiness about this test

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[892]Ibid.
[893]Ibid.
[894]A Consultation Paper on "Liability of the State in Tort" Vigyan Bhavan Annex, New Delhi, 2001. 20.
[895]Ibid., 25.

and about the difficulties in its practical application particularly in *Kasturi lal and Nagendra Rao* case.[896] It is submitted that decision of *Kasturi lal* is outmoded especially the test applied in sovereign and non-sovereign functions, therefore, it is suggested the legislative action to solve the problem of state liability in tort.[897]

Here is also need to examine and analyse the situation in Pakistan related to the subject under consideration. For this purpose, it will be surveyed some important judgments and then analyse the stances and views taken by the Higher Courts in these judgments. Even though judgments have been mentioned in previous sections of this research but here researcher is going to discuss in different aspect that is, principles derived and then compatibility amongst these judgements. It is being analysed so that it would be able to recommend some concrete suggestions if there is needed.

An appeal, for example, *Punjab Province* vs. *Malik Ramiz Ahmad* was brought before and accepted by the Additional District Judge, Lahore at Sheikhupura. [898] The claim of damages was based on the negligence of the employees of the defendant in stacking bajri on the roadside without taking proper precautions by way of warning to the traveling public and on account of bad condition of the road. The court framed issues including can the plaintiff sue the defendant in tort for damages out of the negligence of the defendant's employees?[899]

The Additional District Judge set aside the decree on the ground that the maintenance of the road being one of the 'Sovereign functions of the Government' and a

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[896] Ibid.

[897]The Commission also has made recommendation in this regard; see also Alic Jacob, "Vicarious Liability of Government in Tort," *Journal of the Indian Law Institute,* no.7 (1965): 247; Jamshed Ansari,"Tortious Liability of State: A New Judicial Trend In India," *Researcher* 6, no. 5 (October, 2014):50;"The Extant of Liability of State under Article 300," chapter 3. 113.

[898]*Punjab Province vs. Malik Ramiz Ahmad*: (P L D 1964 (W. P.) [Lahore] 736).

[899]Ibid., Issue no. 1.

'Sovereign act', the defendant (Government) was not liable in tort for the injuries caused to the plaintiff, who had no cause of action against the Government.[900]

In the same case, second appeal filed by *Malik Ramiz Ahmad* vs. *Punjab Province*, in which Lahore High Court held that a master is liable for the acts of his servant if the act is done within the scope of his employment. The plaintiff in the instant case seeks to establish the liability of the defendant on the basis of the negligence of the defendant's employees in stacking bajri on both sides of the road. The act complained of is one which is alleged to have been done within the scope of employment, and the defendant is liable if the act is performed negligently. Thus, the expression "sovereign act" has no application to cases where a government deals with or acts in relation to its own subjects. There should be no dispute about the expression "sovereign act" being applicable only to acts committed in relation to other states or aliens and being inapplicable to a case where the Government is acting in relation to its own citizens.[901]

In the latter case, the Government has authority to act only in accordance with the Municipal Law. Thus, the act complained of, viz., the stacking of bajri in a negligent manner for repairs to a highway, cannot be said to be a sovereign act, and protected as such. The same views had been adopted at length by B. Z. Kaikaus, J., in *Federation of Pakistan* vs. *Ehsan Ellahi*[902]. Honorable Akhlaque Husain, J., as he then was, stated that expression "sovereign acts" applicable only to acts committed in relation to other States

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[900] Additional District Judge relied on the Secretary of State for India. Council through the Collector of *Malabar vs.* A. Cockcraft (27 I C 723); *Secretary of State vs. Sri gobinda Chaudhuri:* (A I R 1932 Cal. 834); *Secretary of State vs. Ramnath Bhatta:* (A I R 1934 Cal. 128) and *Etti and another vs.* Secretary of State: (A I R 1939 Mad. 663). Ibid.

[901] *Punjab Province vs. Malik Ramiz Ahmad*: (P L D 1964 (W. P.) [Lahore] 736).

[902] *Federation of Pakistan vs. Ehsan Ellahi*: (P L D 1955 [Lahore] 303 at p. 335). Ibid., ref.

or aliens and further when theft, whether by a servant or by a stranger, is due to the negligence of its staff concerned, the railway cannot be absolved of its responsibility.[903] In this case important rule 'sovereign function' or a 'sovereign act' of government has been distinguished. Two principles emerged such as, master is liable for its employees and 'sovereign act' has no application to cases where a Government deals with or acts in relation to its own subjects.[904] The District Court did not hold liable to the Government under the 'sovereign act'. This, basically, is departure from the principle of vicarious liability of the state. But in second appeal, the High Court held that a master is liable for the acts of his servant in municipal law and 'sovereign act' applies only for foreign states or aliens.[905]

The important issue to point out here is that there is disparity in both judgments. The main reason behind this is nonexistence of law on the subject. The District Court, therefore, had to rely on the judgments which favored the state under the guise of 'sovereign act'. It is noticeable that these judgments have been decided before the independence relied on by Dist & Session Judge. High Court, whereas, has applied practical approach and made precious precedence on the state liability.

In the above case, state was held liable for the acts of its employees, whereas the court took one step forward and State being fully responsible and liable for the tortious acts of its officials, tort feasors were jointly and severally liable and all of them, each or any of them could be sued in the case of *Dost Muhammad vs. WAPDA*.[906] Quantum of damages

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[903]Ibid.
[904]*Punjab Province vs. Malik Ramiz Ahmad*: (P L D 1964 (W. P.) [Lahore] 736.
[905]Ibid.
[906]*Dost Muhammad vs. WAPDA*: (2005 Y L R 2520 [Lahore]).

was assessed by application of thumb rule and suit was decreed in the sum of Rs.10, 000/ in circumstances.[907]

This case is a good development in state liability jurisprudence which has well-settled the principle of vicarious liability and made servants jointly and severally liable. But important point did not discuss which is that although they can be sued but who should pay the compensation in result of damages proved against them, state or servants? Even though in *Malik Ramiz,* above case, the master made liable for its employees and the present case servants also liable but both cases give different rules and the present case left the place for new rule that is, who should pay the compensation? This is because of absence of concrete principles and law on state liability. Further, the damages awarded in this case are not just because of its minimum value against mental torture of many years.

Gap identified in the above cases is that, who should pay the compensation for example, state or servant itself? This gap has been filled by Supreme Court in the latter case of *Azizullah* vs. *Jawaid a. Bajwa & 3Ors.*[908] The court not only enhanced the amount of damages and included loss of profit but also observed that the public functionaries must perform their official duty in line with law and if they do any wrong, the sufferers must be compensated by the officials.[909]

It can be said under three judgments (above mentioned) that there are three different rules inferred from these judgments. Every rule is different from the other. This is basically due to nonexistence of concrete principle on state liability which can be

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[907]Ibid.

[908]*Azizullah vs. Jawaid a. Bajwa & 3Ors:* (2005 SCMR 1950 SC]).

[909] The amount of damages was "from Rs.3,00,000 to Rs.10,00,000 as compensation for travelling expenses, loss of profit and mental torture which shall be paid to the petitioner in addition to Rs.1,00,000 the sale price of watches payable to him in terms of the judgment of the trial Court."Ibid.

prevented by making clear laws on it. Laws not only on complete package of state and servant's liability but also on assessment of compensation so that discretionary powers of judges may be decreased and victim' right may be protected in true sense. For example, in present case, for loss of profit and mental torture Rs.1, 00,000/- has been awarded against the officials.[910] Again, this compensation is not just in any sense.

It is being discussed that, this awarded compensation (1 lac) is not just because of mental torture and loss of profit but someone can imagine when there is more miserable situation than it. This kind of situation was happened in the case of *State* vs. *M.D., Wasa & Ors* in which only Rs.1, 00,000/ compensation was paid by *MD* of *WASA* to the father of Alooba, a 9 years old girl who died because of an open manhole of sewerage in Multan.[911] In the above (Azizullah case) compensation of 1 lac Rs. have been awarded for mental torture and profit loss at one hand and at the other hand 1 lac Rs. have been awarded in the present case for the 'right to life'. Is it justifiable at any platform in any sense? That is a big question mark on the wisdom of the Higher Courts of the country. Further, the conduct being violative of the constitutional rights under Article 9 reveals the commission of a cognizable offence as well but unfortunately, it has not been dealt.

In the present case, there are two happenings such as civil liabilities as well as commission of a cognizable offence. For civil liability, WASA paid compensation 'a cheque of Rs.1, 00,000/ which is not just and substance, because life has not so cheap value that compensation is awarded only Rs.1, 00,000/against it. Further this compensation is awarded by WASA rather the concerned officer/in charge of area.[912] Mostly compensation has been awarded from Public Funds which gives moral boosting

[910]Ibid.
[911] *State vs. M.D., Wasa and others :(*2000 CLC [Lahore] 471).
[912]Ibid.

to erring or corrupt officials. Due to this reason, the order for compensation must be made from their own salaries not by public exchequers, as it was awarded in *Zahid Ali* case in Pakistan jurisdiction.[913]

For the second part, the conduct being violative of the constitution reveals the commission of a cognizable offence as well. For example, Section 321 of the Pakistan Penal Code is related to *Qatl-bis-Sabab* (a cause for death).[914] The punishment for *Qatl-bis-Sabab* (a cause for death) is *diyat* (blood money).[915] The value of *diyat* shall not be less than the value of thirty thousand six hundred and thirty grams of silver.[916] Unfortunately, in the instant case neither the commission of cognizable offence has been dealt nor *diyat* has been provided. Only, whereas, civil liability has been considered wherein compensation awarded is even not just. Court, finally, directed that on any future eventuality if a child dies by falling into the uncovered manhole, the WASA shall be liable to pay compensation to the bereaved family. In this regard, when in above cases vicarious liability has been settled then, is there any need to direct again that WASA will be liable for the future happening as has been directed in the present case? Whereas, need for the direction is that, the concerned in charge/ public servant should be liable. The WASA is state institution and ultimately the funds will be provided from the public

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[913] *Zahid Ahmed vs. Province of Sind*: 2012 PLC (C.S) [Sindh High Court] 124).

[914] "*Qatl-bis-Sabab* is an Arabic term which means a cause for death. Whoever, without any intention to cause death of, or cause harm to, any person, does any unlawful act which becomes a cause for death of another person, is said to commit *Qatl-bis-Sabab*." (the Pakistan Penal Code, 1860(XLV of 1860)).

[915] Punishment for *Qatl-bis-Sabab*:-"Whoever commits *qatl-bis-sabab* shall be liable to *diyat*."Ibid., Section 322.

[916] Value of *Diyat*:- "The court shall, subject to Injunctions of Islam as laid down in the Holy *Quran* and *Sunnah* and keeping in view the financial position of the convict and the heirs of the victim, fix the value of *Diyat* which shall not be less than the value of thirty thousand six hundred and thirty grams of silver."Ibid., Section 323.

funds therefore, it humbly submitted, it is not fair rule. Therefore, servant should pay the compensation so that he should be vigilant and responsible for his duty in future.

This fact was realized to some extant in heartbreaking Karachi Tragedy case in which fire was exploded and 256 workers were burnt to death and they could not be rescued. Sindh High Court order to award compensation to the victims and their heirs, which was distributed PKR 500,000/ to 650,000/ for each deceased person' family. *Diyat* was also not given in this case. The compensation awarded in both cases (Alooba and present case) for right to life is contradicting in itself. There must be clear and concrete principles to avoid these contradictions and disparities. It was realized in the case of *Mushtari* vs. *Islamic Republic of Pakistan* which was under the Fatal Accident Act, 1855 and decreed in the sum of Rs.64, 58,000/ with cost and profits/returns at the prevailing bank rate from the date of the decree till realization.[917]

It is being discussed that every violation of rights has some remedy. The violation may cause injury physically, financially or mentally (as mental torture). But remedy was not given by the court in the case of *Sabz Ali Khan and 2 Ors* v. *IG of Police, KPK &Ors.*[918]It was writ petition against framing of an incorrect document by public servant with intent to cause injury and giving false evidence. The court quashing the First Information Report (FIR) held that the FIR in the present case was the result of colorful exercise of the powers by the police and had shown that prosecution had built the entire case on erroneous and wrong foundation.[919]The court further stated that we are not hesitant to mention here that if a police officer investigates a case of non-cognizable

[917]*Mushtari vs. Islamic Republic of Pakistan*: (2006 MLD [Karachi] 19).
[918]*Sabz Ali Khan and 2 others vs. IG of Police, KPK & 3 Ors*:(2016 Y L R [Peshawar] 1279).
[919]Ibid.

offence without permission of a magistrate, his act shall amount to blatant violation of the mandatory direction of law, and its continuation shall be an abuse of process of law.[920] Although court itself noticed that FIR was due to misuse of powers of the police and prosecution was built on erroneous and wrong foundation but except quashing FIR court did not awarded any damages occurred to the victim party such as mental torture, defamation, and embarrassment and alike.[921] Police had violated direction of law and abused process of law but court has not made liable to police or state to pay any damages in the shape of compensation, which is contradiction itself with the fundamental law as well as with the judgments discussed above.

Although in the above case, the court did not held liable to police officials to pay any damages to the petitioners due to color full exercise of their duty except quashing FIR but the court held liable to public servants and awarded compensation by using very technical mind in the case of *Zahid Ahmed v. Province of Sindh.*[922] In this case the petitioner was duly appointed as school teacher but payment of salary was suddenly stopped, in spite of the petitioner was continuing teaching. The court held that current salary of the petitioner be paid on regular basis by deducting 50% of it from the salary of the E.D.O. and the other 50% from the salary of the Head Master.[923]

In this case, the court held liable to pay by servants rather the state. Further, the court applied very technical and novel method to pay compensation by the servants personally. In the above-mentioned cases (*Malik Ramiz Ahmad* vs. *Govt of Punjab,*

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[920] "*Mst.Malka Jan vs. IGP NWFP Peshawar and 2 others*: (2000 PCr.LJ 320 (DB)); *Haji Rehman SHO and 3 others vs. Provincial Police Officer, Government of KPK Peshawar and 3 others*; (2012 PCr.LJ [Peshawar] 1526), *Muhammad Ashiq and 2 others vs. S.H.O., Police Station, Northern Cantt. Lahore and 3 others*" (2005 YLR 1879); *Muhammad Shafi vs. S.H.O. and others*: (2012 YLR 828) ref."Ibid.
[921] See further *Sabz Ali Khan and 2 others vs. IG of Police, KPK & 3 Ors*: (2016 Y L R [Peshawar] 1279).
[922] *Zahid Ahmed vs. Province of Sind*: 2012 PLC (C.S) [Sindh High Court] 124).
[923] Ibid.

Federation of Pakistan vs. *Ehsan Ellahi, Dost Muhammad* vs. *WAPDA*, Azizullah vs. *Jawaid a. Bajwa and State* vs. *M.D., WASA)* the courts settled the principles regarding liability of the state and liability of public servants but none of them mentioned the nature, importance and obligations of their duties.

In the present case, the court beautifully has mentioned the nature of the duty of public servants. According to the court, authority given to a public servant is a sacred trust and the public servant is required to perform his duties honestly and diligently. If any wrong is being committed by his subordinate, it is his duty to ensure that not only the act of wrong is brought to an end but also the delinquent officer is taken to task in accordance with the rules. [924]On the other hand, it is also his responsibility that none of his subordinates is being unfairly treated or denied any of his service rights and if it happens it is his duty to raise hue and voice to high heavens so that, the grievance of his subordinates is redressed according to law. But if the public servant does not act in accordance with the above principles, either he is complicit or is merely negligent and, therefore, must be burdened with the requisite consequences.[925]

The same kind of nature, scope and responsibilities of public servants duty has been mentioned in another case (*Shoukat Ali Qureshi* vs. *the State and another)* which is for especially judicial officers.[926] Under this case, a judge has sacred duty for dispensation of justice and responsibilities towards judicial system, which is the only hope of people of Pakistan. This sacred, important and sensitive duty has been given to judges because the judicial officers are custodian of the rights of the people, rule of law and administration of justice, therefore, it is expected from them that, while discharging

[924]Ibid.
[925]Ibid
[926]*Shoukat Ali Qureshi* vs. *the State and another:* (P L D 2012 [Islamabad High Court] 65).

their sacred duty of dispensation of justice, they would adhere to the provisions of law and no consideration, relation, liking or disliking would influence or prevail upon them.[927]

But unfortunately, this duty could not be fulfilled in impugned case. It is really heart breaking that orders like impugned before this court raises eye brows about the institution of judiciary and bring question mark about the integrity of judicial officer as well. The only course through which such type of criticism can be avoided is that judicial officer must exercise his authority within the four corners of law and not by adopting any novel procedure. Although scope of servant's duty has been mentioned in the instant case but the final decision is mentionable here.

As the court held that even though the explanation advanced by learned ASJ is unsatisfactory, still this (instant) court by showing grace, declares the impugned order as a result of some misunderstanding amalgamation of facts of two different cases and not of any other consideration.[928] The instant court at one hand says that duty is sacred and judicial officers are custodian of rights but at the other hand shows grace to judge and does not made liable to pay for any damages to the victims, which shows that the principles settled in instant case are self-contradictory. This kind of perverse orders burden the litigant with heavy costs as unfortunately, even filing of any petition before High Court is not inexpensive in Pakistan.

It has been happening because there is no clear and definite law on state liability and, arbitrariness happens ultimately which needs to eradicate for the protection of rights of poor victims and administration of justice in Pakistan.

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[927] Ibid.
[928] Ibid.

5.2.2. Need for Certainty and Codification

In the context of above discussed situation, which shows conflict of judicial decisions, confusion and serious disparities, therefore there is need for certainty and codification of law to mitigate the conflict of judicial decisions, confusion and serious disparities in the stance adopted by various courts in this regard. This fact was also realised seriously in Indian jurisdiction by 'the Indian Commission' in 1956 which strongly of the view that, "this is one area of the law where a statutory formulation is badly needed, in the light of the considerations set out in the preceding paragraphs".[929]The researcher considers it desirable that: i) the general should be reduced to particular; ii) abstract doctrines must be converted into concrete propositions and; iii) the law should present itself in legislation that is at least easily accessible and conveniently readable. The researcher also holds the views of the Commission to apply the same in the instant case. It is submitted that the legal maxim '*Ubi jus incertum, ibi jus nullum* (where the law is uncertain, there is no law), can be applied, with great force.In addition to this, 'Rule of Law' principle can also be applied here which is that the process through which laws are enacted, administered, and enforced must be accessible, clear and fair. As with government accountability, this principle is satisfied in the abstract.[930]

As for as Islamic concept is concerned, under Islamic law all sections of society, apart from gender, wealth or status, are entitled to sue in an Islamic court, to defend themselves if be sued, and to be treated fairly.[931] Moreover, everyone is entitled to

[929]The Law Commission of India, *Liability of the State in Tort* (Delhi: The Law Commission of India, 1956), 33;A Consultation Paper on "Liability of the State in Tort" Vigyan Bhavan Annex, New Delhi, 2001. 25.
[930]Ibid.
[931] Majid Khadduri, *The Islamic Conception of Justice* (Baltimore: Johns Hopkins University Press, 1984), 56.

participate in the political process. In theory, therefore, the enactment, administration, and enforcement of laws obey rules of impartiality.[932]Ultimately, a comprehensive legislation that is at least easily accessible and conveniently readable may protect the rights of citizens as well as provide access to justice in Pakistan. Important aspects, which should be considered to incorporate by making this law, have been discussed in the section of recommendations and suggestions of this research.

5.3. Constitutional Tort Remedy: Cases Involving Fundamental Rights

In the above section, the jurisprudence developed by the courts in both countries on state liability law has been discussed. Judgements discussed were mixed in nature such as in private law and constitutional law. The survey of cases revealed that remedy for tortious injuries in private law/traditional tort was not adequate and litigation was very lengthy.

In a result, a new remedy has been developed which is parallel to the evolution of the law applicable to tort actions which is the development related to the infringement of fundamental rights. As it is evident from some recent judgments, where fiscal redress is sought by a victim against the state for the infringement of its fundamental rights, courts currently do not take up the issue purely from the opinion adopted in the litigation of traditional tort. Since the Constitution assures not only fundamental rights, but also the right to get a remedy for the infringement of such rights, the remedy cannot be curtailed by shackles applicable to ordinary litigation. Therefore, that has been the judicial tendency.[933]

In this manner, the Indian legal system functions on two parallel levels such as: (i) the victim can sue in the ordinary courts, through an action in tort. In this way, the

[932] Ibid.

[933] A Consultation Paper on "Liability of the State in Tort" Vigyan Bhavan Annex, New Delhi, 2001. 26.

ordinary law applies concerning State liability in tort and; (ii) the victim can file a writ petition. In this way, the constraint functioning in ordinary actions (i) above does not apply. The important feature is that the distinction between sovereign and non-sovereign functions has no application to writ proceedings.[934]This issue can be analysed as under that: (a) the wrong complained of is not a tort in the traditional perspective. It is a violation of the constitution. Therefore, the substantive law is different in this regard. The expression "Constitutional Tort" is frequently employed in legal literature for this reason. This expression may be convenient but it should not be equated completely with traditional torts; (b) the forum to deal it is also different, because writ jurisdiction is confined only to the Higher Judiciary of the state and; (c) the process to follow is also different.[935] For example, "the Code of Civil Procedure, 1908," does not apply to proceedings for writ.[936]Thus, it has a parallel procedural rules and parallel substantive law, in the area of civil wrongs amounting to infringements of the constitution.[937]

An important condition for the application of rule is that, the case must be appropriate in which the infringement of the fundamental right must be gross, patent, incontrovertible, and its magnitude must be such so as to shock the conscience of the court.[938]

However, the advent of this remedy has raised question about the arbitrariness of the amounts/compensation awarded in all these cases. For example, in Indian jurisdiction, in the tragic case of Uphaar Cinema fire the Delhi High Court tried to use the private law

[934]Ibid.
[935]Ibid., 27.
[936]Code of Civil Procedure, 1908, as amended in 1976, Section 141.
[937]A Consultation Paper on "Liability of the State in Tort" Vigyan Bhavan Annex, New Delhi, 2001. 27.
[938]Chidananda Reddy S. Patil "Liability of the State for the Torts Committed by its Servants" (PhD diss., Karnatak University, 2002), 227.

technique to decide the amount of compensation under public law.[939] The sad fact is that the court has repeatedly ignored these factors and has arrived at very different amounts in matters with similar situations.[940]

To solve the question arose as to the legality of such awards, it was clarified by the Supreme Court that it is always open to the Supreme Court (under article 32 of the Constitution) and to the High Court (under article 226 of the Constitution), to award compensation in the exercise of its constitutional powers.[941] The landmark case was *Nilabati Behra* vs. *State of Orissa* for the award of compensation to the petitioner for the death of her son in police custody, the court held that a claim in public law for compensation for contravention of human rights and fundamental freedoms, the protection remedy for enforcement and protection of such rights and such a claim based on strict liability made by resorting to constitutional remedy provided for the enforcement of fundamental right is distinct from and in addition to the remedy in private law damages for tort.[942] It was expressly held by the court that "principle of sovereign immunity does not apply to the public law remedies under Article 32 and Article 226 of Indian Constitution for the enforcement of fundamental rights".[943]

An analysis of above important cases gives an indication that the courts in India, at least the higher courts, have started realizing the importance of the victim and the necessity to ameliorate the plight of the victim to the extent possible by restitution.

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[939] High Court "framed out the average income of the deceased persons, and thereafter multiplied it with the digit 15 in order to conclude the final amount to be awarded to each of the claimants. The Court at least laid down the factors which should be borne in mind while arriving at the amount of compensation. These factors were, he first is the age of the deceased, the second is the income of the deceased and the third is number of dependants to determine the percentage of deduction for personal expenses." (In the tragic case of Uphaar Cinema fire as discussed above). Ibid.
[940] Ibid.
[941] *Nilabati Behera vs. State of Orissa*: (1993) 2 SCC 746.
[942] Ibid.
[943] Ibid.

A good trend, to some extent, towards giving compensation through writ for violation of fundamental rights has been initiated by the courts in Pakistan as well, following the Indian concept of constitutional tort. Further, new 'constitutional tort remedy' as a 'concept' and its related some important issues are being analyzed under the light of developments in India for instance, basis to initiate the case, compensation as a substantive right, criteria to quantify the compensation to see that to what extent Pakistan judiciary following and developed the constitutional tort jurisprudence.

In India, in the case of *Rudul Sah,* the court desires to give "some soothing" to the victim in the shape of a 'right to compensation' and to penalize the public servants for their illegitimate actions done. The compensation was awarded by the court under Article 21 for 'gross violation' of fundamental right. The cost was also awarded by the Court in *Devaki Nandan* case to the petitioner for his deliberate, motivated and intentional harassment by the public servant, afterward the principle of 'appropriate cases' was invented by the Court in the important cases of *Sebastian Hongray* and *Bhim Singh* whereas this principle was explained in *Mehta* case as; appropriate case to be one "where violation of fundamental rights must be gross, patent, incontrovertible and its magnitude must be such so as to 'shock the conscience' of the Court."[944]

In Pakistan, this kind of concept has been given in an important case of *Nizam Din* vs. *Azad Government* in which compensation was not provided.[945]The important proposition discussed in this case by the court was that: "the appellants have continuously been pursuing to get the compensation but when they felt that there is no other forum except to knock the door of the court, they filed the writ petition for the enforcement of

[944]*M. C. Mehta vs. Union of India*: (A.I.R. 1987 SC 1086).
[945]*Nizam Din vs. Azad Government*: (2013 Y L R 1489 [Supreme Court (AJ&K)]).

their fundamental right, therefore, this is a fit case in which fundamental right guaranteed by the constitution should be enforced."[946]This is basically principle of appropriate cases which has been developed by the Indian courts for the constitutional tort as discussed above in detailed. It reveals that when there is no any platform to get damages against the violation of the fundamental right of the citizen, he can invoke the writ petition in Higher Courts. The principle of 'appropriate cases' was supported by the court in this case to award compensation due to violation of fundamental rights of the people. However, it was not elaborated by the court, which can be considered as 'appropriate case' to compensate the victims of state' illegal actions.

To be an 'appropriate case' there must be gross violation of right to life and its dependents. Under this concept, there was very important constitutional petition under Article 199 related to Article 9 (right to life) *State* vs. *M.D., WASA and Ors* in which public functionaries had to pay compensation to the petitioner whose 9 years old daughter died because of an open manhole of sewerage in Multan, Punjab (Pakistan).[947] High Court showed its great concern over such negligence and to prevent the recurrence of such tragedy in future Rs 1, 00000/ were awarded as compensation to the petitioner and further ordered public authorities to take action against concerned public officials.[948]
The court was persuaded to take up the matter: i) on account of the socially and economically disadvantageous position in which the bereaved family was placed; ii) the lack of development of law of tort in the country; iii) the absence of civic consciousness on the part of the public at large; iv) the apathy and inefficiency of the functionaries of

[946] In view of the above discussion, this appeal was accepted. Ibid.
[947] *State vs. M.D., Wasa and others*: (2000 C L C [Lahore] 471).
[948] Ibid.

the state and; v) the inspiring precedents set by the Honorable Supreme Court in the field of public interest litigation.[949]

There are some important issues in the decision of instant case which need to be analyzed. For this purpose, it needs first to mention here some important points of the decision of the court.

The Court held, with view to prevent the repetition of the tragedy which has promoted this case , that: (i) the act of keeping the manholes uncovered constitutes a serious threat to right to life and besides the civil liability it discloses the commission of a cognizable offence; (ii) taking note of the compensation of Rs.1,00,000 (Rs one lac only) given by the WASA to the bereaved family and; iii) the equality clause of "the Constitution of Islamic Republic of Pakistan, 1973" this Court directs that on any future eventuality if a child dies by falling into the uncovered manhole, the WASA shall be liable to pay compensation to the bereaved family.[950]

In paragraph (i) there are two happenings such as civil liabilities as well as commission of a cognizable offence. For civil liability, WASA paid compensation 'a cheque of Rs.1, 00,000/'. Which is not just and substance because life has not so cheap value that compensation is awarded only Rs.1, 00,000/ against it. Further this compensation is awarded by WASA rather the concerned officer in-charge of the area. Mostly compensation has been awarded from Public Fund which gives moral boosting to erring or corrupt officials. Due to this reason, the order for compensation must be made

[949]Ibid.
[950] Ibid., para Tasadduq Jilani

from their own salaries not by public exchequers, as it was awarded in *Zahid Ali* case in Pakistan jurisdiction.[951]

For the second part of this paragraph, the conduct being violative of the Constitution reveals the commission of a cognizable offence as well. For example, Section 321 of "the Pakistan Penal Code, 1860" is related to *Qatl-bis-Sabab* (a cause for death).[952] The punishment for *Qatl-bis-Sabab* (a cause of death) is *Diyat* (blood money).[953] The value of *diyat* shall not be less than the value of thirty thousand six hundred and thirty grams of silver. Unfortunately, in the instant case neither the commission of cognizable offence has been dealt nor *diyat* has been provided. The court, whereas, has considered only civil liability wherein compensation has been awarded, which is even not just.

The Supreme Court, in a case in 1991, was required to fix the value of *diyat* but not less than the value of thirty thousand six hundred and thirty grams of silver. Not only that the heirs of the deceased desired to compound the offence and end their differences but a sum of Rs. 1, 71,000/ were to be paid to the heirs of the victim as *badl-i-sulh* by the convicts.[954]

In the present case, court seems confuse to apply the option of *diyat* (which is Islamic concept) and adapted to award compensation which is, again, not just. The above-mentioned case of Supreme Court was decided in 1991 and *diyat* was given Rs. 1, 71,000/ and Alooba case was decided in 2000 and compensation was awarded Rs.1,

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[951] In which the court awarded compensation by using technical mind and held that "current salary of the petitioner be paid on regular basis by deducting 50% of it from the salary of the E.D.O. and the other 50% from the salary of the Head Master."*(Zahid Ahmed vs. Province of Sindh:* (2012 PLC (C.S) 124)).
[952] The Pakistan Penal Code, 1860.
[953] Ibid.
[954] *Safdar Ali vs. the State*: (PLD 1991 SC 202).

00,000/. The difference of time duration between both cases is 9 years and amount difference is Rs. 70,000/. Time fluctuation affects the money or economy. But in Alooba case this rule did not effected and, court after 9 years, this fluctuation made constant and awarded Rs.1, 00,000/ as compensation.[955] It also seems that court did not adopted *diyat* procedure because it has to pay by the state institution and *diyat* has much money value than compensation. Therefore, court did not combine both civil as well as criminal liability. It is submitted that if the method used in the instant judgment apply in future to prevent the recurrence of the tragedy, the tragedies cannot be prevented. Because method/parameter/mind used in the said judgment is not realistic. Hence, the court should move towards *diyat* system in criminal law and enhance the amount of compensation in civil liability. Further, the courts should held liable to public servants to pay *diyat* and compensation from their pockets rather the state institutions so that future repetition of the tragedies like minor Alooba or many others can be prevented from our beloved country. It is also submitted that the judges must do care when there law exists, but they must do care more where there is no law and they need to use their discretionary powers.

Right to life is fundamental right of every citizen for which the state is duty bound to protect it. In result of gross violation of right to life due to drone attacks an important case of *Foundation for Fundamental Rights* vs. *Federation of Pakistan & 4 Ors* was brought before the Peshawar High Court.[956] The High Court took jurisdiction to deal the matter under the Article 199 of the Constitution and placed the Court under tremendous obligation to safeguard and protect the life and property of the citizen of Pakistan and any

[955]See *State vs. M.D., Wasa and others:* (2000 C L C [Lahore] 471).
[956] *Foundation for Fundamental Rights vs. Federation of Pakistan and 4 others*: (P L D 2013 [Peshawar] 94).

person for the time being in Pakistan, consequently court ordered to pay the compensation.[957]

Similarly, in another case, a widow had no source of income for her and her children to live life except compensation of her deceased husband which were not dispersed by the employer and commissioner had also exploited her through lengthy process. In this violation a petition against her under Article 199 in *Wackenhut* vs. *Malik Zafar Iqbal* was filed but was dismissed with the cost of Rs.5000/ to be paid to the widow/respondent.[958]Two significant propositions were considered such as speedy disposal, justice for poor victims and needs of her life and her children. But the procedural technicalities were not considered as hurdle.[959]

It is inferred that procedural defects can be afforded during the proceedings because the main objective of law is to help people, to provide justice and to provide redressal of their grievances instead of making difficulties going through the torturous lengthy litigation. The observation of this court is appreciable. No doubt such type of matters requires special attention not for speedy disposal but speedy justice as well.[960] The time factor is very important in every field but especially in judicial system. Dragging of poor litigants especially ladies into the courts cannot be appreciated by any rhyme or reason. The employers are supposed to be the guardians of the employees and their families. But in Pakistan, this relation is exploited in many ways. However, they should earn good will instead of creating hardships to the bereaved families.[961] This practice is depreciated

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[957]Ibid.

[958]*Wackenhut vs. Malik Zafar Iqbal*: (2011 P L C 196).

[959]Ibid.

[960]Such as the Constitution of the Islamic Republic of Pakistan, 1973 has the same essence under Article 38.

[961]See the case *Wackenhut vs. Malik Zafar Iqbal*: (2011 P L C 196).

where the poor ladies are forced to spend the precious time of their life for getting their legal right in form of a petty amount. The purpose of law is to help people for redressal of their grievances instead of going through the torturous lengthy litigation in courts. The courts should also, like in this case, move towards speedy disposal and speedy justice generally for all and especially for poor victims. Same kind of a constitutional petition was also filed under Article 199 for compensation and the petition was partially allowed and directed to decide the suit within two months in a case titled *Musarat Bano* vs. *Additional District Judge, Lahore and others.*[962]

Speedy disposal and speedy justice is back bone of every society in which time is spot light. And justice is important for rule of law same as arbitrary exercise of authority is dangerous for rule of law. If it occurs, then rule of law damages as it is gross violation of fundamental rights of every citizen. An arbitrary authority was used in *Shoukat Ali Qureshi* vs. *the State and another.*[963]

In this petition, order of judicial officer (ASJ) dismissed the bail application of accused by considering F.I.R different from F.I.R for which accused sought the bail. The High Court denounced the order of judicial officer with the observation that orders of such sort brought mortification, hopelessness, distress, disappointment and sadness to the common litigants. It was arbitrary exercise of authority against the rule of law and dictum set down by the Honorable Supreme Court,[964]so court gave grace and declared the impugned order as a result of some misunderstanding amalgamation of facts of two different cases and not of any other consideration. Although compensation was not

[962]*Musarat Bano vs. Additional District Judge, Lahore and others*: (2010 M L D 1656).
[963]*Shoukat Ali Qureshi* vs. *the State and another*: (P L D 2012 [Islamabad] 65).
[964] In a case titled *Muhammad Ayub vs. Muhammad Yaqoob and others* reported as (PLD 1966, Supreme Court 1003).
[964] Ibid.

awarded in this case but court constrained to call in person to Learned ASJ who put appearance in order to confront and to know the causes of departure.[965]

It is humbly argued that this instant court itself has not exercised his authority within the four corners of law and has opened the doors of criticism and question marks on its own judgment because the instant court has showed the grace to ASJ even he advanced explanations unsatisfactorily. It is humbly suggested that the instant court must not had showed the grace to ASJ but order to pay the compensation to the victim. The instant court also has not discharged its sacred duty to provide justice because the final order is against its own words that, "they should discharge their sacred duty to dispensation of justice rather liking and disliking of the parties."[966]

As the instant court had liked the ASJ therefore, it showed the grace to ASJ and the party, resultantly, could not get remedy/justice against ASJ. The instant High Court also gave the views that, "the judicial officers are custodian of the rights of the people, rule of law and administration of justice therefore they judicial officers are duty bound to perform their duty accordingly."[967]The important question arises whether these views of the instant High Court are not applicable on itself? Off course, these are also applied on it as well. The High Court is custodian of the rights of the people; therefore, it is the duty of the High Court to protect these rights even against the judicial officers/judicial institution.[968] It must not give the favor to the judges as given by the ASJ in this case against the rights of the people.

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[965]*Shoukat Ali Qureshi* vs. *the State and another*: (P L D 2012 [Islamabad] 65).
[966]Ibid.
[967]*Shoukat Ali Qureshi vs. the State and another*: (P L D 2012).
[968]As mentioned in this case. Ibid.

As, it discussed above in Indian jurisdiction, that the case must be an appropriate case and gross violation of fundamental right to constitutional tort. So, in the case of *Sabz Ali Khan* vs. *IG Police, KPK*[969]the scope of jurisdiction of the high court under Article 199 has been described by the court itself such as:

> "This Court has always exercised jurisdiction to review those proceedings, decisions or actions of police officials which suffer from defects of jurisdiction. In the present case, it is apparent from bare reading of F.I.R that prosecution has built the entire case on erroneous and wrong foundation."[970]

It can be inferred from the observation of the court that the High Court has jurisdiction under Article 199 when the Article 4 of the constitution is violated even against the public servants for the administration of justice. Because it is the inalienable right of every citizen, under the constitution, to enjoy the protection of law and to be treated in line with law and thus where an order has been passed, or action taken against him by any platform, executive or judicial which is clearly illegal particularly the express provision and the essence of statute, which if permitted to continue intact tantamount to, and shall cause serious violation of the right of the citizen, the High Court can come for his rescue in its constitutional jurisdiction.[971]

Some illustrative cases have been mentioned above. Under this situation, it is humbly submitted that this expression is very subjective. Here an important issue arises "whether the rights in question really do form a substantive basis for such course of action".[972]The Indian Court made distinction in the 'public law' and 'private law' remedy in the case of

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[969]*Sabz Ali Khan vs. IG Police, KPK*: (2016 Y L R 1279).
[970] Ibid.
[971]The High Court has Jurisdiction under the Constitution of the Islamic Republic of Pakistan, 1973, Article 199.
[972]The words have been taken borrow from the research of Chidananda Reddy S. Patil in his research "Liability of the State for the Torts Committed by its Servants" (PhD diss., Karnatak University, 2002) from Indian jurisdiction. 252.

Nilabati Behera to develop concrete principles of compensation jurisprudence. The court awarded compensation for constitutional torts and observed that sovereign immunity defense is not available in the field of public law.[973]

In Pakistan, Higher Courts have not given clear principles regarding new remedy such as given by Indian Higher Courts. For example, subsequent to 1977 in India, when matters of unlawful detention and custodial death were brought before the Supreme Court by way of writ petitions under article 32 of the Constitution, or in appeal against the decisions of the High Court under article 226,wherever the arrest was found unlawful or wherever it was found that the custodial death had occurred on account of ill-treatment by, or gross negligence on the part of, the police officers, compensation was awarded to the injured person (or to his legal representatives). In this regard, when a question arose as to the legality of such awards, it was clarified by the Supreme Court in the case of *Nilabati Behera* vs. *State of Orissa*, that it is always open to the Supreme Court (under article 32 of the Constitution) and to the High Court (under article 226 of the Constitution), to award compensation in the exercise of its constitutional power.[974]

One more feature is that as the growth of law is based on public law for the infringement of fundamental rights in which judicial discretion performs a key role, the Pakistan Courts could not succeed to make effective jurisprudence as to the State liability. The best way the court could have assumed is by overruling the law, which has made by the judiciary in order that the remedy can be attained from the lower courts as given in common law, so that any error in ruling can be cured. This, however, has been attained by the Supreme Court of India in its innovatory judgment in *Challa Rama*

[973]*Nilabati Behera vs. State of Orissa*: (1993) 2 SCC 746.
[974]Ibid.

krishna Reddy case. Due to it, the tort liability law and compensation was released from the control of the old notion of sovereign immunity *vis-à-vis* the fundamental rights. However, a great development has been made from *Rudul Sah* to *Challa Ram krishna Reddy* through *Nilabati Behera* cases by providing remedy for infringement of fundamental rights of the people.[975]

Nonetheless, due to absence of concrete and clear principles, the existing situation is not up to the mark in Pakistan. There is no express provision in the constitution to grant compensation in case of violation of fundamental rights. Therefore, it is most required to integrate in the constitution an express enforceable right to compensate for infringement of fundamental rights without it to the judicial discretion. It is submitted that an express enforceable right to compensation for violation of fundamental rights be incorporated in the constitution at the beginning of the chapter on fundamental rights in the form of Article 8-A, which shall read as under:

> Article 8-A. Right to Compensation: "Any person who has been the victim of violation of fundamental rights shall have an enforceable right of compensation."[976]

In a result, this substantive article will help to eradicate the subjectivity and arbitrariness of the judges. This right also has been recognized by the Supreme Court of Azad J&K in which, the right to recover compensation is a primary right conferred by the law of nature.[977] The court, in this case, has mentioned that the compensation as a fundamental right is of a universal nature. It is based on the natural reasons and natural justice.

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[975]Chidananda Reddy S. Patil "Liability of the State for the Torts Committed by its Servants" (PhD diss., Karnatak University, 2002), 235.

[976]This recommendation has also been made in Indian perspectives by Chidananda Reddy S. Patil in his research "Liability of the State for the Torts Committed by its Servants" (PhD diss., Karnatak University, 2002), borrowed and this can also be applied in Pakistan perspectives. 255.

[977]*Muhammad Uris vs. Station. House Officer Police Station Dokri and 2 Ors*: (PLD 2005 SC 297, 15).

Justinian in his institutes says "Natural Law (*Jura Naturalia*)" which is observed equally, in all nations established by divine providence remains forever settled and immutable.[978] Blackstone also says that the basic right for the satisfaction from the injury was given by the law of nature and the right to receive satisfaction is based on the sanctity of individual right, which humanity has always been, from its infancy, jealously protecting from being wantonly violated. This natural right is essential for the growth of well-being of society and during the successive stages of civilizations; various means were devised for enforcing the same. The right to receive compensation is a natural right. It is regulated by a number of maxims which are condensed for the good sense of nations.[979]

It is obvious from the above cases that the disjointed legal framework awarding compensation is inadequate which does not give for a comprehensive legislative scheme for either compensating victims of crime (for any 'loss' and physical, mental, or psychological 'injury') or the payment of 'compensation' and 'specified amount' awarded to them. Further, it neither mandates courts to compensate the victims nor creates any legal right in their favor. It is entirely left to their (courts') discretion to compensate victims of crime as well as to initiate legal action to recover the fine, out of which compensation is ordered, or the specified amount of compensation from the offender to pay it to crime victims. In Pakistan, the method of award of compensation solely depends upon the sweet will of courts which can be analyzed as following.

The method used by court in Pakistan to awarded compensation is on basis of irrationality. For example, in number of cases compensation is awarded from public funds which give moral boosting to erring or corrupt officials as in *State* vs. *M.D. WASA*

[978]Ibid.,ref.
[979]Ibid.

case (Alooba case) the Court ordered to (WASA) to pay of Rs. 1, 00,000/ as compensation.[980] It is submitted, the order for compensation must be made from their salaries and not by public exchequers. The appreciable decision, however, was given by the Sindh High Court in the case of *Zahid Ahmed* vs. *Province of Sindh.*[981]In which the court awarded compensation by using technical mind and held that current salary of the petitioner be paid on regular basis by deducting 50% of it from the salary of the E.D.O. and the other 50% from the salary of the Head Master. The court protected the petitioner from exploitation, forced labour and his right to life by awarding the exemplary damages to the petitioner. Again in *State* vs. *M.D. WASA* case (Alooba case) the Court ordered to (WASA) to pay compensation rather the concerned area officer.[982]

It is mentionable here that in the cases discussed above related to the award of compensation on the basis of differentiation is not clear. Even, if common law 'notions' require the compensation to be victim-based (i.e. poor lives getting less than rich live), the Jurisprudence of Supreme Court needs to be violation of rights based, as the purpose of compensation is not just to restore the life of the victim. It is also 'exemplary' in nature without obviating its discretion to individuate principles and recommendatory sums, some thresholds have to be set. In fact, such arbitrary compensation looks more like a charity. For example in *State* vs. *M.D. WASA* case (Alooba case) the Court ordered to (WASA) to pay compensation 'a cheque of Rs.1, 00,000/' to the father of the girl (alooba).[983]

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[980]*State vs. M.D., Wasa*: (2000 C L C 471).
[981]*Zahid Ahmed vs. Province of Sindh:* (2012 PLC (C.S) 124).
[982]*State vs. M.D., Wasa*: (2000 C L C 471).
[983]Ibid.

Generally speaking even in the cases where compensation matters has been left at state governments remain pending for years in the absence of judicial monitoring of the proceedings like *Wakenhut* vs. *Malik Zafer Iqbal* case. The court has moved through judicial activism one step forward but two steps backward in the compensatory jurisprudence for public wrong.

As compensation for constitutional infringements is being followed by courts in Pakistan but there is no any effective criteria which has adopted by the courts in quantifying the compensation especially in constitutional tort cases as mentioned above. In this regard, there are two issues such as: (i) there is no yardstick to determine the compensation and; (ii) the compensation awarded is not just.[984]

The Supreme Court has explained related to award of compensation for the violation of fundamental rights but it could not draw specific criteria to determine the compensation. The Court gave emphasis on the compensatory rather on punitive element and further observed that the quantum of compensation depends upon the peculiar facts of each claim and therefore any straight-jacket formula cannot be developed in this regard. For example, in *State* vs. *M.D., WASA* only Rs.1, 00,000/ was awarded as compensation to the father of the girl[985] and the commission of a cognizable offence was neglected. In this important case, the court has not used any parameter to determine and award of compensation. It does not come under the category of *diyat* therefore, seems arbitrary exercise of authority by the court.

Further, in Karachi tragedy case, about 2000 people died of dehydration and heat stroke and over 40,000 people treated in the hospitals for heatstroke. A fine of Rs 10 million on

[984]For detailed and comprehensive study see Naila Sabir Khan, Law of Damages in Pakistan, Feb 2015. Available at https://pljlawsite.com/articles.asp.
[985] *State vs. M.D., Wasa*: (2000 C L C 471).

KEC was imposed by the NEPRA for failure to supply uninterrupted electric power services and intentional under-utilization of its generation ability.[986] Is fine of Rs 10 million justifiable? Where 2000 people died and 40,000 people treated in the hospitals for heatstroke, of course not.

In another case Azizullah vs. *Jawaid a. Bajwa*, Supreme Court enhanced the amount of damages and included loss of profit and mental torture in decrial amount for the petitioner who suffered mental torture and agony, physical injury and financial loss by the public functionaries (custom officers) such as the amount of damages from Rs.3,00,000/ to Rs.10,00,000/ as compensation for travelling expenses, loss of profit and mental torture which was to be paid to the petitioner in addition to Rs.1,00,000/ the sale price of watches payable to him in terms of the judgment of the trial Court. As there is no any yardstick to determine the compensation, so it is up to the court to determine the proper damages keeping in view the nature of wrong done and loss caused especially in mental torture cases. [987]

The important issue regarding award of compensation is also arises when other state is involved to pay the compensation. Is there any system to determine and receive the compensation from other state? Some detail, in this regard, has been given in the case of *Foundation for Fundamental Rights* vs. *Federation of Pakistan and 4 Ors* which was brought before the Peshawar High Court under Article 199 against the drone attacks, to provide compensation for the victims, destruction of moveable and immoveable property and; to order the respondents to use its 'right to reparation' for the wrongful act. [988]

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[986] See further details at: http://piler.org.pk/. (last accessed at Jan 1, 2018).
[987] *Azizullah vs. Jawaid a. Bajwa*: (2005 SCMR 1950).
[988] *Foundation for Fundamental Rights vs. Federation of Pakistan and 4 others:* (P L D 2013 [Peshawar] 94).

The court held that in view of the established facts and figures with regard to civilians' casualties and damage caused to the properties, livestock of the citizens of Pakistan, the US Government is bound to compensate all the victims' families at the assessed rate of compensation in kind of US dollars.[989]

There was similar case in India to award of compensation in the 'Bhopal Gas Tragedy'; the Government passed "the Processing of Claims Act, 1985"[990] that invoked the *Parens Patria* doctrine to allow itself to represent the victims. The case then moved before the District Court in America and was dismissed primarily on the grounds of *forum non conveniens*, a ruling confirmed on Appeal. Finally, the Indian Supreme Court told both sides to come to an agreement and "start with a clean slate" in November 1988. Eventually, Union Carbide agreed to pay $ 470 million for damages caused in the Bhopal disaster, 15 per cent of the original $ 3 billion claimed in the suit.[991]The average amount to families of the dead was $ 2,200.[992]On the other hand the government of Pakistan did not take any step to formulate any law to deal the present issue as well as for future happenings.

The survey of the above cases reveals that there is no any adequate scientific criteria to assess the quantum of compensation in constitutional tort therefore, it is suggested that an adequate scientific criteria to assess the quantum of compensation must be developed by the Supreme Court on the bases of well accepted doctrines. To assess the damages caused in constitutional tort the "voting rights model" applied in the jurisprudence of America may be followed as the victim may not constantly suffer actual

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[989]Ibid.
[990] The Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985.
[991] Kenneth F. McCallion, "International Environmental Justice: Rights and Remedies," 26 *Hastings Int'l & Comp. L. Rev.* (Spring 2003): 427.
[992]Ibid.

damages.[993] Further, mostly in cases compensation is awarded from public funds which give moral boosting to erring or corrupt officials. Due to this reason, it is submitted that the order for compensation must be made from their salaries and not by public exchequers.[994]The new remedy is thus to be welcomed as it would go a long way in providing relief to victims of violation of fundamental rights. However, this remedy would be available where it is the only practicable mode left for redressal. A contrary view would have merely rendered the court powerless and made the constitutional guarantee a mirage, if the court was powerless to grant any relief against the state, except the punishment of the wrong-doer.[995] The monetary compensation for redressal by the court acts as a useful and at times perhaps the only effective remedy to apply balm to the wounds of the family members of the deceased victim. This innovation as created by Higher Courts will also help in reducing backlog as well as multiplicity of litigation and providing speedy, less expensive justice to the victim.[996]

As discussed in previous section that the principle of sovereign immunity has no place in civilized society as well as in Islamic law because it is against the rule of law concept in common law and in Islamic law as well. In this context, the beauty of the constitutional tort is that the principle of sovereign immunity does not apply to the public law remedies under the constitution for the enforcement of fundamental rights.[997]Therefore, the archaic concept "Sovereign Immunity" or "King can do no

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[993]These words have been borrowed from the research of Chidananda Reddy S. Patil "Liability of the State for the Torts Committed by its Servants" (PhD diss., Karnatak University, 2002), 256.
[994]Chidananda Reddy S. Patil "Liability of the State for the Torts Committed by its Servants" (PhD diss., Karnatak University, 2002), 256.
[995]Ibid.
[996]See further the study C. K. Rameshwara Rao, *Law of Damages and Compensation* (Allahabad: Law Publishers Pvt Ltd., 1996).
[997]*Nilabati Behra vs. State of Orissa*: (1993) 2 SCC 746.

wrong"' can also be removed by applying constitutional tort concept in true sense here in Pakistan.

An important factor which found from the above discussion is that Pakistan Higher Courts do not exercise their statutory powers as freely and liberally as could be desired, as Indian courts are doing. It is fact that Indian courts have made many liberal and encouraging developments in judicial jurisprudence for the protection of fundamental rights of its citizens like constitutional tort remedy. The judicial developments, whereas, in Pakistan have not been made much like India and therefore situation is not up to the mark. It is time for the highest courts in Pakistan to lay down certain definite and concrete rules and guidelines for compensation under constitutional torts law for itself and all the High Courts to follow.

5.4. Protection/Immunity Clauses: A situational Analysis

The protection clauses that is, statutory provisions/good faith/limitations which, in essence, provide that a protection clause, a suit etc. is barred, for anything which is 'intended to be done' (under the statute concerned). Therefore, action which does not comes firmly within the statute concerned, but which is (in good faith) looked upon by the wrongdoer concerned as taken 'under the statute' in question, would also get protection (indeed, that is the law-maker' intention as well). Thus, an illegal act, including a tort, would also come to enjoy protection. Such a position is inconsistent with the concept of rule of law and access to justice to the citizen. This important aspect is being considered to discuss in this present section.

There is a difference in treatment between the citizens and the public servants according to the present legal framework.[998] For example in Pakistan, for the citizen the Pakistan Penal Code, 1860 provides such as, "nothing is said to be done in good faith which is done or believed without due care and attention." Conversely, for public servants, "General Clauses Act, 1956" provides that, "a thing shall be deemed to be in good faith where it is in fact done honestly, whether it is done negligently or not."[999] However, a citizen during the British *Raj,* when charged with lack of good faith, was required to show that he was not negligent. But the servant of the British Crown had just to prove nonexistence of malice, disregarding negligence in this regard.[1000]

Further, under Indian & Pakistani law standards of 'good faith', which influence the interpretation of many different laws,[1001] differ between that for the citizen and public servant, ensuring an imbalance and shields the bureaucracy from accountability.[1002] Clearly for the public servant, unlike the citizen, there is no requirement for acting with due care and attention. So long as an act is done honestly it is deemed to be in "good faith", which is not sufficient in the case of the citizen.[1003] By removing the element of

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[998]Related cases on the subject have been mentioned above which show the disparities therein.

[999]General Clauses Act, 1956, Section 27. (Pakistan).

[1000]For more details, read the study of Munir Ahmed Khokhar, *Law of Torts* (Lahore: Irfan law Book House, 2004), 38.

[1001]See further chapter 4 of this research for details which discusses immunity clauses in different statutes of India and Pakistan.

[1002]For example see in the following cases: *"Shariat Suo Motu* No.120 OF 1987 2010 PCrLJ 206 FSC; *Khan Gul Government Contractor Federation of Pakistan through Secretary/Chairman* vs. *Federal Board of Revenue, Islamabad* 2018 PTD 415 QHC; *Nimra Sohail* vs. *Chairman Board of Intermediate and Secondary Education* 2018 CLCN 31 LHC".

[1003]The meaning and scope of "Good Faith" have been mentioned in the following important cases: *"Mehra Ginningn Industries vs. Sajid Shafique*: (2017 CLD 1165 LHC); *Muhammad Younas vs. Abdul Rehman*: (2017 CLC 198 LHC); *Muhammad Afzal vs. Fida Hussain*: (2017 CLC 51 LHC); *Loretta Iqbal vs. Province of Sind*: (2017 PLC (CS) 1033 KHC); *Syed Muhammad Sohaib (Shoaib) vs. Federation of Pakistan*: (2017 PLC (CS) 1020 KHC); Ayaz Ahmed Memon *vs.* Pakistan Railways through Chairman :(2017 PLC (CS) 226 KHC); *Waheed Shahzad Butt vs. Federation of Pakistan* through *Director Legal-II President (Appellate Authority)*: (2016 PLD 872 LHC); *Mian Muhammad Sharif vs. Income Tax Appellate Tribunal, Lahore*: (2016 PTD 296 LHC); *Nadeem Raja vs. Additional Sessions Judge*: (2016 MLD 1810 LHC); *Dr. Bashir Ahmed vs. Province Of Sindh through Chief Secretary*: (2016 PLC (CS) 179 KHC); Pir

negligence, this effectively undermines the very basis of negligence-based torts. Practically, therefore, only intentional torts that turn on proving deliberate or willful conduct, constructive intent, recklessness *et al*, can be pursued against the state and its public servants. Public servants are thus effectively protected against the vast majority of torts, which are negligence-based, involving a failure to take reasonable care to avoid a reasonably foreseeable harm.[1004]Therefore, by suitable legislation, the protection should be made not to extend to negligent acts, however honestly done and, for this purpose; the relevant clauses in such enactments should be examined, so that the full range of tort-based remedies is effectively available to the citizen.

For this purpose, in Indian jurisdiction notable step was taken by "the Law Commission of India" in its first report, 1956.[1005] It was recommended in this report on the subject that:

> "Under the General Clauses Act, a thing is deemed to be done in good faith, even if it is done negligently. Therefore, by suitable legislation, the protection should be made not to extend to negligent acts, however honestly done and, for this purpose; the relevant clauses in such enactments should be examined."[1006]

Imran Sajid vs. Managing Director/General Manager (Manager Finance) Telephone Industries of Pakistan (2015 SCMR 1257 SC) ; *Muhammad Amin Muhammad Bashir Limited vs. Government of Pakistan: through Secretary Ministry of Finance, Central Secretariat, Islamabad*: (2015 SCMR 630 SC); *Colony Textile Mills Limited* Water and Power Development Authority (Defunct MESCO): (2015 CLC 1378 LHC); *Mumtaz Oad vs. Sindh Public Service Commission*: (2015 CLC 1605 KHC); *Parveen Akhtar Additional District And Session Judge, Muzaffar abad*: (2015 PLD 7 HCAK); *Dhooharika vs. Director of Public Prosecutions*: (2014 SCMR 1423 Privy-Council); *Dr. Riaz Khan vs. Abdur Rasheed*: 2014 PLD 45 PHC; *Board of Governor's through Secretary vs. Musharaf Khan*: (2014 YLR 2667 PHC); *Maple Leaf Cement Factory Limited vs. Federation of Pakistan*: (2001 MLD 500 LHC)".

[1004]Hafiz Aziz-ur-Rehman, *Citizens versus State: Public Servant Liability and Tort Reforms in Pakistan* (Islamabad: the Network for Consumer Protection, 2005), 2.

[1005]See for details the Law Commission of India, *Liability of the State in Torts* (Delhi: the Law Commission of India, 1956).

[1006]Ibid., 89, Para II, (IV), Note under 'N. B'.

The same subject was rectified in 2001 in the consultation paper by "the National Commission to Review the Working of the Constitution".[1007] In addition, Higher Courts also have pronounced liberal decisions against the State and its servants by holding liable to their negligent acts (A series of cases has been mentioned above). These steps prove the seriousness of the judiciary in this field. A constitutional tort remedy, an innovative and revolutionary approach, is a good example to mention here. This gives not only speedy justice but also inexpensive justice for the poor citizens.[1008]

As far as Pakistan is concerned, the legal position has not been changed since its independence in 1947 in spite of its own Constitution. For example, the Supreme Court of Pakistan has still not struck down Section 2(27) of "the General Clauses Act, 1956" and similar laws which protect negligent servants.[1009] The legislature must take serious steps to consider the issue. Although, Higher Courts have been taking steps through their judgments, but they could not develop concrete principles in their decisions against the state and its servants by holding liable (as the researcher discussed many cases above).

As the lawmaker has option to make an Act providing a right of suit against the state in cases in which such a right is not available, or removing or restraining an available right of suit.[1010]Immunity has been provided in certain cases to the government but not in others. There may be two likely clarifications to exclude the government from the extent of immunity for example: (i) the function concerned is a sovereign function and therefore immunity or protection exists to the state and; (ii) as the function has been given on a

[1007]The report of Law Commission and Consultation paper has been discussed in details in chapter 4 of this research.
[1008]See further chapter 4 of this research for details on constitutional tort remedy.
[1009]Hafiz Aziz-ur-Rehman, *Citizens versus State: Public Servant Liability and Tort Reforms in Pakistan* (Islamabad: the Network for Consumer Protection, 2005), 2.
[1010] Article 174 of the Constitution of Pakistan, 1973 & Article 300 of the Constitution of India, 1949.

specific servant by the Act, in such case state is not liable under legal position as it places at present.[1011]

However, immunity given through this clause is inconsistent with the concept of rule of law and access to justice to the citizen. This does not only violates the rights of the citizens but also creates frustration in society. This concept is also against the Islamic injunctions as well as certain provisions of the constitution of Pakistan. This concept has been already discussed in the above section in detailed however it can be discussed here shortly to recall our arguments given therein.[1012]The focus of arguments here is that the state and its public servants must be accountable and liable for his negligent acts committed even during their duty.

In this regard, "the Constitution of the Islamic of Pakistan, 1973" accords the highest place to the rights of the citizens to justice as well as rule of law.[1013] The rule of law concept has been provided under Article 4 of the Constitution which states that, "to enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Pakistan."[1014] Further the equality provision has been incorporated under Article 25 (1) which provides that, "all citizens are equal before law and are entitled to equal protection of law."[1015]These constitutional provisions are good examples of equality and rule of law in the country. The supremacy of the rule of law is a fundamental idea of

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[1011]M.P.Jain and S.N. Jain, *Principles of Administrative Law*, 4th ed., 2nd Re.pt. (Nagpur: Wadhwa & Co., 1993), 794.
[1012]See further details in chapter 5 section on analysis of constitutional provisions of this research.
[1013]Its Preamble asserts that "the people of Pakistan shall be guaranteed fundamental rights, including equality of status, of opportunity and before law, social, economic and political justice and the independence of judiciary shall be fully secured". (The Constitution of the Islamic Republic of Pakistan, 1973. Preamble).
[1014]The Constitution of the Islamic Republic of Pakistan, 1973. Preamble; Article 4.
[1015]Ibid., Preamble; Article 25 (1).

justice which calls for equality before the law and presuppose accountable and responsible use of discretionary power, a fundamental constituent of good governance.[1016] Principle of public accountability is one of the most significant emerging aspects of good governance. The fundamental objective of the principle is to check the rising misuse of powers by the administration of the government and its public servants and, to provide speedy remedy to the victims of such exercise of powers.[1017]The essence of these provisions must be incorporated in other laws of the country by regularizing the immunity clauses discussed above for good governance in the country.

Amongst the statutory limitations on liability, the immunity in favor of judicial acts is prominent, so it is analyzed here the impact of impunity on citizens' rights in Pakistan. The judicial officers and other officials giving assistance in judicial procedure are not liable for their acts done in the course of their official duty.[1018]In this context, important issues arise here for instance, whether the state itself should not assume liability for judicial wrongs although the judges themselves may be provided immunity.[1019]Whether the aggrieved should go unredressed because he was privileged to be wronged by a servant having immunity from liability? These questions in the context of Pakistan are unanswered yet because the judicial immunity especially case delaying is at critical situation in Pakistan.[1020]However, the judicial acts have not been exempted by

[1016]Hafiz Aziz-ur-Rehman, *Citizens versus State: Public Servant Liability and Tort Reforms in Pakistan* (Islamabad: the Network for Consumer Protection, 2005), 1; see also a comprehensive study on the subject by The Network Publications (second Edition), *Constitution of Pakistan and Peoples' Rights* (Islamabad: the Network for Consumer Protection, September 2004).
[1017]Ibid.
[1018]The Judges (Protection) Act, 1985. Section 3.
[1019]Durga Das Basu, *Commentary on the Constitution of India*vol.4, 4th ed., (Calcutta: S.C, Sarkar & Sons (P) Ltd, 1963), 411.
[1020]See further details in chapter 2, section on citizens' rights and the judiciary of this research.

related laws in USA.[1021]In addition, there is a clause which makes liable the USA in remedy to an individual who has undergo imprisonment under a sentence which was later reversed on appeal.[1022]It has been argued by the Street for the taking up liability in England in conformity with American Act in these words:

> "The personal immunity of a judicial officer is not necessarily inconsistent with the acceptance by the state of the duty to compensate those who suffer loss unjustly at the hands of the judicial machine, even if the loss has not been caused by the fault of any employee of the Crown.... No one would saddle the trial judge with pecuniary liability, but that the convicted innocent should still be remediless is deplorable."[1023]

In Pakistan, on the other hand, it has become a standard drafting practice to insert an extensive immunity and non-prosecution clause in every statute involving public servant (including a judge). This extensive practice, to protect and immune public servants against tortious liability, is the major reason for violation of rights of citizens, hurdle in access to justice for the poor and impediment in the growth of law of tort in Pakistan. In the absence of judicial accountability and existence of immunity the situation of justice sector is not mark able,[1024] where justice is delayed, ultimately poor citizens suffer.[1025]

It is dilemma in Pakistan that the existing system has not much put the liability of delays on judiciary and therefore victims of delays are not able to get remedy for their loss of time, resources and labour in such delayed cases.[1026] Resultantly, victims lose their trust and confidence on the judicial system to get their interests and basic

[1021] The Federal Tort Claims Act, 1946.
[1022] Federal Statute of 1938 (52 St. 438).
[1023]Harry Street, *The law of Torts*, 6th ed. (London: Butterworths, 1976), 43.
[1024]Dr Richard Blue & Ors, *Pakistan Rule of Assessment Final Report* (Washington, DC: United State Agency for International Development, 2008), 12.
[1025]Situation of citizens' rights and judiciary has been mention above. See further details in chapter 2, section on citizens' rights and the judiciary of this research.
[1026]For efficiency of Supreme Court see further Annual Report of Supreme Court of Pakistan June 2015-May 2016.

rights.[1027]In this regard, there are several examples of blind justice. For example, Mr Azizullah was 30 years old and married young man, who spent 9 years in jail without having committed any crime. Even he had to spend nine years of his prime life to prove innocent.[1028] There is another case of blind justice in which accused Syed Afzal Haider spent 18 years in prisons to prove innocent in January, 2005.He was just as innocent 18 years back but his adult life, youth, freedom and his education having been consumed over these 18 long and torturous years in different police lockups and jails across the country.[1029]

Further, there is one of cases of unfortunates in the judicial history of Pakistan in which two real brothers, Ghulam Sarwar and Ghulam Qadir are names that must not be forgotten, had already been hanged when the court acquitted them from murder charges.[1030]On the other hand in the same case Mazhar Farooq was acquitted by the Supreme Court because of a weak prosecution and evidence. He went to the jail when he was a young and came out as an old man. He, however, had to spend period of 24 years of his prime life in jail. There is innocent but harsh question that who is responsible for sufferings of the victims including their long and precious time they spent in jails, asset they wasted to give legal attorneys and bribes to police men and sufferings to their families (in above mentioned cases).[1031] At the moment, there is no any answer for their

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[1027]Dr Richard Blue & Ors, *Pakistan Rule of Assessment Final- Report* (Washington, DC: United State Agency for International Development, 2008), 17.

[1028]*The Dawn News*, Islamabad, March 4, 2005, www.dawn.com (last accessed at March 5,2017).

[1029]Rizwan Ahmad Tariq, "Afzal Haider: Guilty or Innocent," *the Jang Sundy Magzine*, serialized in Jang Sunday Magazine of April 3-9, April 10-16, April 17-23 and April 24-30, 2005, www.jangnews.com (last accessed at April10, 2017).

[1030] The Dawn News, October 24th, 2016,https://www.dawn.com/news/1291750 (last accessed at March-10-2017).

[1031]Iqtidar Gilani and Fida Hussnain, "Corruption in Judicial System Delays Justice," *The Nation*, November 27, 2016, http://nation.com.pk/newspaper-picks/27-Nov-2016/corruption-in-judicial-system-delays-justice (last accessed at April 1, 2017).

and our questions because judges are not liable and accountable for this blind and delayed justice in Pakistan. They have immunity and are not accountable and liable for this kind of negligent actions, for this they must be accountable.[1032]

Under the above discussion, it can be inferred that where a citizen has suffered a loss or harm due to the state or it's public servant' failure to exercise proper care and attention, the citizen cannot pursue the matter on the basis of negligence, as a tort action, thus denying him/her an important legal remedy which is totally against the rule of law and Islamic concept of accountability. A long imprisonment and hanging of when the persons were not guilty, wherein judges, prosecutors and police as a state functionaries and lawyers as an individual are responsible and equal to blame for the irreparable loss caused by such a prolonged detention.[1033]As a short term step, there is need for compensating the aggrieved persons and families and, as a long term, accountability laws must be made to hold them liable and accountable to avoid such unfortunate incidents in future. This step is very important for good governance, peace and prosperity in the country. Because lack of public confidence in the justice system undermines rule of law and contributes to rising violence.[1034] If these laws are made and utilized effectively, the graph of the delay in courts would be decreased and the access to justice, rule of law and confidence of the poor on judicial system will increased. In this regard, the Chief justice of Malaysia stresses on the accountability in these words: "thus judicial accountability is an indispensable to judicial independence, for an unaccountable judge would be free to

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[1032]Ibid.

[1033]Iqtidar Gilani and Fida Hussnain, "Corruption in Judicial System Delays Justice," *The Nation*, November 27, 2016, http://nation.com.pk/newspaper-picks/27-Nov-2016/corruption-in-judicial-system-delays-justice (last accessed at April 1, 2017).

[1034]Dr Richard Blue & Ors, *Pakistan Rule of Assessment Final Report* (Washington, DC:USAID, 2008), iv; see also the steps taken in this regard by Asian Development Programme. *Pakistan: Access to Justice Programme* (December, 2009).

disregard the ends that independence is supposed to serve".[1035] However judicial accountability must be developed, consistent with the principles of judicial independence and integrity, because the purpose of the judicial accountability is to advance the cause of justice for the protection of the rights of the people.[1036]

In addition to the judicial system, the immunity power is also misused by the hands of the police due to that the poor citizens suffer. There are a lot of cases of arbitrary arrests, false claims, torture and ill treatment of suspects, and fake encounter killings by the police.[1037] For example, Sulaiman Lashari, 18 years old, was shot dead at his own home by the son of a superintendent of police through the assistance of police constables.[1038] Similarly, a prominent social activist, Parween Rehman, was murdered on March 13, 2013 by the land dealer and well-known political party member.[1039] The police covered up the matter very swiftly. It is much practice here that police concerned is not brought to justice in grave abuses due to immunity. This practice was done in the case of Syed Alam who was killed in 2015 by the police to evade accountability for corruption.[1040] Same like, Akhtar Ali died from police torture on June 3, 2015.[1041]According to his wife, Riffat Naz, she found him in a coma, with a broken skull, there was no hair on the back of his head, his nose was broken and there were signs of torture on his face.[1042]

[1035]Amanullah Shah and others, Analysis of Judicial Independence and Judicial Accountability in Pakistan, ,*Gomal University Journal of Research*, 30,no. 1 (June 2014): 65; see also T. M. D. Abdullah, *Judges as Trustees must Give an Account for their Conduct* (Delhi: Universal Law Publishing Co. Pvt. Ltd., 2005).
[1036]Amanullah Shah and others, Analysis of Judicial Independence and Judicial Accountability in Pakistan, ,*Gomal University Journal of Research*, 30, no. 1 (June 2014): 73.
[1037]See further details in chapter 2 of this research, section on citizens' rights and the police.
[1038]Human Rights Watch, *This Crooked System* (Human Rights Watch: September 26, 2016).
[1039]Ibid.
[1040]Ibid.
[1041]Ibid.
[1042]Ibid.

This kind of practice does not create frustration only among the citizens, but the extremism also. The cases against the police are not filed by this kind of victims due to fear from the police and they think that they have already lost their precious time in jail. Police escape in some filed cases whereas in very little cases they are found guilty.[1043] Additionally to these practices of the police that help impunity and departmental sanctions raised by the police, there are specific provisions of the law that protect the police from its accountability discussed in above section.[1044]In Pakistan, the matter of accountability of police remains a point of concern, given the excessive discretion and authorities to police officials. To use coercive force in enforcing the law, accountability is critically significant relating to police officials due to their authorities. There is a need of effective accountability for transformation of police behavior, on the bases of a deep-rooted culture of repression. In the period of current liberal-democratic states in the world are engaged in developing and strengthening systems to monitor and make accountable to public service organizations such as the police.[1045]

There are two aspects of police accountability in which, first is the accountability of the police department to give a feeling of safety to all in the society whereas, the second is the accountability for assurance that complaints of citizens against negligence or misuse of powers by individual police servants are inquired into justly, and remedy given to the complainants speedily and fairly.[1046] They must be accountable for the both systems to increase the rule of law in the society.[1047]In this regard, accountability

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[1043]Human Rights Watch, *This Crooked System* (Human Rights Watch: September 26, 2016).
[1044]Criminal Procedural Code, Article 197.
[1045]Hafiz Aziz-ur-Rehman, *Public Grievances Redress* (Islamabad: the Network for Consumer Protection, 2005), 19.
[1046]G.P Joshi, *the Government, the Police & the Community: A comparative Analysis of the Police Acts,*(Common Wealth Human Rights Initiative: Aug 2002),13-23.
[1047]Ibid.

mechanisms have been introduced by the modern societies for Police Departments comprising of Public Safety Commissions,[1048]Magisterial/Judicial Institutions[1049](external grievances mechanisms) and Internal Accountability Mechanisms[1050]for dealing with this most vital aspect of administrative efficiency.[1051]

In India, "the National Commission on Human Rights" functions as an external mechanism for police accountability which has been successful. The Commission has authority to enquire *suo motu* or upon petitions filed on issues relating to violations of

[1048]The Police Order (PO) 2002 "introduced additional accountability mechanisms by replacing previous police legislation. The Public Safety Commissions created under the police reforms in 2002 have been vested with authorities to make the police accountable at all functional levels by suitable provisions of law which is a case, at least in theory, of democratization of police regulations." Ibid., 22.

[1049]The Police Rules, 1934, Section 1.15 - 1.120 provided "a role and authority to the District Magistrate (DM) and Subordinate Magistracy for accountability of the police. Sections 1.15, 1.16 and 1.17 empowered the DM as head of criminal administration, making the police an instrument for the maintenance of public order. In addition, the DM and subordinate Magistracy, under Criminal Procedure Code, have powers of judicial scrutiny in cases of illegal detentions/arrests, and of judicial accountability in incidents of police excesses including custodial killings. Those powers, unfortunately, were hardly ever utilized independently and judiciously, and in fact served to provide judicial cover to police brutalities in Pakistan." (Hafiz Aziz-ur-Rehman, *Public Grievances Redress*, (Islamabad: The Network for Consumer Protection, 2005), 21-22.

[1050]Strict punishments have been provided under the Police Order 2002, Article 155 to police officers guilty of certain types of misconduct. Such as, Article 155 of Police Order 2002 provides: Penalty for certain types of misconduct by police officers.–"(1) Any police officer who-
(a) makes for obtaining release from service as police officer, a false statement or a statement which is misleading in material particulars or uses a false document for the purpose;
(b) is guilty of cowardice, or being a police officer of junior rank, resigns his office or withdraws himself from duties without permission;
(c) is guilty of any willful breach or neglect of any provision of law or of any rule or regulation or any order which he is bound to observe or obey;
(d) is guilty of any violation of duty;
(e) is found in a state of intoxication, while on duty;
(f) maligns or feigns or voluntarily causes hurt to himself with the intention to render himself unfit for duty;
(g) is grossly insubordinate to his superior officer or uses criminal force against a superior officer; or
(h) engages himself or participates in any demonstration, procession or strike or resorts to or in any way abets any form of strike or coercion or physical duress to force any authority to concede anything, shall, on conviction, for every such offence be punished with imprisonment for a term which may extend to three years and with fine.
(2) Prosecution under this Article shall require a report on writing by an officer authorized in this behalf under the rules."
Further, "a code of conduct has been placed under this Order for law enforcement officials and makes police an instrument of the rule of law by shifting the focus of policing from an idea of rule to one of service. It is important to mention here that under Police Order 2002, Article 155 only an 'authorized officer' can proceed against a delinquent police officer. And citizens have no remedy (except tort) and who suffer in result of such delinquency." Ibid., 20.

[1051]Hafiz Aziz-ur-Rehman, *Public Grievances Redress* (Islamabad: The Network for Consumer Protection, 2005), 19.

human rights. It may intervene in any judicial proceedings on human rights, summons or seek attendance of witness, procure any document or witness, visit prisons and detention centers, and make recommendations to the government in this regard.[1052] This kind of commission should also be established for the external accountability of the police in Pakistan.

The situation discussed above, leads towards the confusion about the law and policy on public servant's immunity. On the one hand we have overwhelming immunity provisions along with strange definitions of good faith, which on the other hand do not match with some very encouraging verdicts given by the courts.[1053] To avoid such confusion and in the absence of a strong tradition of tort actions in Pakistan, it is recommended that certain aspects of law of tort dealing with public servants' discretion and immunity should be regulated through an appropriate enactment in which the protection should be made not to extend to negligent acts.[1054] A similar approach was recommended by "the Law Commission of India" in its First Report.[1055] The Commission recommended that, "under the General Clauses Act, a thing is deemed to be done in good faith, even if it is done negligently. Therefore, by suitable legislation, the protection should be made not to extend to negligent acts, however honestly done and, for this purpose the relevant clauses in such enactments should be examined."[1056]To follow this recommendation, a Bill on State Liability of the State in Tort was produced in 1967 in

[1052]See further "Legal Accountability of the Police in India," (Center for Law and Policy Research, 2013-14). 15.
[1053]Some verdicts have been mentioned above.
[1054]Hafiz Aziz-ur-Rehman, *Citizens versus State: Public Servant Liability and Tort Reforms in Pakistan*, (Islamabad: The Network for Consumer Protection, 2005), 23.
[1055] Law Commission of India, 1956, 89, Para II, (IV), Note under "N. B."
[1056]Ibid.

India but couldn't pass due to dissolution of Lok Sabah. The same recommendation can also be applied or considered by making laws on the state liability in Pakistan.

As the tendency has been initiated towards liability of officers but the progress is not satisfactory in this regard.[1057] The courts also have to develop an objective criterion like in the liability laws of USA and UK respectively.[1058] Hence, it is also time for the highest courts in Pakistan to lay down certain definite and concrete rules and guidelines for compensation under constitutional tort law for itself and all the High Courts to follow. It is concluded the above discussion that the rule of liability of the state for torts of its servants as settled down in the *Peninsular and Oriental Steam Navigation* case is very outdated. In contemporary time, when the state activities have broadly increased, it is very hard to draw a distinction between sovereign and non-sovereign functions of the state. The increased state activities have made a deep impact on all aspects of life of an individual and thus, the liability of the state should be made co-extensive with its modern function or role accordingly, welfare state and not be restricted to the period of individualism.

The ruling in *Nagendra Rao* case from Indian jurisdiction is very significant one in the subject of law on tortious liability of the state in a welfare state. According to this ruling there is no need of distinction between sovereign and non-sovereign functions while making hold liable to the state. To realize the liability of the state for the tortious acts of its public servant's one of the tests is whether the State is answerable for such actions in courts of law. State may be exempted from liability only for those functions which are related to external sovereignty and/or are political in nature, for instance

[1057] Cases in which officers have been made liable by the courts have been discussed in detail in the above section of this research.
[1058] The Federal Tort Claims Act, 1946 (USA) and the Crown Proceedings Act.1947.

defense, foreign affairs etc. It is obvious that the state is subjected to law same like individuals.[1059]

The state immunity ends with political acts. In order to enlarge the realm of liability, the demarcating line between sovereign and non-sovereign functions has largely departed.[1060]For example, the court technically demarcated the functions of the state in to primary and inalienable functions in *Nagendra Rao* case.[1061]

In Indian jurisdiction, the National Commission to review the working of the Constitution is strongly of the view that there is one area of law where the need for a clear settlement of law in a statutory form, is urgent and undeniable.[1062] In Pakistan, the need of certain and precise principles of law of universal application in nature is also lacking. The views of the Commission can also be applied in Pakistan. Academic researchers or Jurists may hold different opinions as to the relative advantages of codified and un-codified law.[1063] But this is certainly a field where a statutory formulation is urgently needed in Pakistan.[1064]

The efforts of USA and UK, although hailed to be revolutionary made by passing "the *Federal Tort Claims Act,* 1946" (USA) and "the *Crown Proceedings Act.*1947" (UK) respectively, to hold the state liable in tort in the same way and to the same level as the private individuals have invalidated the equation by adding in a series of exceptions wherein the state cannot be made liable or responsible. The situation in Indian

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[1059] See the on the topic a study by Chidananda Reddy S. Patil "Liability of the State for the Torts Committed by its Servants" (PhD diss., Karnatak University, 2002).
[1060]Ibid.
[1061]Ibid.
[1062]A Consultation Paper on "Liability of the State in Tort" Vigyan Bhavan Annex, New Delhi, 2001, 25.
[1063]Ibid.
[1064]Warda Yasin, "Tort Liabilities of Multinational Corporations in the Perspective of the Principles of Separate Legal Entity &Limited Liability" (PhD diss., International Islamic University Islamabad, 2016), 189.

jurisdiction also is not different except that the law is not codified. It is submitted that Pakistan must take step in this regard under the lines of *"the Federal Tort Claims Act,* 1946" (USA) and "the *Crown Proceedings Act.*1947" (UK) respectively. Further, the approach of higher judiciary in the post constitution era for making more and more functions to be non-sovereign functions and eventually limiting the sovereign immunity to merely inalienable functions of the State is a course of concretization of principles in the most right track.[1065] Likewise, courts have performed a creditable job in limiting the defense of statutory functions only to such functions which are performed by the public servants as the delegate of sovereign functions of the state. Though, immunity persists in the field of judicial functions and there is no ground as to why the state under a welfare constitution should not recognize the liability even if the servants are personally immune.[1066]

From the comprehensive discussion of the present situation of the law concerning liability of the state in tort in Pakistan, it reveals that the law is neither just in its substance, nor satisfactory in its form. It denies remedy to citizens injured by a wrongful act of the state or its servants, on the basis of the exercise of sovereign function/immunity, a concept which itself carries a flavour of autocracy and high-handedness. Further, the Higher Courts do not exercise their statutory powers as freely and liberally as could be desired as Indian courts are doing. One would have thought that if the state exists for the people, this ought not to be the position in law. A political organisation which is set up to protect its citizens and to promote their welfare, should, as

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[1065] See the studies Debanshu Mukherjee & Anjali Anchayil, *Vicarious Liability of the State in Tort in India: A Case for Reform* (New Delhi: Vidhi Centre for Legal Policy, 2015); Chidananda Reddy S. Patil "Liability of the State for the Torts Committed by its Servants" (PhD diss., Karnatak University, 2002).

[1066] For details on the subject see Chidananda Reddy S. Patil "Liability of the State for the Torts Committed by its Servants" (PhD diss., Karnatak University, 2002).

a rule, accept legal liability for its wrongful acts, rather than denounce such liability.[1067]By codifying state liability law, exceptions can be made for exceptional cases but the exceptions should be confined to genuinely extraordinary situations.[1068]

Under the backdrop of above research, an immense issue emerged here (general) is to be analyzed that why Pakistan, as compare to India, could not succeeded to develop effective laws and judicial jurisprudence in general and law on state liability in tort in specific. By considering this issue, there are some factors which contributed for these non-developments, in which some are related to patterns of governmental system and others are related to institutional and legislative drawbacks. These factors include such as: non independence of judiciary from politicians and army, non-seriousness of legislature, confusion of laws (common and Islamic law to which they follow) and political instability in the country.[1069] These factors made hurdles in the judicial as well as legislative developments including liability of the state in law of tort. These can be analyzed constitutional, legal and political perspectives as following.

Any development can be made on macro and micro level. The constitution, being a supreme law of the land, is considered to establish at macro level as it runs the state' institutions. Therefore, it is established on emergency basis in any state. The law of tort or liability of the state in it, whereas, comes under the micro level legislation as compare to the constitution. The development of law can be possible in functional, systematic and stable environment of the state. As for as, the development of the constitution in Pakistan

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[1067]Ibid.

[1068]Exceptions have been well discussed by Debanshu Mukherjee & Anjali Anchayil, *Vicarious Liability of the State in Tort in India: A Case for Reform* (New Delhi: Vidhi Centre for Legal Policy, 2015).

[1069]These factors, also, have been well identified by Dr Richard Blue & Ors, *Pakistan Rule of Law Assessment Final Report.* (Washington, DC: United State Agency for International Development, 2008), iv.

is concerned, the constitutional history of Pakistan is full of turmoil and toil since its very inception as a "Nation State". A new born state (Pakistan) in 1947 was plunged into a Constitutional crisis in 1954 by dissolving the Constituent Assembly by Governor General due to non-agreement on proposed constitution. This was, basically, first major subversion of the constitutional process in Pakistan. One can imagine the situation where the first constitution of the country was passed in 1956 after the 9 years of its independence. In the battlement amongst the elite politics for their elite interests, other developments like constitution suffered on a mark able level.[1070] In a situation, where constitution, a macro level development, was not given so much importance to develop, one cannot supposed to develop a micro level development for ordinary people like State liability law in tort.

Surprisingly the first constitution of the country, 1956 was abrogated by the first President of Pakistan and imposed Martial Law in 1958. Further, surprisingly the extra-constitutional actions of the executive were validated by the Supreme Court of Pakistan and the doctrine of 'revolutionary legality was pronounced in the *Dosso* case.[1071] This situation changed the whole scenario of the country's politics.[1072] Here two important issues aroused; one is intervention by the army in democratic system and, other is validation of martial law by the Supreme Court. This intervention disturbed the democratic infrastructure established before 1958.[1073] After 6 years, a new Constitution was passed in 1962 that empowered an autocratic executive and General Ayub Khan

[1070]See the Constitutional history of Pakistan prepared by Mehboob Hussain, "Institution of Parliament in Pakistan: Evolution and Building Process (1947-1970)," *Journal of Political Studies* 18, no. 2 (2011): 77-99 & Dr Richard Blue & Ors, *Pakistan Rule of Law Assessment Final Report.* (Washington, DC: United States Agency for International Development, 2008).
[1071]*The State vs. Dosso*: (P.L.D. 1958 S.C. 553).
[1072]Dr Richard Blue & Ors, *Pakistan Rule of Law Assessment Final Report.* (Washington, DC: United States Agency for International Development, 2008), 1.
[1073]Ibid.

ruled until 1969. It reveals that a democratic country was run under the army rule for this long time. Instability further increased when a great war occurred between India and Pakistan in 1965.[1074] But an unforgettable incident happened when 2nd war occurred between India and Pakistan and, resultantly Bangladesh took birth in1971.[1075]

It is mentionable here that Pakistan is basically democratic country but army took control the country from politicians and it ruled. Third constitution was passed in1973 by the civilian government in which "the British Model of Government" was created and also included a Bill of Rights as Fundamental Rights.[1076]

As for as the role of higher courts is concerned, it is important to mention here that superior courts of Pakistan, historically, have been reluctant to challenge the executive to enforce fundamental rights and even have not invalidated any major legislation on account of in compliance with these articles of fundamental rights.[1077] Further, some of the constitutional foundational principles have been compromised by the weakness of the judiciary including: (i) the dominance of rural and urban elites in political parties; ii) the primacy of federal law over provincial laws; (iii) the subservience of political parties to their leading figures and;(iv) federalism and judicial independence. In fact, these dynamics have led to several amendments to the present constitution.[1078]

Further, the Supreme Court once again validated the takeover of Zia-ul-Haq in the *Nusrat Bhutto* case (1977)[1079] by using the Common Law doctrine of 'State Necessity'.[1080] The

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[1074]Mehboob Hussain, "Institution of Parliament in Pakistan: Evolution and Building Process (1947-1970),"*Journal of Political Studies* 18, no. 2 (2011): 86.

[1075]Dr Richard Blue & Ors, *Pakistan Rule of Assessment Final Report.* (Washington, DC: United States Agency for International Development, 2008), 1.

[1076]The Constitution of the Islamic Republic of Pakistan, 1973 includes this bill from the Article 8-28.

[1077]Dr Richard Blue & Ors, *Pakistan Rule of Law Assessment Final Report.*(Washington, DC: United States Agency for International Development, 2008), 2.

[1078]Ibid.

[1079]*Begum Nusrat Bhutto* vs. *Chief of Army Staff and Federation of Pakistan*: PLD 1977 S.C. 657.

major legacy of the Zia-ul-Haq period, such as enhanced presidential powers and Islamization steps, sustained to trouble the Pakistani political landscape for another decade. In 1999, military through Pervez Musharaff took over of powers and Pakistan started to experience the unfolding of a plan established by the former military governments and endorsed by the superior court.[1081]Two external wars with India and three interventions by the army created instability and uncertainty in the country.[1082] During this time, both the parties (army and politicians) did not sat silence and with peace. Army was busy to run the government and also making laws to prolong their government. Political parties, whereas, were also trying to get back their government from army.[1083] Regardless, who were right, the countries' machinery disturbed and ordinary people suffered due to the battlement between two elite parties for their elite interests. There is no question of development of law especially for the public in this kind of situation.

On the other hand, India established their constitution in 1949 quite after 2 years of its independence. India is also a democratic state but there is no any concept of intervention by the army in the affairs of government. Even organs of the State (legislature, judiciary and executives) are busy in their duties and they do not intervene in each other' functions. Therefore, democracy (government) is running very smoothly over there. They are consuming their energies to make country prosperous rather high jacking their own

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[1080]'The **doctrine of necessity'** is "the basis on which extra-legal actions by state actors, which are designed to restore order, are found to be constitutional. The maxim on which the doctrine is based originated in the writings of the medieval jurist Henry de Bracton and similar justifications for this kind of extra-legal action have been advanced by more recent legal authorities, including William Blackstone." (M. G. Singh, *What is Doctrine of Necessity and its Sordid Connection with Pakistan*, November 2015 see also legal dictionary at https://legal-dictionary.thefreedictionary.com/Necessity).

[1081]Dr Richard Blue & Ors, *Pakistan Rule of Law Assessment Final Report.*(Washington, DC: United States Agency for International Development, 2008), 3.

[1082]Ibid.

[1083]Ibid.

institutions or government. Resultantly, Indian democracy is one of the best democratic societies of the World. In addition to this, India is also member of BRICs.[1084] This type of achievement is possible when all state organs /institutions work in their limits to run the state smoothly, which creates certainty and builds the confidence of its citizens as well as international communities. On the other hand, it creates uncertainty and non-confidence of its citizens as well as international communities, like in Pakistan. Hence, India is at best position as compared to Pakistan to establish legislative as well as judicial jurisprudence including law on liability of the State and its public servants. For instance, "the Indian Law Commission" in its first report, 1956 recommended that the state servant should be liable for its tort actions committed negligently even during its duty.[1085] They felt this need quite after 9 years at the same time when Pakistan just made its constitution in 1956. It is surprising fact that after 61 years of this report, the researcher felt the need and is doing research on this topic in hand in Pakistan jurisdiction. Even then at this position, Pakistan must learn from Indian practices and make laws especially a law which governs the liability of the State servants in law of tort.

As discussed above, the Supreme Court has legitimated again and again interferences by the military into politics through three coups. Throughout history of Pakistan, the domination of the executive over the judicial branch has been obvious at all rank and judges often succumbing to political pressure.[1086] But, in 2005, judicial activism

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[1084] In economics, "**BRIC** is a grouping **acronym** that refers to the countries of Brazil, Russia, India and China, which are all deemed to be at a similar stage of newly advanced economic development. It is typically rendered as "the **BRICs**" or "the **BRIC** countries" or "the **BRIC** economies" or alternatively as the "Big Four"." See further details at: http://www.investopedia.com/terms/b/bric.asp (last accessed at Oct 30, 2017).

[1085] For all other recommendations made by the commission see at the Law Commission of India, *Liability of the State in Tort* (Delhi: Ministry of Law, 1956), 30.

[1086] Dr Richard Blue & Ors, *Pakistan Rule of Law Assessment Final Report* (Washington, DC: United States Agency for International Development, 2008), 4.

started by Iftikhar Muhammad Chaudhry, then the Chief Justice, who started to exercise the '*Suo Moto*'[1087]judicial review powers of the higher courts.[1088] This power could be used by the courts to respond to individual or collective complaints for a broad range of matters that were not being settled down by legal or administrative ways. Article 184(3) of the Constitution gives the superior courts a great deal of latitude to challenge other branches of government for Public Interest Litigation.[1089]

Generally speaking, the principle of judicial independence has been strong in oratory but weak in enforcement. It is mentionable here that Superior Courts in Pakistan have been reluctant to challenge the executive to implement fundamental rights and have not invalidated any main law on account of noncompliance with fundamental rights. Even then, in this time of duration the confidence of the people increased on the courts especially the Supreme Court, speedy justice started easy access to the Supreme Court and State' institutions were called and made liable. Many laws including judicial policy were reformed.[1090] But the subject under consideration was not taken to observe.

There are four major historical forces emerge here which created the existing body of law and legal systems in Pakistan such as: (i) British colonial rule;(ii) intermittent democratic

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[1087] '*Suo Moto*' was initiated in the case of *Darshan Masih* vs. *The State of Punjab (Pakistan)* (1990) S.C. 513 . "Its meaning is "on its own motion" and is a Latin legal term, approximately equivalent to the English term, *suasponte*. It is used, for example, where a government agency acts on its own cognizance, as in "the Commission took Suo Moto control over the matter."(Collins Dictionary, s.v. *"Suo Moto"*,https://www.collinsdictionary.com/submission/8861/suo+motu (last accessed at January 1, 2018)). It should be noted that following the Indian example, the Supreme Court of Pakistan had established in 1997 the power for itself to initiate 'Public Interest Litigation' on its own accord under Article 184(3) of the Constitution.

[1088]Articles 184(3) and 199 of the Constitution of the Islamic Republic of Pakistan, 1973, vest judicial review powers in the Supreme Court and the High Courts, respectively.

[1089]The Constitution of the Islamic Republic of Pakistan, 1973. Article 184 (3) & 199.

[1090]Dr Richard Blue & Ors, *Pakistan Rule of Law Assessment Final Report.* (Washington, DC: United States Agency for International Development, 2008), 5.

law making;(iii) military era and;(iv) Islamic legal system.[1091]These four forces are being discussed as following:

i) Pakistan, being British colony, inherited a body of civil as well as criminal procedural laws from British that are still a main source of law in courts at present in the country for instance, "the Civil Procedure Code, 1908" and "the Criminal Procedure Code, 1898".

ii) Pakistan has alternated between democratic and military regime legislative. Pakistan, though, started its independence as an autonomous democracy, under "the Government of India Act, 1935" until the first constitution, 1956 herein. The army had taken over in 1958 for the first time, starting a tortured history of swings between intermittent period of elected governments and army regime. In the seventy years history of Pakistan, it has managed to maintain a democratic elected government merely for 21 years. There are three constitutions (1956, 1962, and 1973) which have been made so far in which 25 amendments also have been made in this limited span of time.[1092]

The main amendments are generally related to: a) shifting the powers to a very strong executive or president (these are under military era) or; b) back to a parliamentary system with a Prime Minister as the chief executive officer (these are under civil governments). Resultantly, the contest between legislation made by military and parliament regimes has most probable added to a perception of the legal system of Pakistan as incoherent, confusing and inconsistent in nature.[1093]

[1091]Dr Richard Blue & Ors, *Pakistan Rule of Law Assessment Final Report.*(Washington, DC: United States Agency for International Development, 2008), 7.
[1092]For updated Constitutional amendments see at http://www.pakistani.org/pakistan/constitution/.
[1093]Dr Richard Blue & Ors, *Pakistan Rule of Law Assessment Final Report.*(Washington, DC: United States Agency for International Development, 2008), 7.

However, apart from the confusion, contradictory and overlapping Acts, one thread appears to run continually through the many of laws of Pakistan after its independence, whether passed under military or democratic regimes: the main focus on 'rule by law' rather than rule of law has been sustained.[1094]

This, in turn, very likely adds to a point of frustration that the legal framework does not give the basis of justice and may be an adding factor to justice delayed in the country. Basically, these three important forces (discussed above) have in complex ways produced a legal framework that is hard to apply and, additionally, which is perceived by several citizens of Pakistan as an obstacle to justice.[1095]

iv) A fourth and important force is the Islamic laws. How to accommodate Islamic law with the secular tradition of English law has produced challenge for efforts to devise a legal framework extensively accepted by all in the country.[1096] As, the Islamization plan of laws developed principally in the 1970s through the 1990s, fueled in big element by the creation of the *Shariat* Courts[1097]and the text of the *Hudood* Laws. But recently, a wide critique of the legal framework from an Islamic perspective has emerged. For

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[1094] For example, "Musharraf in November 2007 amended the Army Act of 1952 to permit for the court-martial of civilians, the list of offenses for which civilians may be tried comprised many draconian laws which included statutes adopted under military and civilian eras, for instance the Security of Pakistan Act, 1952; the Prevention of Anti-national Activities Act, 1974; Anti-terrorism Act, 1997. Other such laws now in force include the West Pakistan Maintenance of Public Order Ordinance (1960) and certain provisions of the PPC: 121 (waging or attempting to wage war or abetting waging of war against Pakistan), 121A (conspiracy to commit offences punishable by Section 121), 122 (collecting arms, etc., with intention of waging war against Pakistan), 123 (concealing with intent to facilitate design to wage war), 123A (condemnation of the creation of the state and advocacy of abolition of its sovereignty), and 124A (sedition)."(Dr Richard Blue & Ors, *Pakistan Rule of Law Assessment Final Report* (Washington, DC: United States Agency for International Development, 2008), 8).

[1095]Ibid.

[1096]Particularly, concerning family relations, commercial transactions, crime and its punishment and inheritance.

[1097]In Pakistan, the Federal *Shariat* Court and the *Shariat* Appellate Bench of the Supreme Court are appellate courts. In judicial hierarchy, the Federal *Shariat* Court is a step above the High Courts, on whom its rulings are binding. Appeals from FSC's decisions lie to the *Shariat* Appellate Bench. All issues under the *Hudood* Ordinances and the *Qisas & Diyat* laws are tried before the criminal trial courts (Sessions Courts). Muslim personal law issues (family and inheritance) are tried before civil courts. Appeals lie to the Federal Shariat Court." For further details see at http://www.federalshariatcourt.gov.pk/.

instance, criticism is made on the *Hudood* laws as well as other codified Islamic laws for the infringement of human rights in consequence of these laws and their departure from classical Islamic laws.[1098]

In this regard, an issue that courts in Pakistan are coping with is the difficulty to apply Islamic legal rules within the framework of a Westernized legal system. As in classical period, the inherent pluralism of Islamic law made possible for a Muslim subject to appear and opt the body of law that would be applied in his case by the *qazi*. For instance, somebody who belongs to the *Hanafi* School could require that in a family issue the decisions of *Hanafi jurists* be applied. The difficulty occurs when a court in contemporary time, while laying down rules of universal applicability, is dealt with divergent *fiqh* decisions. For example, the High Courts, which are not the *Shariat* Courts, notoriously attempted to make decisions whether an adult female can get married of her own accord or whether she needs the consent of her *wali* (her parents or guardians). But the difficulty occurred for the reason that a marriage held without the consent of *wali* is void under the *Hanbali, Shafi'* and *Maliki* schools of *fiqh*, but is valid under the *Hanafi* and *Shiite fiqh*. In such kind of a case, it is very difficult for the court to pick and choose from among the different positions and consequently opens it up to criticism from all sides.[1099]

Similarly, practice of judges in lowers courts is mentionable here. For example, the crime of theft comes under "the *Hudood* laws" (Islamic law) and "Pakistan Penal Code, 1860". The punishment under *Hudood* laws is wipes and cutting of hands, whereas, in "Pakistan Penal Code, 1860" is imprisonment and fine. It is surprising fact

[1098]Dr Richard Blue & Ors, *Pakistan Rule of Law Assessment Final Report.*(Washington, DC: United States Agency for International Development, 2008), 9.
[1099]Ibid.

that judges choose and apply only "Pakistan Penal Code, 1860" and don't apply the *Hudood* laws, cutting of hands. Therefore, not a single example can be found in the history of Pakistan imposing and implementing the *Hudood* punishment for theft, cutting of hands. Why judges do not choose and apply Islamic provision and choose only "Pakistan Penal Code, 1860"?

There may be some possibilities such as: there are two options to apply one is Islamic law and other is "Pakistan Penal Code, 1860". Islamic provision is difficult to implement due to pressure on judges national and internationally, fear to judges, whereas "Pakistan Penal Code, 1860" is easy to apply. But these are no solid reasons for not applying the *Hudood* laws. For this purpose, there must be only one law because the existence of both creates confusion and contradiction. The existence of *Hudood* provision otherwise seems just like the teeth of elephant in Pakistan legal framework. It is submitted that there must be only one law that is *Hudood* laws in this regard. The non-implementation of this provision contributes in theft crimes which can be decreased by applying it in true letter and spirit. For example, the impact of implementation of this provision can be seen in Saudi Arab, where crime ratio is very low.[1100] Its implementation is not only a violation of human rights but it protects also the rights of the society in large. The impact of its implementation (cutting of hands) can be realized exact the next day of its implementation, as the social media is on every door and hands.

The state should show the intention to implement it and judges should also take bold steps in this regard. For this purpose, the *Shariat* Court by playing its role must take effective steps.[1101] Principally, the *Shariat* Court is empowered to review any law for

[1100]A good statistics recorded can be seen at https://knoema.com/atlas/Saudi-Arabia/topics/Crime-Statistic.
[1101]Further see its role at https://www.federalshariatcourt.gov.pk/.

consistency with 'the injunctions of Islam' and declare any inconsistent law to be null and void, but in practically, the court could use these powers in such a mode as to dictate to the legislature what Islamic law provisions would replace the voided legal provisions. This shifting discourse on the Islamization of the law forms, along with the constitutional crises and frequent shifts in the locus of authority, provides the backdrop for the current state of the rule of law in Pakistan.[1102]

On the other hand, India is a secular state and has only one state law to apply, which is common law. Therefore, judges are not confused for the reason to which law should be applied. Consequently, their most of the rulings (discussed above) are very encouraging; thought provoking, innovative approaches applied such as constitutional tort, well applied law and developed judicial jurisprudence. The main factor is that they are very clear in applying laws as compared to judiciary in Pakistan.

Further, political will is one of the fundamental factors for any development in the state including legislation. This principle can be applied for the development of law on tortious liability of the state and its public servants which is linked to public at large. Priorities and interests of the state functionaries and politicians are something different from the consideration of the poor people related issues.

Situation of rights of the citizens (above discussed) in Pakistan is not at a good position and, reveals that neglected areas are directly link to poor community of the country for instance food, health, railways, justice or police. It seems that it is not political will of the state to make law in which they become accountable, responsible or liable to its negligent acts done against the citizens.

[1102]Dr Richard Blue & Ors, *Pakistan Rule of Law Assessment Final Report* (Washington, DC: United States Agency for International Development, 2008), 11.

Discussing about food, which is basic necessity of every human being as it links to the life. One can imagine that food is not a fundamental right in the Constitution of Pakistan. Issue to be analyzed is that why it is not included in the chapter of fundamental rights? It seems that it is not the priority of the legislatures/parliamentarians. As legislatures/parliamentarians are not ordinary people. They are landlords and business men. They eat from their mess or lavish dining. Therefore, they cannot feel the pain of hunger. Resultantly, they have no concerns to make it fundamental right, make law or discuss the problem in parliament. No one can even read in newspaper or listened on TV news in the history of Pakistan that a parliamentarian or his wife with her children has committed suicide due to with hunger.

On the other hand, there are several incidents happing in Pakistan where a mother kills her children first and then commits suicide (as above mentioned these incidents in food portion, chapter 2).

Food is basic necessity of every human being regardless his cost, creed, colour, tribe, area, language and religion therefore, state must take it seriously. Pakistan, being an Islamic State, has most responsibility related to this issue. Islam gives most importance to right to food as well as clothe and shelter. In a very beautiful and eye-opening *Hadith*, the Prophet (PBUH) states that no one right is so important than food, cloth and shelter. In another place He (PBUH) states, hunger can lead to even *kuffer*.[1103]If this *Hadith* is followed in true sense and incorporated in our laws or state policies, the issue of hunger can be eradicated and poor mothers can be saved from suicide along with their children in any state especially Pakistan. As Islam gives the importance to the basic needs of the

[1103]These *Ahadith* have been mentioned as well in previous section of food chapter 2 of instant research.

humans rather luxuries as capitalism gives.[1104] Therefore, no any example found from whole of Islamic history where a mother took suicide along with his beloved children.[1105] Serious steps should be taken by the parliamentarians and legislatures to incorporate the right to food as a fundamental right by the amendment in the constitution. For this purpose, Federal *Shariat* Court can play role for compliance with Islamic provisions. In Shehla Zia case, the court also held that everything which is necessary for life is also right to life, wherein food is very basic necessity to survive.[1106] Hence, under the above analysis the article may be included as fundamental right in the constitution of Pakistan which reads as:

> Article 8-B: "Right to Basic Food; every person has right to basic food to survive his life."

This Article will not only help to poor people to get their fundamental right against the state but also eradicate extremism, frustration and comply with Islamic injunctions as well as international human rights law commitments in the country.

Further, to attain food-secure and pro-poor growth of agriculture, there is a need in Pakistan to adopt an inclusive approach towards growing productivity of all foods. Managing food security also needs an understanding about its dimensions; challenges of future of agricultural growth and food security; and impact of agricultural policies on food supply and income and the poor vulnerable in rural and urban areas.[1107]

[1104]"Poverty drives women of South-Asia to suicide under the ugly rule of Capitalism," *The Khilafah,* 1st November 2014,http://www.khilafah.com/poverty-drives-women-of-south-asia-to-suicide-under-the-ugly-rule-of-capitalism/(last accessed at November 9, 2017).

[1105]Ibid.

[1106] For further detail see the case *Ms. Shehla Zia* vs. *WAPDA:* (PLD 1994 SC 693).

[1107]See the research by Munir Ahmad and Umar Farooq "The State of Food Security in Pakistan: Future Challenges and Coping Strategies," *The Pakistan Development Review* 54, no. 2 (Winter 2010): 903-923.

Similarly, health is also most important for a healthy and prospers life of the citizens. One the other hand, it is most neglected area in Pakistan. The current situation in public health sector shows that state is not much serious to take up the situation. As it is related and utilized by the public and not by the parliamentarians or legislatures therefore, it seems they do not have political will to develop or make laws to develop.

The situation becomes more miserable especially in emergency cases. For example, recently there were two very miserable, critical, eye opening and shameful cases in the same week in Lahore, Pakistan. In first case, on Tuesday, a mother gave birth outside the Tehsil Headquarter Hospitals Raiwind, Lahore (Punjab) after being denied entry into hospital.[1108] In second case, on Friday quite after 2 days of the first case, woman gave birth on the stairs of Lahore's Sir Ganga Ram Hospital after being denied entry for not possessing the required hospital card.[1109]

Just compare this poor soul with another lady lying on a plush bed in a most advanced hospital in the UK getting treatment on government expenses or a senior civil servant getting treatment abroad on government expenditures. Such incidents are enough to realize the performance of Ministry of Health and accountability.

This research submits two solutions to minimize the problem which are: (i) they must be the people those who feel the pain and; (ii) they must be accountable for their negligent acts. This instant research is also an initiative for our second suggestion purposed herein. For second suggestion, the parliamentarians must use the public health

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This research paper traces the pathways to achieve food and nutritional security for a growing population in Pakistan but it does not discusses legal and rights based perspectives.

[1108] Ibid.

[1109] For further details please visit: https://www.dawn.com/news/1365235/woman-gives-birth-in-ganga-ram-underpass (last accessed at October 20, 2017).

facilities or hospitals in the same line as the citizens. At this stage, they will feel the taste of pain and, resultantly they will upgrade the health system ultimately.

Similarly the situation of the railways is not different from the above discussed issues. It is not political will to develop the railways because elite class of parliamentarians themselves or their families do not use railways to travel. They only use their private plane or state provided VIP transportations with heavy protocols. There is also discrimination by the police and justice sector to handle the ruling elite class of the country.

After visiting the fields which are related to public, now this research can identify the important issues where parliamentarians have political will or interests and they took and take the steps to develop therein. For example, there are 25 amendments in the Constitution of Pakistan, 1973 up till now.[1110] It is very surprising fact that all of them are related to the parliamentarians and their powers. There is no even single amendment related to our discussed issues in this research. For example, the government had pledged to made laws under its "Action Plan for Human Rights, 2016" regarding torture, domestic violence, Hindu and Christian marriages, protection of women and children, compulsory vaccination, justice system reforms and custodial deaths. The government presented merely five pieces of legislation in National Assembly and Senate which may be classified as human rights matters. This legislation was related to the protection of child against sexual abuse, reforming justice system, censuring sectarian and religious hate-

[1110]See for further updated details regarding constitutional amendments at: www.pakistani.org.

speech and Hindu marriages. However, only one of these legislative proposals could be made to-date regarding child protection.[1111]

This example shows the interests of the parliamentarians to consider the issue. It reveals that political will also undermines the development of law. It is up to the state that to which it gives priority. The subject in the instant research is public and accountability of the state in which, both of them do not come in interests of the state. Therefore, tortious liability of the state law could not become the priority and interests of the state, ultimately could not develop to till date. Again, instant research is initiative for the accountability of the state/public servants and, to protect the rights of the citizens against the state and its public servants.

Another important factor for non-developments is on one hand unawareness by the parliamentarians of their constitutional duties and misconception by the citizens on the other hand.[1112] These general misconceptions regarding the duties of parliamentarians constantly discourage the actual role of legislative body which eventually undermines the true strength of democracy.[1113]

[1111] Similarly, "recently the joint sitting of the Parliament has passed legislative proposals on rape and honor-killing submitted by the Private Members. In the Senate, these proposals initiated by previous government but still are pending. It is mentionable here that the parliamentarians introduced 23 bills in the Senate and 30 in the National Assembly related to the protection and welfare of children, women , minorities, disabled citizens and fundamental rights of citizens but unfortunately any of these Private Member bills has not been passed by the National Assembly so far. It is also mentionable here that besides legislation, the Parliament has passed 53 Resolutions, held 19 discussions, asked 373 Questions and took up 15 Calling Attention Notices on the issue of human rights." (Free and Fair Election Network. "*Human Rights' Issues in Parliament June 1, 2013 - November 30, 2016*," (Islamabad: FAFEN. 2016). 2,3).

[1112] "*Responsibilities of Elected Representatives*", 8. See further details at: www.pakvoter.org (last accessed at Jan 1, 2017).

[1113] In this regard, there are certain reasons identified which hinder the legislation process as following:

"i) Election campaign is started by the candidates of all level by attending the funerals and weddings of the voters. In order to enhance its own influence, extended family system supports the political campaigns of the candidate. Corner meetings to gather the large number of people are arranged and much money is wasted for this purpose. In this race, the party agenda is pushed into corner and memorable matters are discussed to rally the voters;

ii) Candidate is expected to tackle all public demands ranging from foreign policies matters to the maintenance of streetlights; due to unawareness of the voters for the difference of duties among the

As legislature is an important organ of the state having important duty to make laws for the protection and promotion of the citizens' rights. But unfortunately, in Pakistan, politicians as well as people are not fully aware of the significance of the constitutional and legal duties of elected representatives in all three different tiers of government (local, provincial &federal).[1114] This is because of repeated intervention of military in electoral process and complete lack of civic education particularly regarding democracy and electoral process. Throughout military rules, the constitution remained in abeyance; therefore, they deliberated elected representatives into development task rather in legislative process. This ambiguity concerning responsibilities of elected representatives also effected into non-performance of legislators.[1115]

Further, legislators themselves ignore their actual duties of at federal and provincial levels, like legislation, accountability of executives, policy formulations, budget making, and raising the public concerns in assemblies. Citizens, whereas, force

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candidates all three levels. Therefore, candidates publically make promises in order to win and get help that once they assume power; they will resolve all matters, whether that may or may not lies purely within the sphere of their duties or domain. The expectations level of the voters is raised once candidate comes to the power. As a result, these elected parliamentarians consume most of their energies to get development funds to satisfy the voters of the constituency;

iii) Parliamentarians belonging to ruling party are frequently discouraged by their relevant political party to raise matters of public importance, because the position of government could be damaged;

iv) They, in general, do not attend the regular sessions of committees to review, discussion and passing of annual budget because they are frequently busy in appeasing their voters in unimportant nature of matters at concerned constituency;

v) It is expected by the voters from their elected representative to resolve their clashes at street level, police stations, litigations, and assistance for getting their child admission in desired institution, help in jobs and attending weddings and funerals;

vi) Legislators are expected to perform actions, which are purely in the sphere of local government such as, sewerage matters and removal of encroachment, maintenance of streetlights and installation of water filtration plants, etc. These expectations push the representatives to remain busy with the local activities rather than exercising their actual duties;

vii) The performance of representatives is evaluated by the voters (that matters to get votes for the next time) On the bases of local level engagement and;

viii) Finally, voters do not appreciate for what legislatures have delivered for legislation or their level of output in Assemblies or as a member of a standing committee." *("Responsibilities of Elected Representatives"*, 8, 9.

[1114]Ibid.

[1115]Ibid.

and expect from legislators to perform the duties, which are not lies in their domain and, basically entitled to local government representatives. These expectations push the representatives to remain busy with the local activities rather than exercising their actual duties. As a result, these elected parliamentarians consume most of their energies to get development funds to satisfy the voters of the constituency.[1116] Therefore, the identified causes for the subject in issue are needed special attention to aware both the parties and, made liable and responsible especially to the parliamentarians for not making the effective laws and protect the rights of the citizens. This, ultimately, can play effective role in diluting the perception of people regarding the clear constitutional and legal duties of elected representatives at all level.[1117]

The role of civil society to push the government for developments especially to the legislatures for new legislation is also important to discuss here. We are living in an era where the state alone cannot tackle the heavy plan of development. Therefore, other sectors are encouraged for working in partnership with the state for the attainment of developmental objectives. Civil society is one of those new arrivals on the scene of partnership for development. Its role cannot be overlooked in the development of a State in the contemporary age. It, in democratic field, forces the undemocratic factors to follow democratic culture and custom in a given society. It keeps a vigilant watch on the activities of the state organs such as legislature, executive and judiciary. Further, it criticizes to those organs which misuse its authority or contravenes the constitution or interfere with the activities of other organs of the State.[1118]Further, it functions within the

[1116]Ibid.
[1117]Ibid.
[1118]"Civil Society and Parliament". A note prepared by Blue veins available at: http://blueveins.org/assets/publications/publications_pdf/civil_society_and_parliment.pdf; Lindiwe

limits of law and works in the public sphere to make the State responsive, accountable and transparent and controls it to not transgress its limits fixed by the constitution.[1119]

In Pakistan, civil society has also played a role in the promotion and protection of democratic culture and tradition.[1120] For example, it forced the ruling class to make "the Objectives Resolution, 1949" as well as the first "Constitution of Pakistan, 1956". It also compelled General Ayub Khan to resign on increasing the sugar prices; the civil society came forward in open protest and demonstrations in the country. Similarly, Z.A. Bhutto became a public leader due to the efforts of the civil society. The public was so impressed from him that in public meetings, public responded to his motto and speeches. His democratic ideas had been supported by the civil society. The government of General Zia-ul-Haq was also pressurized by the political forces of the civil society. The political forces gave him a tough time during his military regime. Likewise, the role of the civil society is more evident during Musharraf era. It was the civil society that compelled Musharraf to resign from his office. The civil society criticized greatly to General Pervaiz Musharraf on electing himself as a President of Pakistan by so-called referendum.[1121]

In addition, on deposing the judges of the Supreme Court of Pakistan by the Musharraf, the civil society especially the associations of lawyers started a huge movement for the restoration of those judges. Lastly the associations of lawyers were succeeded to restore them. This movement of lawyers became a milestone for an

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Maseko, "Parliament, Democracy and Civil Society" (paper Delivered at Gauteng Provincial Legislature CPA Post Election Seminar for the Parliament of Lesotho, Maseru, Lesotho, September 15-19, 2013); Civil Society Participation in Egypt see at http://www.zef.de/fileadmin/webfiles/downloads/projects/politicalreform/Civil_Society_Participation_Egypt.pdf. (last accessed at Jan 1, 2017).

[1119] Fakhr-ul-Islam& Farmanullah, "Civil Society and Democracy in Pakistan," *J.R.S.P* 52, no.1 (January-June 2015):258. This research paper discusses that how civil society played its role in the promotion of democratic tradition and culture in Pakistan.

[1120] Ibid., 261.

[1121] Ibid., 258.

independent judiciary in the country, which is the basic requirement of a true democracy.[1122]The associations of lawyers are very significant but are only one constituent in the overall effort for democracy in Pakistan. To maintain the movement, they must gather the support of other groups of civil society.[1123]

The situation, whereas, is still in the early phases in Pakistan, where numerous factors obstruct the effectiveness of participation of civil society. Civil society has been rising more for the past two decades in different areas of social life. It has been focusing on human rights particularly minorities, women and social development of rural communities.[1124] However, its fresh focus is on rule of law, representative government and democracy as a universal social importance. For instance, recently civil society has contributed to pass two bills on women protection and honor killing.[1125]But the law like liability of state has not been considered by the civil society. The two bill passed are specific to a group that is women, whereas our issue in consideration is related to all public interest including women. The common point of collaboration between civil society and parliament is to draw round their fundamental activities and establish their linkages. In which one of the fundamental functions of both is policy development for the subject.[1126] The interaction between the both is referred to in many states as part of the struggles to improve the democracy; struggle which aspires to widen; view to increase and refine the interplay between civil society and parliament, with a view to achieving a

[1122]Ibid., 262.
[1123]Ibid.
[1124]"Civil Society of Pakistan: Contribution, Impact, Challenges and Way Forward," Samson Salamat, Center for Human Rights Education-Pakistan, 1.
[1125]Fakhr-ul-Islam & Farmanullah, "Civil Society and Democracy in Pakistan," *J.R.S.P* 52, no.1 (January-June 2015): 259.
[1126]"Civil Society and Parliament", 4.

higher stage of democracy.[1127] For instance, civil society institute does work closely with the legal committee of the parliament in Georgia. The institute reads the draft bill made, prepares expert views, and distributes by email and in press for their comments on the concerned draft bill.[1128]This kind of practice provides a very good example how civil society and parliament can work to gather to attain definite aims.[1129]This shows an ideal situation, on the other hand, there is lack of trust between the both, especially on civil society in developing countries like Pakistan. For this purpose, it is submitted that civil society should: i) establish credibility as accountable and transparent; ii) give practical expertise to the parliament when and where required in a positive way; iii) carry out lobbying and advocacy as element of its agenda of change and push the matter actively on the radar of parliament and; iv) wide its scope for its consideration the issues related to all public interest like state liability law rather a specific group as women.[1130]

Further, government should institutionalize these processes, become more accommodating and consider to civic sectors, needs and recommendations, which will help it, to make improvements in legislation in the country. Conversely, civil society sector should become more active, develop its monitoring ability and enhance availability of information to the public about these processes in turn to get more influence during legislation process.[1131]

[1127]Ibid.

[1128] See further (George Gogsadze, "Civil Society Participation in the Parliamentary Law Making Process in Georgia" (MS diss., Central European University, 2011). Available at http://www.parliament.ge/index.php?lang_id=ENG&sec_id=1072

[1129]"Civil Society and Parliament" , 5.

[1130]Suggestions given in the paper can also be applied for strengthening the civil society in Pakistan. See Civil Society and Parliament. at 5-6.

[1131]See George Gogsadze, "Civil Society Participation in the Parliamentary Law Making Process in Georgia" (MS diss., Central European University, 2011). This important research is about the civil society participation in law making in Georgia. The research aims to understand law and by which means civil society influences legislation in the country, mainly focusing at cases of healthcare and education.

The main factors discussed above can be easily summarized such as: law developments in Pakistan have suffered from 38 years of military rule with only short lived and intermittent experience with democratic governance, which created instability. Since much of the law derives from "the British Colonial System", it is seen by many as lacking legitimacy. There is/has been also tension between the inherited common law system and the Islamic law based on the *Quran*, army and elected democratic regimes. The weak and influenced justice system and lack of public confidence thus contribute to the cycle of rising violence and extremism. All these factors contributed for non-developments of laws in Pakistan and; which most of these do not exist in Indian jurisdiction. At the same time, a well-defined law including state liability and judicial jurisprudence can be developed by eradicating these factors.

5.5. Conclusion

This chapter made a comparison between India and Pakistan for some important factors such as: (i) nature and scope of constitutional provision of state liability;(ii) post-constitutional judicial rulings;(iii) constitutional tort remedy; (iv) state liability in tort law reforms and;(v) immunity clauses.It reveals that Pakistan could not reform/develop the state liability law in tort due to instability in the country created by martial law and democracy form of government; tension between the inherited common law system and the Islamic law based on the *Quran*, army and elected democratic regimes; weak and influenced judicial system and non-political will of the legislatures in the field. In India, whereas, these hurdles are at minimum level therefore India is at better position on the subject. It concludes that constitutional provision, in both countries, related to state liability is general in nature rather than specific. Judicial rulings regarding state liability

and compensation are liberal and brave made by Indian Higher Courts rather than Pakistan courts. Although constitutional tort remedy is an innovative technique to protect fundamental rights and provide compensation but it is subjective method especially in Pakistan due to non-existence of concrete principles. It, further, concludes that India has made good reforms on the subject, except codification, as compare to Pakistan.

CONCLUSIONS AND RECOMMENDATIONS

Conclusions

The research may point out here in a concise way what has been concluded following with certain recommendations that have been emphasized.

From the above cited detailed discussion, it is concluded that in any contemporary society interactions between the state and the citizens are huge in their number, common in their periodicity and imperative from the standpoint of their result/effect on the fortunes and lives of citizens. Such interactions, frequently, create legal difficulties. Several problems so occurring fall within the area of law of tort. There is no specific legislation in Pakistan which administers the state liability for the torts committed by the state through its public servants, since its independence and; legislature has not given much intention for this purpose. In the absence of specific liability law, Higher Courts have made efforts to balance out the citizens' grievances and the immunity of public servants but they could not prepare concrete principles related to tort liability of public servants of the state under the interpretations of immunity provisions as included in various laws. This led towards the existing confusion about the law and policy on public servant's immunity. On the one hand we have overwhelming immunity provisions along with strange definitions of good faith, which on the other hand do not match with some very encouraging verdicts of the courts.

In general, victims of civil wrongs are compensated through private law/statutes but the Higher Courts of India have developed 'constitutional tort remedy', an innovative

constitutional jurisprudence' based on the need to provide new connotation to fundamental rights of the people of India. Indian Higher Courts have made many liberal and encouraging judgments for the protection of fundamental rights of its citizens. The Higher Courts of Pakistan also practicing this doctrine but do not exercise their statutory powers as freely and liberally as Indian courts are doing, therefore situation is not up to the mark in Pakistan. Although innovative remedy is being practiced in both of the countries but Courts could not develop concrete principles for this purpose. In other jurisdictions of the World, states firstly granted blanket immunity to the sovereign from litigation but they have, though, slowly moved away from this doctrine, dealing with in a different way from India and Pakistan. In Pakistan, due to abuse of executive powers, discretion, misfeasance, and maladministration by the state through its public servants, the existing state of rights are relatively depressing and present a miserable picture of the country. This is alarming situation which creates non-confidence of public on the state, weakens "rule of law" and gives rise violence in Pakistan. The researcher finds, by making comparison between India and Pakistan, that Indian jurisdiction has made many reforms/taken steps to make liable to the state for example; constitutional tort remedy, liberal and encouraging judgments by the courts, reports of the law commission on state liability, 1956, consultation paper on liability of the state, 2001 therefore India, as a whole, is at better position rather than Pakistan.

The following section focuses on the possible actions that are possible in Pakistan in the light of research conducted. This includes general proposals like improvement in the law in general as well as specific proposals directed towards identified remedies. These recommendations are being recorded as following.

Suggestions & Recommendations

The possible remedies against tort committed by the state and its public servants available to Pakistan and the problems to be overcome, begins to emerge gradually as briefly overviewed. To address this issue, certain range of possibilities has been adopted globally which include: (i) strengthening policies and institutions of public interest law; (ii) widening the scope of extraordinary constitutional remedies i.e. writs and; (iii) codification of tort law to check the violations of public functionaries in the area of rights of the citizens. Thus, appropriate legal and policy developments need to be undertaken. The research makes general and specific recommendations, some on the basis of this research whereas some from other studies, as following:

1) The first major recommendation is that 'law of torts' must be revived forthwith. This is necessary not only for dealing with the torts committed by the state but for all torts committed by individuals. The World has moved so far ahead in this area, while Pakistan appears to have taken a backward step from the position where the British left this country and its legal system. The specific recommendations that are made within this general recommendation are as under:

    a. The first specific recommendation is that the law of tort must be codified in a comprehensive manner that takes into account all new torts that have received attention in developed countries. Codification is expected to have a tremendous impact on this law; in fact, the impact might be revolutionary. This is also expected to have a healthy effect on the legal system as a whole. The proposed Act, modeled on the lines of "Federal

Tort Claims Act, 1946" (US) and "Crown Proceedings Act, 1947"(UK), should cover the grave aspects of strict and vicarious liability, information disclosure, executive discretion, an enabling procedural law, to control the administrative powers on the basis of reason *vis-à-vis* discretion;

b. The other specific recommendation in this area is the immediate regularization of immunity/good faith clause. This clause has been regularized in the entire common law world; only India and Pakistan are still clinging to this old idea. Therefore, it is recommended that such protection clauses should not extend to negligent acts however honestly done. The regularization of this clause may encourage the public for their rights, which is something that is critically needed in Pakistan. This step is likely to secure the rights of the poor people very effectively;

2) The courts, until the enactment of an Act, must carry on the moderate interpretation followed in the trend setting judgments and eliminate the distinction between 'sovereign' and 'non-sovereign' functions. So as to put the law in its suitable place, the sovereign immunity defense must be made limited to the area of an 'act of state' only. In all other circumstances, where the state is agreeable to the jurisdiction of municipal courts, the sovereign immunity defense must be unavailable.

3) The other major recommendation here deals with the principles of compensation awarded in the subject as under:

a. As in Pakistan, same like in India, the Higher Courts under Article 184(3) and 199 of the Constitution are awarding compensation in writ applications in violation of fundamental rights of the citizens by the State (public servants). The new remedy is thus to be welcomed as it would go a long way in providing relief to victims of violation of fundamental rights. The research implied that the Supreme Court in its great effort of fashioning new remedies against governmental lawlessness has evolved constitutional tort remedy wherein compensation is awarded to the victims for violation of fundamental rights. This is being done without refinement of the principles of liability or form of remedy. Therefore, it is suggested that without leaving it to be shaped by the judiciary, an enforceable right to compensation for violation of fundamental rights be incorporated in the Constitution in the form of Article 8-A, which shall read as under:

"Article 8-A. Right to Compensation: Anyone who has been the victim of violation of fundamental rights shall have an enforceable right to compensation."

b. The courts have not developed concrete doctrines to quantify compensation for infringement of fundamental rights. It is recommended that the 'voting rights model' be adopted because the sufferer of unconstitutional conduct may not constantly suffer actual injury;

c. The investigation of the Supreme Court and High Courts judgments reveals that the courts are pleased with award of compensation against the state for breach of fundamental rights. The liability is imposed on the public servants only on some circumstances. It is recommended that personal liability be imposed in appropriate cases in turn to make the message of liability to percolate through the minds of public servants. This will deter the public servants from infringing fundamental rights with impunity. In this regard the *cumul* doctrine of French may be adopted to share out the liability between the State and the public servants;

d. When the liability is imposed on the public servants then the injured party has to face the difficulty regarding recovery of compensation. Rather than expecting the injured party to rely on lengthy procedures, it is recommended that the state may be held transiently liable with a right of indemnity against the public servants;

e. Further, in number of cases compensation is awarded from public funds which give moral boosting to erring or corrupt officials. Due to this reason, it is submitted that the order for compensation must be made from their salaries and not from public exchequers.

4) The general recommendation is related to "Public Interest Law" (PIL) which deals with the issues of public interests.[1132] It seeks to emphasize the issues of social interest concerning society or its specific group which are usually ignored by the political process. Its broad themes include access to justice for poor and deprived sections of society, questions of administrative malpractice, consumer protection and environmental protection. It is alien to legal system of Pakistan and it could not be linked with the notion of accountability of the public servants of the state. As the bar councils and law schools in some countries have also contributed considerably but this aspect is absent in Pakistan but no institutional system could be established over the years to begin and strengthen the concept of PIL in Pakistan. Hence, this gap should be filled like other countries and institutional system should be developed to initiate and strengthen the concept of PIL in Pakistan.

PIL is deemed to be an effective remedy to a victim against the misfeasance of public servants of the state. Its purpose is to promote the public interest which mandates that infringement of legal or constitutional rights of plenty of people, oppressed, socially or economically deprived should not go without remedy. On the other hand, it has also come to be believed and criticized broadly that judiciary has begun to invade the exclusive legislative and executive domains in the name of public interest. In this regard, it is recommended that:

a. Specific provisions of the constitution should prescribe specific principles for the exercise of public interest litigation jurisdiction

[1132] For more details see at: http://www.pili.org/; http://www.cepil.org/; http://www.acjnet.org & http://www.ptla.org/international.htm.

by the Supreme Court of Pakistan under Article 184 (3) of the constitution, so that uncertainty ends and litigants, lawyers and judges know the principles involved;

b. The Supreme Court of Pakistan should add a separate chapter on public interest litigation in the Supreme Court rules, indicating the procedure regulating the exercise of *suo motu* jurisdiction and;

c. The judiciary must ensure that exercise of *suo motu* jurisdiction does not encroach upon the jurisdiction of other institutions. The ultimate aim of public interest litigation should be that the relief granted should not weaken democratic institutions.

5) "Administrative Procedural Law" (APL) is very important in making public functionaries accountable within a given timeframe and system. The purpose of 'APL' is to attain and promote good administration and access to justice in administrative affairs in the state. Many countries have passed Administrative Procedure Acts or Codes to take care of administrative actions in various subjects.[1133] Currently, the rights of an average Pakistani are more directly affected by the decisions of administrative agencies than by the courts in the country. Although civil and criminal procedure codes give procedural details of litigation but no procedural law has been designed for administrative purposes. At

[1133]For statutes and experiences of Administrative Procedure Laws in different jurisdictions see www.law.fsu.edu/library/admin/ (USA); http://www.unpan.org/ (Greece, Latvia and many other jurisdictions).

present in Pakistan, the whole administrative law is enacted rather haphazardly with a variety of ambiguities, inconsistencies and uncertainties.

Thus, it is recommended that an APL to be made to bring in a constituent of certainty, consistency, uniformity and accountability in the entire process of administrative actions in Pakistan. Codifying APL these general principles should be followed: recognition of citizen' right to petition; observance of the rights of citizens ; equality; rule of law; transparency; accountability; reasonable application of the norms of law; redress to citizens' grievances through mechanisms other than the available lengthy procedures; right to compensation; access to information and other procedural details including but not limited to, public hearings and consultations, evidence-related requirements, jurisdiction and execution. An enactment on APL will make sure improved grievance redress to citizens.

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