

# Citizens versus State



## **Public Servant Immunity & Tort Law Reforms in Pakistan**



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**Public Servant Immunity and  
Tort Law Reforms in Pakistan**

*Insaaf Series*

TheNetwork Publications

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Tort Law Reforms in Pakistan  
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## Preface

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The crisis of governance in Pakistan is multi-dimensional and complex. Issues confronting citizens - from everyday administrative matters, such as basic services, to citizens' rights under a democratic dispensation, to underlying structural inequities of resource distribution - are manifold and impinge on the social fabric in a manner that can enable or disable social development and poverty alleviation efforts. And the situation shows no signs of improving.

One critical reason for the alarming status is the lack of trust of the citizenry in the system of justice - constitutional, criminal, civil and administrative. Without a basic trust in the state's position as final arbiter and underwriter of justice, citizen-citizen and citizen-state relations break down, as does the social contract holding a democratic state together. The Pakistani state has proven itself unable to restore the fractured social contract. That is partly because the social contract that constitutes a state relies, in no small part, on the active adoption by the state of certain collective responsibilities, including good governance and the provision of justice. Citizens are therefore 'consumers' of justice provided by the state, even though they are not 'customers' of justice in the marketplace. And, as consumers of justice they have certain rights that need to be protected and promoted. The recognition and exercise of rights is a fundamental requirement for a democracy.

In Pakistan, the recognition of the rights of consumers vis-à-vis justice is far from automatic. Rather, it must be demanded by an informed and active citizenry if the provision of justice is to be reliable and equitable. While efforts to reform the justice sector continue apace, from frequent if meager resource allocations to infrastructural improvements to legislation, these are all focused on correcting the supply of justice. However, the problems confronting the citizenry are not abating, nor are the policy measures being translated into relief for citizens: witness the growing rate of crime, increase in red tape, delay in decisions of courts, rising costs of legal aid, reports of corruption and excessive use of authority by officials, and a jump in the complaints lodged by citizens on administrative matters.

A critical problem, therefore, is that citizen-consumers are not engaging with the state to demand access to justice, to hold public officials accountable, to obtain redress for their grievances, to create a litigation environment conducive to blind justice, and so on. It is in this context that TheNetwork for Consumer Protection, a civil society organization, undertook to bridge this gap between citizens and the state, and help empower the citizenry, by providing information and facilitating platforms of engagement. TheNetwork's initiative includes a series of issue papers, a monthly newsletter on critical issues related to consumers' access to justice, a series of policy meetings, and a website providing basic information to citizens and facilitating their complaints on justice matters ([www.insaaf.org.pk](http://www.insaaf.org.pk)).

This is the first paper under the Insaaf Series, and focuses on Public Servant Immunities and Tort Law Reforms in Pakistan. The paper is intended to generate an informed debate on the issue within and outside the government, and stems from the appreciation that the legal structure in Pakistan in fact disables citizens from holding public officials accountable. It has been prepared by TheNetwork, with extensive working by Hafiz Aziz-ur-Rehman, under the able guidance of the series editor, Raja Ehsan Aziz. I wish to thank the Asian Development Bank for extending the support to bring out this publication.

Ali Qadir  
Executive Coordinator  
TheNetwork for Consumer Protection

## 1. Introduction

The Constitution of Pakistan of 1973 accords the highest place to people's right to justice and rule of law. The Preamble of the Constitution 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". Article 4 of the Constitution states:

*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.<sup>1</sup>*

Article 25 (1) provides that "All citizens are equal before law and are entitled to equal protection of law." The supremacy of the rule of law is a fundamental concept of justice. The rule of law calls for equality before the law and presupposes responsible and accountable exercise of discretionary authority - a key component of good governance.

Doctrine of public accountability is one of the most important emerging facets of good governance. The underlying purpose of the doctrine is to check the growing misuse of power by the administration and public servants and to provide speedy relief to the victims of such exercise of power. Public servant can be held accountable to the people by adopting different strategies such as establishing public grievance redress mechanisms at administrative level and judicial or administrative review of executive decision-making. It is also necessary to rationalize the public servants' immunities and privileges to encourage private tort actions against their misfeasance.

The purpose of this paper is to identify and highlight the gaps in tort law in Pakistan, whereby the citizens-consumers cannot get redress for their grievances caused by the negligent acts and omissions of public servants. Citizens are recognized as consumers who need to be protected against the acts of civil servants under Article 212 (1) (b)<sup>2</sup> of the Constitution. But unfor-

<sup>1</sup> For further details on the subject see *Constitution of Pakistan and Peoples' Rights*, The Network Publications (Second Edition), TheNetwork for Consumer Protection, Islamabad, September 2004.

<sup>2</sup> Article 212 (1)(b) provides: "(1) Notwithstanding anything hereinbefore contained, the appropriate Legislature may by Act [provide for the establishment of] one or more Administrative Court or Tribunals to exercise exclusive jurisdiction in respect of-- "(b) matters relating to claims arising from tortious acts of Government, or any person in the service of Pakistan, or of any local or other authority empowered by law to levy any tax or cess and any servant of such authority acting in discharge of his duties as such servant".

*“ The rule of law calls for equality before the law and presupposes responsible and accountable exercise of discretionary authority - a key component of good governance. A thing shall be deemed to be done in 'good faith' where it is in fact done honestly, whether it is done negligently or not.”*

“ there is a stark contrast in treatment of the citizen-consumer and the public servant under the existing legal system”

tunately since its promulgation in 1973, this clause has not been allowed to operate by Government authorities, which are generally indifferent to the needs and demands of the underprivileged citizens-consumers. The fact of the matter is that existing laws and regulatory mechanisms are more inclined towards protecting and providing immunities to the public servants who often tend to disregard citizens-consumers' rights and concerns while discharging their statutory obligations.

Section 27 of General Clauses Act 1956, a statute applied to the interpretation of all laws including the Constitution, states that 'A thing shall be deemed to be done in 'good faith' where it is in fact done honestly, whether it is done negligently or not'. Care was taken in almost every single legislation thereafter to provide that 'no suit, prosecution or other legal proceedings shall lie....in respect of any thing which is in good faith done or intended to be done by....person under this Act'. Most of the statutes promulgated in Pakistan since independence incorporated this sweeping provision. The result is that no criminal prosecution or civil suit for damages can lie for negligent exercise of statutory power even if it deprives the citizen-consumer of his/her liberty or rights or does damage to his/her property or business. It is patently violative of fundamental rights to equality and to personal liberty and equal protection of the law under Article 25 of the Constitution.

Likewise, there is a stark contrast in treatment of the citizen-consumer and the public servant under the existing legal system. For instance, the Pakistan Penal Code provides for the citizen-consumer that "*Nothing is said to be done in good faith which is done or believed without due care and attention*". On the other hand, 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*". Thus when charged with lack of good faith, a citizen during the British *Raj* was required to demonstrate that he was not negligent. But the official of the *Raj* had only to prove absence of malice, disregarding negligence. The legal position has not changed ever since in post-independence Pakistan despite its own Constitution. The Supreme Court of Pakistan has still not struck down Section 2 (27) of the General Clauses Act and similar legislation which protects negligent officials.

## 2. What is Tort Law

Tort is a "civil wrong" for which the liability arises from the breach of the duty primarily fixed by law; this duty is towards persons generally and its breach can be redressed by an action for *damages*. To put it in more simple terms, tort "liability arises when a person fails to comply with the duty/standard of care through an act or omission which can be either, an intentional act or a negligent act." In torts law the action for breach of *statutory duty* is conceptually separate from the general tort of *negligence*. The action for breach of statutory duty enables the plaintiff to recover compensation for losses brought about by the defendant's failure to comply with a statutory obligation.

In principle, liability in tort attaches to the acts or omissions of a statutory body, local authority or government department and their functionaries (public servants) in just the same way as would be to those of a private person. Contrary to the situation in Pakistan, in democratic and publicly accountable jurisdictions public authorities and their employees do not enjoy general immunity from tortious liability. The Victorian Constitutional theorist A.V. Dicey once noted that: *'the Reports abound with cases in which officials have been brought before the courts, and made, in their personal capacity, liable to punishment, or to the payment of damages, for acts done in their official character but in excess of their lawful authority'*.<sup>3</sup>

In England, the liability of public bodies and public employees in the field of negligence was clearly established in the middle of nineteenth century and then consolidated in a series of actions brought against public utilities and other statutory undertakings for negligent interference with property. The old notion that "the king can do no wrong" was gradually withdrawn and now by virtue of the Crown Proceedings Act 1947, the Crown and his agents are subject to all liabilities in tort.

**Crown Proceedings Act 1947:** Government departments and ministers became liable to be sued for wrongful acts, establishing a doctrine of government according to law. The Sovereign has personal immunity.

Text available on: [www.justis.com](http://www.justis.com)

<sup>3</sup> A. V. Dicey, *An Introduction to the Study of the Law of the Constitution*, Liberty Fund USA, 8th reprint edition (September 1, 1982) p. 193.

<sup>4</sup>VICARIOUS LIABILITY - When one person is liable for the negligent actions of another person, even though the first person was not directly responsible for the injury. For instance, a parent sometimes can be vicariously liable for the harmful acts of a child and an employer sometimes can be vicariously liable for the acts of a worker.

The Act makes the Crown liable for torts committed by its agents and servants - i.e. vicarious *liability*<sup>4</sup> - and for the breach of the common law duties owed by employers and by owners or occupiers of property. The Act further provides for the liability of the Crown for the breach of statutory duty, whenever the statute binds the Crown, and for dangerous operations without negligence on the principle of strict liability.

The liability of the United States for the torts committed by its public servants is governed by the Federal Tort Claims Act 1946 (text annexed). This Act makes the United States liable, respecting tort claim, in the same manner and to the same extent as a private individual under like circumstances.

In India, the Law Commission in its first Report highlighted the need for a comprehensive legislation on the pattern of the Crown Proceedings Act 1947 to fix the tortious liability of the public servants. Two Bills were presented in the Parliament in the light of Law Commission's first report, i.e. 1965 and later in 1967, but both turned *futile*.<sup>5</sup> However Indian judiciary invoked the principles of human rights jurisprudence and evolved the concept of Constitutional Tort<sup>6</sup> to compensate the victims of "Governmental lawlessness".

In Pakistan there is no legislation as such, which governs the liability of the state and public servants for the torts committed. On the contrary, there are various provisions in different laws that shield and protect the public servants for their tortious acts and omissions. Some of these provisions are discussed in the following section.

“ officials have been brought before the courts, and made, in their personal capacity, liable to punishment, or to the payment of damages, for acts done in their official character but in excess of their lawful authority”

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<sup>5</sup> I.P Massey, *Administrative Law*, Fifth Edition, Eastern Book Company, Delhi, 2001, pp. 380-381.

<sup>6</sup> Constitutional tort actions, like their common law counterparts, are generally thought of in terms of their function as monetary remedies. Ideally, awarding damages to individuals who are harmed by a state official's violation of the Constitution compensates for some of the individual's past injury and deters future rights deprivations.

### 3. Who is a Public Servant

The terms *public servant* and *civil servant* have been defined separately under the Pakistan Penal Code 1860<sup>7</sup> and the Civil Servants Act, 1973.<sup>8</sup> Definition of public servant in the Pakistan Penal Code is inclusive and it even incorporates Commissioned Officer in the Military, Naval or Air Force of Pakistan and judges in the category of public servants. This scope has been further elaborated by the higher courts.<sup>9</sup> However this paper does not address the issue of immunity of public servants in the context of this

<sup>7</sup> Section 21 "**Public servant**". The words "public servant" denote a person falling under any of the descriptions hereinafter following namely:

*First.* [Omitted by Ord. XXVII of 1981].

*Second.* Every Commissioned Officer in the Military, Naval or Air Force of Pakistan while serving under the Central Government or any Provincial Government;

*Third.* Every Judge;

*Fourth.* Every officer of a Court of Justice whose duty it is, as such officer, to investigate or report on any matter of law or fact, or to make, authenticate, or keep any document, or to take charge or dispose of any property, or to execute any judicial process or to administer any oath, or to interpret, or to preserve order in the Court; and every person specially authorized by a Court of Justice to perform any of such duties;

*Fifth.* Every juryman, assessor or member of a panchayat assisting a Court of Justice or public servant;

*Sixth.* Every arbitrator or other person to whom any cause or matter has been referred for decision or report by any Court of Justice, or by any other competent public authority.

*Seventh.* Every person who holds any office by 'virtue of which he is empowered to place or keep any person in confinement;

*Eighth.* Every officer of the Government whose duty it is, as such officer, to prevent offences, to give information of offences, to bring offenders to justice or to protect the public health, safety, or convenience;

*Ninth.* Every officer whose duty it is, as such officer, to take, receive, keep or expend any property on behalf of the Government, or to make any survey, assessment or contract on behalf of the Government, or to execute any revenue -process, or to investigate, or to report, on any matter affecting the pecuniary interests of the Government, or to make, authenticate or keep any document relating to the pecuniary interests of the Government, or to prevent the infraction of any law for the protection of the pecuniary interests of the Government, and every officer in the service or pay of the Government or remunerated by fees or commission for the performance of any public duty;

*Tenth.* Every officer whose duty it is, as such officer, to take, receive, keep or expend any property, to make any survey or assessment or to levy any rate of tax for any secular common purpose of any village, town or district, or to make, authenticate or keep any document for the ascertaining of the rights of the people of any village, town or district;

*Eleventh.* Every person who holds any office in virtue of which he is empowered to prepare, publish, maintain or revise an electoral roll or to conduct an election or part of an election.

“Definition of public servant in the Pakistan Penal Code is inclusive and it even incorporates Commissioned Officer in the Military, Naval or Air Force of Pakistan and judges in the category of public servants.”

“Under the National Accountability Ordinance 1999 prosecution cannot be initiated against serving armed forces personnel and judges”

broader definition. There are specific laws and regulatory mechanisms that afford relatively higher immunity to certain categories of public servants. For instance under the National Accountability Ordinance 1999 prosecution cannot be initiated against serving armed forces personnel and judges.<sup>10</sup> Furthermore, Constitution of Pakistan 1973 provides protection and immunity to President, Governors, Prime Minister, Ministers, Chief Ministers and Provincial Ministers.<sup>11</sup> This approach, however, needs to be critically reviewed and dismantled in order to seriously introduce a culture of across the board accountability and good governance in the country.

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<sup>8</sup> According to Section 2(b) of the Civil Servants Act, 1973 "civil servant means a person who is a member of All Pakistan Service or of a civil service of the Federation, or who holds a civil post in connection with the affairs of the Federation, including any such post connected with defence, but does not include - i) a person who is a deputation to the Federation from any Province or other authority; ii) a person who is employed on contract, or on work-charged basis, or who is paid from contingencies; or iii) a person who is a "worker" or "workman" as defined in Factories Act, 1934 (XXV of 1934), or Workmen's Compensation Act, 1923 (VIII of 1923)"

<sup>9</sup> For Example a Minister has been declared a public servant. PLD 1964 Dacca 330 and PLD 1961 Dacca 753.

<sup>10</sup>Section 5 (m) of the NAB Ordinance.

<sup>11</sup> Article 248 of the Constitution states:

(1) The President, a Governor, the Prime Minister, a Federal Minister, a Minister of State, the Chief Minister and a Provincial Minister shall not be answerable to any court for the exercise of powers and performance of functions of their respective offices or for any act done or purported to be done in the exercise of those powers and performance of those functions:

Provided that nothing in this clause shall be construed as restricting the right of any person to bring appropriate proceedings against the Federation or a Province.

(2) No criminal proceedings whatsoever shall be instituted or continued against the President or a Governor in any court during his term of office.

(3) No process for the arrest or imprisonment of the President or a Governor shall issue from any court during his term of office.

(4) No civil proceedings in which relief is claimed against the President or a Governor shall be instituted during his term of office in respect of anything done by or not done by him in his personal capacity whether before or after he enters upon his office unless, at least sixty days before the proceedings are instituted, notice in writing has been delivered to him, or sent to him in the manner prescribed by law, stating the nature of the proceedings, the cause of action, the name, description and place of residence of the party by whom the proceedings are to be instituted and the relief which the party claims.

## 4. Situation Analysis

Before embarking upon the state of tort liability of public servants and the role of immunity clauses, it would be appropriate to recapitulate the plight of citizens-consumers because of abuse of executive discretion, mal-administration and misfeasance of public servants.

Government functionaries have a major responsibility and role in promotion and protection of human rights and the rule of law. It is particularly so in case of law enforcement agencies. The Vienna Declaration (1993) pointed out, "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". But the situation of rights in Pakistan is quite depressing and presents a dismal picture of the state. The situation in justice sector is further alarming in light of the data available on human rights violations in the HRCP annual report.<sup>12</sup> Pakistan's percentile ranking on Rule of Law for 2004 in the World Bank's Governance Indicators: 1996-2004 is 26.1 as against regional average of 34.2 on 0-100 scale covering 209 countries.<sup>13</sup>

### ■ Citizen's Rights and Police

Even though speaking out on atrocities and human rights violations by the police is now a common phenomenon, its redress side still remains in doldrums. Despite all the rhetoric about the police reforms and various new initiatives, public grievances continue to persist and the situation is only worsening. The problems on this front are manifold such as:

- (i) Violation of due process, for instance: denial of access to legal counsel, denial of access to information, torture, failure to advise the detainee on legal rights and fabrication of evidence.
- (ii) Illegal or inappropriate seizure of people in illegal law enforcement raids, unwarranted and fake police encounters, questioning of suspects based solely on ethnic or religious appearance, arbitrary arrest made without a cause, unlawful temporary detention, deprivation of food,

“Pakistan's percentile ranking on Rule of Law for 2004 in the World Bank's Governance Indicators: 1996-2004 is 26.1 as against regional average of 34.2 on 0-100 scale covering 209 countries.”

<sup>12</sup> State of Human Rights 2004, Human Rights Commission of Pakistan, Lahore, January 2005.

<sup>13</sup> Governance Indicators: 1996-2004, World Bank, May 2005  
<http://www.worldbank.org/wbi/governance/govdata/>

water and medical attention.

- (iii) Illegal searches, entry without warrant or consent, and searches undertaken without reasonable grounds for suspicion.
- (iv) Unlawful seizure and/or destruction of property, including seizure of vehicles, personal belongings, money, or documents, and intentional destruction of/or damage to evidential property.

Many of these abuses go unreported, because victims are unaware of their rights, fear police retaliation, are more concerned with immediate issues or do not wish to pursue the complicated and seemingly futile complaint process. Some victims feel that abuse is already written in their fate, just something they perhaps deserve or are even embarrassed to admit that they have been abused. Whatever may be the definition of arrest, the general notion is that the police have the authority to arrest anybody and put anybody anytime in custody and they are not bound to give any reason or justification for that custody or arrest.

According to the Constitution of Pakistan 1973 on arrest or detention in custody, a person is to be told grounds for such action as soon as possible and has the right to consult and be defended by legal practitioner of his/her choice.<sup>14</sup> Furthermore, an arrested person is to be produced before the Magistrate within 24 hours of arrest; any detention beyond this period without the Magistrate's authority is illegal. However, people taken into preventive detention are dealt under separate procedure where authorities can even deny furnishing related documents to a Review Board of High Courts.<sup>15</sup>

“ Many of these abuses go unreported, because victims are unaware of their rights, fear police retaliation, are more concerned with immediate issues or do not wish to pursue the complicated and seemingly futile complaint process. ”

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<sup>14</sup> Article 10 (1) of the Constitution of Pakistan 1973

<sup>15</sup> Article 10 (6) of the Constitution of Pakistan 1973

### Case 1: Guantanamo Bay returnees detained in Adiala Jail, Rawalpindi

Presently, 35 Pakistani detainees captured from Afghanistan in 2001 and repatriated from Guantanamo Bay by the Americans in September 2004 are being held in Adiala Jail, Rawalpindi without being charged or produced before any court since the past eight months. According to the Superintendent Adiala Jail, no case was registered against them and some of them had developed psychological disorders. But he was only following the orders of the Punjab government to keep them imprisoned. They were reportedly being held under a secret law empowering the Interior Ministry to detain suspected "Indian Agents" for up to one year without producing them before a court.

Source: Detailed report by Rauf Klasra, "Runaway terrorist to blame for agony of Pak prisoners", *The News*, Islamabad, May 14, 2005.

Torture, death in police custody and extrajudicial killings are three most problematic areas. The statistics cited from the HRCP *State of Human Rights 2004* are really shocking. Nearly two-third (62.3 per cent) of the accused were either killed in police encounters or escaped justice - indicating prevalence of large scale police brutality, incompetence and corruption. The above data is only of total reported cases during 2004, whereas a very large number of cases go unreported. The actual situation is therefore even more critical. A victim is left with only two remedies, i.e. to invoke departmental / administrative redress mechanisms or to seek redress through the extraordinary judicial remedy such as writ jurisdiction of High Courts. Both of these remedies, if they work optimally, can be best used as a deterrent. What is totally missing is the right of compensation and damages which is left upon the normal tort procedure - an option hardly available to a poor victim.

#### Box 1: Police Encounters: Jan-Dec, 2004

<b>Killed</b>	<b>271 (39.7%)</b>
<b>Escaped</b>	<b>154 (22.6%)</b>
<b>Arrested</b>	<b>257 (37.6%)</b>

Source: *State of Human Rights 2004*, Human Rights Commission of Pakistan.

## **Box 2: UN Perspective on Law Enforcement and Human Rights**

The United Nation's Perspective on Law Enforcement and Human Rights has framed eight Articles for the adoption of law enforcement officials. These should help them to understand their role and functions in the area of human rights protection:

- 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.

Source: [http://www.unhchr.ch/html/menu3/b/h\\_comp42.htm](http://www.unhchr.ch/html/menu3/b/h_comp42.htm)

### Box 3: Police Torture & Human Rights

Right to life and protection from torture is stated in Articles 3 & 5 of the Universal Declaration of Human Rights (UDHR). "Everyone has the right to life, liberty and security of person", says Article 3 of UDHR. Article 5 asserts that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

What would be the case with a person charged with a penal offence? Article 13 of UDHR aptly addresses this question. The article states, "Everyone 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".

International Covenant on Civil and Political Rights (ICCPR) also explains right to life in Article 6 (1): "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."<sup>16</sup>

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) clarifies the responsibility of states in Article 2: "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". Therefore, there is neither scope under the Convention for the justification of torture in any situation nor an order can be invoked from a superior officer or a public authority as a justification of torture.

Apart from these principles, the UN Code of Conduct for Law Enforcement Officials along with the UN Standard Minimum Rules and the UN Body of Principles have set out several important principles and prerequisites for the humane performance of law enforcement functionaries.<sup>17</sup>

#### ■ Delays in Courts: Justice Delayed, Justice Denied

'Justice delayed is justice denied' is a well-known adage. It is not a mere cliché but the general impression of the current state of our judicial system. Speedy justice is not merely an ingredient of the 'right to life with dignity' guaranteed in the Constitution of Pakistan but is also related to 'access to justice', a basic right of every individual. It is a general perception that a large number of civil lit-

"The State shall ensure inexpensive and expeditious justice"

Article 37 (d), Constitution of Pakistan 1973.

<sup>16</sup> Pakistan is not a signatory to ICCPR.

<sup>17</sup> See [www.unhcr.ch](http://www.unhcr.ch) for the abovementioned human rights instruments.

igants spend half of their lives in seeking redress from the court of law. Such prolonged delays result largely from the fact that judges seem to be so hard pressed by the workload that they have to deal with hundred of cases daily. These types of delays are caused by many factors such as seeking of adjournments by the lawyers on minor and frivolous grounds as they are not fully prepared, and inadequate distribution of time by the judges due to large number of cases put for hearing in one day - the number varies from 200 to 230 cases per day. Long, complex and vexatious legal procedures, mishandling of cases by lawyers, and inefficiency within the justice system, are among the common causes contributing to delays.

Pakistan has been rated among the lowest as far as the efficiency of the judiciary is concerned.<sup>18</sup> The system does not place the responsibility of delays and *laches* on anyone and a consumer of justice cannot recover any sort of damages for his loss of time, resources and labour in prolonged and futile litigation. Such delays undermine public faith and confidence in the justice system to secure their lawful rights and interests.

## **Case 2: Azizullah, a victim of blind justice**

Mr Azizullah, aged 30 and married, resident of Allahabad Colony in Karachi, spent nine years in prison without having committed any crime until his release on March 3, 2005 on orders of the Balochistan High Court. He was traveling on a bus from Hub to Nushki via Quetta on January 25, 1996 to meet a friend when police arrested him, accusing him of being a citizen of Myanmar. Speaking at a press conference after his release, Azizullah said he was a Pakistani by birth, his family having internally migrated in pre-partition India and settled in Karachi in 1940. A local court convicted him under Section 14 of the Foreigners' Act and sent him to prison for six months, but the jail authorities did not release him even after he had undergone this illegal sentence. He had appealed to the highest leadership in the country for his release but nobody responded while he went through the ordeal for nine long years in the prime of his life. His lawyer, Ms. Andlib Qasrani belonging to a welfare organization, disclosed that upon their request the Court had ordered an enquiry into the episode. When asked why the Court had not taken any action against those officials who were responsible for 'destroying the life of a young man', she said there were certain legal complications in the matter.

**Source:** *Dawn*, Islamabad, March 4, 2005.

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<sup>18</sup> *Human Development in South Asia 1999: The Crisis of Governance*, (The Mahbub ul Haq Human Development Centre) Oxford University Press, Karachi, 1999, p. 65.

### **Case 3: Afzal Haider spends 18 years in prisons proving 'innocent'**

Syed Afzal Haider, then aged 23 and resident of Pak Patan, enrolled for LL.B. in Wafaqi Urdu Government Law College, Karachi after graduating from FC College, Lahore in Psychology and English Literature. Before moving to Karachi, he had been engaged to the daughter of a close relative. A police officer, Arshad Kamal Kiani, known to his fiancée's family was also interested in marrying her. Upon being refused, since she was already engaged, he allegedly threatened both Afzal and his family with dire consequences.

On February 16, 1987, while Afzal was busy preparing for LL.B. first year exams, Arshad, now SHO at the Artillery Ground Police Station, Karachi along with ASI Khalid Pervez Awan visited him at the YMCA Hostel, where Afzal had been staying since his arrival in the city. According to Afzal, SHO Arshad told that he wanted to put an end to his old grievance against him over the issue of marriage. He invited Afzal to accompany him so they could peacefully sit somewhere and talk out their differences. In the guise of reconciliation, Arshad tricked Afzal to come along. He was taken to the Police Station, brutally tortured and locked up behind bars. A fictitious FIR was then registered against Afzal under Section 13 D for possessing illegal weapons (TT pistol and a hand grenade). He was also implicated in a case of bank robbery that had occurred a year earlier, on January 15, 1986, at Habib Bank, Somerset Street Branch, Karachi.

Afzal thereafter ended up in jail lock up, where he learnt from prison officials of having been falsely implicated in altogether 16 criminal cases, all involving major offences. Afzal was soon moved to a cell reserved for prisoners on death roll, where he was to spend his first two years in jail.

Upon hearing of the his son's ordeal, Afzal's father, a WAPDA employee in Pak Patan came to Karachi and hired Advocate Muzaffar Ali Khan as defense lawyer, who, in view of his client's financial situation, agreed to pursue the case on a nominal fee. From March 2, 1987 to October 14, 1993, Afzal languished in Central Jail, Karachi. The Sindh High Court finally released him on bail on October 14, 1993, only to be re-arrested three months later. This time Afzal was destined for District Jail, Lahore, wanted in a murder case. As the hearing of the case in Lahore was in progress, Faisalabad Police took Afzal into custodial remand and shifted him to Faisalabad, where he had been implicated in a different case. In the Lahore case, Afzal was sentenced to death in November 1995, whereupon he appealed to Appellate Bench of the Federal Shariat Court.

On October 24, 2002, the Federal Shariat Court pronounced Afzal innocent in the Lahore murder case. Proceedings of the Faisalabad case began on June 3, 2002 and by

January 2003 his name was cleared in this case as well. But instead of being immediately released, he was sent back to Central Jail, Karachi, where he suffered for two further years of illegal detention. On December 30, 2004, Afzal learnt that he was pronounced innocent on all counts in cases registered against him in Karachi and his release order had been sent from Karachi to District Jail, Lahore way back in 1998. But Lahore jail officials returned these order insisting that Afzal was no longer in jail, even though they knew fully well that he had been moved to another jail in Faisalabad.

After being falsely implicated in 16 different cases, now 41 years old Afzal Haider, a victim of personal vendetta and criminal abuse of state authority, finally walked out of Central Jail, Karachi on January 24, 2005 upon being proven 'innocent'. He was just as innocent 18 years back when illegally held on that fateful night of February 16, 1987 and condemned to Karachi prison at the age of 23. His adult life and youth, his freedom, and his law studies having been consumed over these 18 long and torturous years in different police lockups and jails across the country. Afzal now intends to complete his LL.B. from where he left in 1987, and hopefully bring justice to those still languishing in the legal 'black hole' of Pakistan's criminal justice system.

**Source: Based on the four-part investigative report in Urdu by Rizwan Ahmad Tariq titled 'Afzal Haider: Guilty or Innocent' serialized in *Jang Sunday Magazine* of April 3-9, April 10-16, April 17-23 and April 24-30, 2005.**

“ He was just as innocent 18 years back when illegally held on that fateful night of February 16, 1987 and condemned to Karachi prison at the age of 23. His adult life and youth, his freedom, and his law studies having been consumed over these 18 long and torturous years in different police lockups and jails across the country. Afzal now intends to complete his LL.B. from where he left in 1987, and hopefully bring justice to those still languishing in the legal 'black hole' of Pakistan's criminal justice system. ”

## 5. Immunity Clauses and Public Servant's Liability in Pakistan

In the backdrop of aforementioned cases, it is a highly frustrating exercise to explore the liability of those who are responsible for the above-referred deplorable state of citizens' rights. Where a citizen-consumer has suffered loss or harm due to a public servant's failure to exercise proper care and attention, s/he is deemed to have exercised the requisite 'good faith' where it is done honestly irrespective of whether it is done negligently.<sup>19</sup> This means that so long as an act is done honestly, the citizen-consumer cannot pursue the matter on the basis of negligence, as a tort action, thus denying him/her an important legal remedy. Moreover, the 'good faith' legal 'cover' has been almost invariably incorporated into statutes of various public bodies to provide immunities and specifically protect their officials from tort liabilities.

In CDA Ordinance<sup>20</sup>, for instance, doctrine of good faith is incorporated as a protective shield against public servant's liability for negligence and all kinds of other wrongdoings. It provides that 'no suit, prosecution or other legal proceedings shall lie against the (Capital Development) Authority, the Chairman, any member, officer, servant, expert or consultant of the Authority in respect of anything done or intended to be done, in good faith under this Ordinance'.

Similarly, public servants enjoy immunity under Control of Narcotics Substances Act, 1997, for their acts 'in good faith or intended to be done in pursuance of this Act or the rules made hereunder'. Presumably, even legally dubious acts, so long as intended to be done in good faith, are covered.

According to Ombudsman Order 1983<sup>21</sup>, the *Wafaqi Mohtasib* and any person appointed under him/her are given immunity from all kinds of prosecution and legal proceedings. Ironically, the office entrusted with protecting citizens' right needs to be protected from the public for its acts or omissions!

Companies Ordinance, 1984 is another variant of the immunity clause under the good faith shield. It provides that 'no suit, prosecution or other legal proceedings shall lie against the Government or the authority or any

“ Ironically, the office entrusted with protecting citizens' right needs to be protected from the public for its acts or omissions! ”

<sup>19</sup> The definition of 'good faith' is provided by Section 2 (27), General Clauses Act 1956.

<sup>20</sup> Section 40, CDA Ordinance, 1960

<sup>21</sup> Section 30

<sup>22</sup> Section 491, Companies Ordinance, 1984

“Islamabad  
Consumer  
Protection Act  
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”

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...'.<sup>22</sup> Apparently such clauses do not cover illegal acts of the officials but their negligent acts are well guarded hereunder.

Income Tax Ordinance, 2001 goes further in providing immunity. 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 intended to be done under this Ordinance or any rules or orders made thereunder'.<sup>23</sup>

Public servant immunity is provided under Oil and Gas Regulatory Authority (OGRA) Ordinance, 2002 that says, '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'.<sup>24</sup>

Pakistan Telecommunication Act provides 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'.<sup>25</sup>

Immunity is also provided under NWFP Consumer Protection Act, 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 in good faith done or intended to be done under this Act'.<sup>26</sup>

Similarly, the Islamabad Consumer Protection Act 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

<sup>23</sup> Section 227, Income Tax Ordinance, 2001

<sup>24</sup> Section 29, Oil and Gas Regulatory Authority Ordinance, 2002

<sup>25</sup> Section 31(5), Pakistan Telecommunication (Reorganization) Act, 1996

<sup>26</sup> Section 21, NWFP Consumers Protection Act, 1997

<sup>27</sup> Islamabad Consumers Protection Act, 1995

<sup>28</sup> Section 197(1), Criminal Procedure Code, 1898 provides:

(1) "When any person who is a judge within the meaning of Section 19 of the Pakistan Penal Code or when any Magistrate, or when any public servant who is not removable from his office save by or with the sanction of the Central Government or a Provincial Government, is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no court shall take cognizance of such offence except with the previous sanction:

(a) in the case of a person employed in connection with the affairs of the Federation, of the President; and

(b) in the case of a person employed in connection with the affairs of a Province, of Governor of that Province

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 thereunder'.<sup>27</sup>

Public servants also enjoy immunity 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 authority, after due consideration, is of the opinion that certain acts may constitute an offence and sanction such prosecution.<sup>28</sup>

The same sort of exemption is also provided by the Civil Procedure Code 1908, which says 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'.<sup>29</sup> 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'.<sup>30</sup>

The problem, however, does not end here. The Police Order provides 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'.<sup>31</sup> The limitation provided for the suits or prosecutions in respect of acts done under discharge of official duties states 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'.<sup>32</sup> 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.<sup>33</sup>

The proposed Punjab Criminal Prosecution Service (Constitution, Functions and Powers) Act 2004 follows the same line. Section 15 provides, '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'. For any 'grave harm' suffered by a citizen due to a public prosecutor being motivated by 'grounds

““ *The Police Order provides 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' ””*

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<sup>29</sup> Section 135(1), Civil Procedure Code, 1908

<sup>30</sup> Civil Practices, Rule 3, Volume I, Chapter 8

<sup>31</sup> Section 171, Police Order, 2002

<sup>32</sup> Section 172, Police Order, 2002

<sup>33</sup> Section 173, Police Order, 2002

other than bona fides', the aggrieved is effectively denied a legal right to directly approach the court. The aggrieved can only seek a remedy for the harm suffered if the government concurs. The government may or may not provide its concurrence.

The above provision lends itself to 'controlling' public servants thus violating prosecutorial autonomy and enabling corrupt practices. Moreover, whilst international practice is to treat 'grave harm' as a strict liability tort, where the citizen does not have to prove intention or fault, merely that a grave harm has been suffered due to an act or omission of another person, this provision denies even the possibility of the citizen directly approaching the courts for a tort remedy without government concurrence, hence, totally counter to international practice.

The list does not end here, thus Civil Services Act of 1973 incorporates the term "Indemnity" instead of immunity. The relevant Section 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 thereunder".<sup>34</sup>

The above-discussed list is by no way exhaustive. Many statutes and laws of public interest do carry such categorical immunity provisions, which in turn shield public servants from a tort action. In fact it has become a standard drafting practice in Pakistan to add a broad immunity and non-prosecution clause in all new laws involving public official. This widespread practice to protect and immune public servant against tort liabilities is the biggest hurdle in the development of law of tort in Pakistan.

“ For any 'grave harm' suffered by a citizen due to a public prosecutor being motivated by 'grounds other than bona fides', the aggrieved is effectively denied a legal right to directly approach the court.”

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<sup>34</sup> Section 23A, Civil Services Act, 1973

## 6. Conclusions & Recommendations

There is an immediate need to revamp existing laws from public servants' accountability perspective to protect citizens' interest and legal rights. As a standard practice of good governance, no legal system can afford to continue functioning with archaic and obsolete immunity provisions. A wide range of possibilities has been adopted globally to address this concern. This include:

- Strengthening policies and institutions of public interest law;
- Broadening the scope of extraordinary constitutional remedies (e.g. writs); and
- Codification of law of tort to check the encroachments of public functionaries in the domain of citizen rights.

Appropriate legal and policy developments need to be undertaken as follows:

### (1) Public Interest Law

Public interest law is that branch of law that relates to matters and issues of public interest.<sup>35</sup> It seeks to highlight those issues of social interest which are of concern either to the nation as a whole, or to a section of the populace, but which are generally ignored by the political process in the country. Access to justice for poor and deprived sections of society, questions of administrative malpractices, consumer protection, and environmental protection are broad themes of public interest law. Three overlapping categories of public interest law are more crucial, namely:

- (a) access to justice;
- (b) law reforms; and
- (c) political empowerment.

Abuse of administrative decision-making can be contested through individual cases, which are a key strategy of public interest law to expand the access of population to justice system.

Public interest law not only focus on the special needs of the disadvantaged sections of society; it is also concerned with the use of the law and

“ Access to justice for poor and deprived sections of society, questions of administrative malpractices, consumer protection, and environmental protection are broad themes of public interest law. ”

<sup>35</sup> For more details and conceptual discussions see: <http://www.pili.org/>, <http://www.cepil.org/>, <http://www.acjnet.org/>, <http://www.ptla.org/international.htm>, etc.

“ Unfortunately the very notion of public interest law is alien to our legal system and it could not be linked with the concept of accountability of public servants. ”

legal techniques for issues of interest to the nation as a whole. Two categories of public interest issues may be discerned in this area:

- The **first** focuses on questions of political and administrative corruption and abuse or misuse of power;
- The **second** relates to the protection of diffused, fragmented and collective interest, most notably the advancement of civil rights and consumer and environmental protection.

Unfortunately the very notion of public interest law is alien to our legal system and it could not be linked with the concept of accountability of public servants. Traditionally the burden for development of public interest law in any society has largely rested on active and alert non-governmental organizations and dedicated individuals. In some countries, however, sections of the bar and law schools have also contributed significantly but this aspect is absolutely missing in Pakistan. No institutional mechanisms could be developed over the years to initiate and strengthen the notion of public interest law.

## (2) Extraordinary Remedial Measures and Public Interest Litigation (PIL)

Public interest litigation (PIL) is considered to be an effective remedy against the misfeasance of public servants. PIL is totally different from ordinary litigation that is essentially adversarial in nature. The purpose of PIL is to promote the public interest, which mandates that violation of legal or constitutional rights of a large number of persons, downtrodden, socially or economically disadvantaged should not go un-redressed. Public interest litigation (PIL) is *pro bono publico* (for the public good) and can be used as a corrective measure against the abuses of administrative discretion and its extraordinary nature allows the courts to turndown the immunity clauses by upholding the public interest. The notion of PIL has been developed gradually over time and now a wide range of remedies can be invoked through a PIL, such as compensation for violation of fundamental rights, illegal detention, custodial torture and abuse of administrative position, etc. Justice Tas-saduq Hussain Jilani in *State v. M D Wasa*<sup>36</sup> observed:

"The rationale behind public interest litigation in developing countries like Pakistan and India is the social and educational backwardness of its people, *the dwarfed development of law of tort*, lack of developed institutions to attend to the matters of public concern, the

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<sup>36</sup> 2000 C L C 471

general inefficiency and corruption at various levels. In such a socio-economic and, political milieu, the non-intervention by Courts in complaints of matters of public concern will amount to abdication of judicial authority." [Emphasis added]

PIL has come a long way since *Shehla Zia case*<sup>37</sup> and standard objections of *locus standi* have been gradually worked out. But notwithstanding the efficacy and importance of PIL, its extraordinary nature does not allow an aggrieved citizen to frequently contest the issues of maladministration and malfeasance, especially to get compensation based remedy. It is a constant hangover that tortious remedies should only be invoked in the courts of first instance. PIL therefore cannot be used to activate the law of tort. There are other problems as well. Some recent cases<sup>38</sup> have further narrowed the scope of PIL by upholding that a PIL action can only be filed in the Supreme Court under Article 184 (3) of the Constitution. It has also come to be believed widely that in the name of public interest, judiciary has begun to invade the exclusive legislative and executive domains. Questions are sometimes raised about the practical viability, feasibility and implementability of some of the verdicts.

#### Box 4: Public Interest Litigation in India

PIL has been used in India on a large scale. Since 1982, when the concept of PIL was accepted by the Supreme Court of India in the famous case of *S.P.Gupta v. India*, hundreds of cases have been filed in the Supreme Court and the High Courts covering various areas, e.g., administration of criminal justice; environment protection; protection of under-privileged and weaker sections of society, such as labour, children, prisoners; protection of independence of the judiciary; maintenance of rule of law; misuse of power, etc.

Two broad categories of PIL may be identified from the Indian case law:

- A court action by a member of a class which may have been adversely affected by an administrative wrong; and
- A court action by a public-spirited individual, or a group of persons, to vindicate the rights of other persons (individuals, groups or public at large), against administrative wrongs, though the person or the group undertaking the court action may not by itself have suffered any injury.

<sup>37</sup> PLD 1994 SC 693

<sup>38</sup> e.g. 2002 P L C (C. S.) 614

“ 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. ”

### (3) Codification of Law of Tort

Article 174 of the Constitution provides:

*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.*

Article 174 of the Constitution of Pakistan originated from the Government of India Act, 1935 (Section 176). This emanates from Section 32 of the Government of India Act 1915, the genesis of which can be found in Section 65 of the 1858 Act which provided 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.*<sup>39</sup>

The first case, which seriously discussed the question of sovereign immunity, is the *P and O Navigation Company Case*.<sup>40</sup> In the case a piece of iron funnel carried by some workmen for conducting repairs of a Government steamer hit the plaintiff's horse driven carriage and got injured. The plaintiff sued for damages. The Supreme Court of Calcutta speaking through Peacock C.J. 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.*

Since then many judgments sporadically elaborated the extent of tortious liability of public servants.<sup>41</sup> The courts tried to balance out the public servant's immunity and the grievances of the public but unfortunately concrete principles of tortious liability of public servants could not be formulated in the light of interpretations of immunity clauses as incorporated in various statutes. This led towards the existing confusion about the law and policy on public servant's immunity. On the one hand we have overwhelm-

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<sup>39</sup> Reference to East India Company.

<sup>40</sup> Chohan, *Law of Tort in Indian Subcontinent*, Eastern Book Company, Delhi, 1997.

<sup>41</sup> PLD 1968 (AJK) 48, PLD 1981 Karachi 673, PLD 1963 SC 627, PLD 1961 Karachi 612, PLD 1968 Karachi 88, etc.

<sup>42</sup> Federal Tort Claims Act, August 2, 1946, Ch. 753, title IV, 60 Stat. 842 USC

<sup>43</sup> The test of *reason vis-à-vis discretion* has been prescribed by the Supreme Court in these words:

A public official, who undertakes to perform an act, even if it is discretionary, must do so reasonably and in complete good faith without such delays as would frustrate its ultimate objective. One who accepts a public office does so 'cum onere', or with the burdens and obligations with its benefits. He thereby subjects himself to all constitutional and legislative provisions relating thereto and undertakes to perform all the duties of the office and while he remains in such office the public has the right to demand that he performs such duties. The acceptance of every public office implies an agreement on the part of the officer that he will execute his duties with diligence and fidelity. 1992 SCMR 1998

ing immunity provisions along with strange definitions of good faith, which on the other hand do not match with some very encouraging verdicts.

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. Modeled on the lines of UK Crown Proceedings Act and US Federal Tort Claims Act<sup>42</sup>, the control of administrative powers on the basis of reason vis-à-vis *discretion*<sup>43</sup> should be the central theme of any such legislative endeavor. The proposed law should cover the critical aspects of information disclosure and strict and vicarious liability. Moreover, an enabling procedural mechanism should also be envisaged as a part of the codification exercise. Following aspects should be adhered during any attempt of codification.

#### ■ Information Disclosure

Transparency and access to information constitute key aspects of good governance. The citizen's right to information is increasingly being recognized as an important instrument to promote openness, transparency and accountability in public administration. The codification of law of tort will be futile if the proposed statute would not adequately focus on the crucial element of information disclosure. Usually a tort action cannot be initiated without having sufficient information about the subject matter. This kind of information is generally kept under the seal of official secret which bars aggrieved citizen's action against official malpractices.

#### ■ Executive Discretion

Abuse of executive discretion is the source of most of the citizen's grievances against public servants. Fortunately, the judiciary has refined this aspect of public servant's liability and guiding principles can be deduced from the case law. In *Messrs Noon Traders v. Pakistan Civil Aviation Authority*<sup>44</sup>, the High Court observed:

*All executive actions/discretion have to be measured on the touchstone of reasonableness and fairness, and should display complete transparency and bona fides, failing which the same would be open to judicial review and correction in appropriate cases.*

To pre-empt the tortious actions of public servants, the proposed law should incorporate detailed mechanism as to how such discretion can be exercised and the extent of tortious liability in case of any breach and

“ Abuse of executive discretion is the source of most of the citizen's grievances against public servants. Fortunately, the judiciary has refined this aspect of public servant's liability and guiding principles can be deduced from the case law. ”

<sup>44</sup> P L D 2002 Karachi 83

““The state should be held liable for the torts committed by its servants”, is a recognized principle in law of tort. The whole idea of vicarious liability of the state for the torts committed by its servants is based on three principles””

infringement.

#### ■ **Strict Liability**

Public servant's tortious liability law should incorporate the rule of strict liability for harm caused by exceptionally hazardous acts/omissions of public servants. This would include the instances of death caused by police torture during interrogation, unwarranted police encounters and other incidental torts.

#### ■ **Vicarious Liability**

"The state should be held liable for the torts committed by its servants", is a recognized principle in law of tort. The whole idea of vicarious liability of the state for the torts committed by its servants is based on three principles:

- (i) Respondent Superior (let the principal be liable).
- (ii) *Qui-facit per alium facit per se* (he who acts through another does it himself).
- (iii) Socialization of compensation.

The proposed law should accommodate this critical aspect of tort liability with full rigour.

#### ■ **Enabling Procedural Law**

Lastly, any attempt to codify law of tort without providing an enabling procedural counterpart would be a futile exercise. Theoretically speaking tort actions can be filed before a court of appropriate jurisdiction, but the vast majority of people refrains from indulging themselves in cumbersome procedures and slow litigation process. Without introducing procedural reforms, a change in substantive law would be hardly useful. Existing provisions of law of evidence are deficient to meet the requirement of tort reforms and they have been drafted mainly in the context of routine civil and criminal practice in our courts. Modern practice of tort law demands an innovative approach in terms of reversal of burden of proof in appropriate cases and elaborated guidelines to quantify damages on scientific basis. All these aspects need to be addressed in the backdrop of tort reforms.

## Appendix

# US Federal Tort Claims Act (FTCA)

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### **Definitions:**

As used in this chapter and sections 1346 (b) and 2401 (b) of this title, the term "Federal agency" includes the executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.

"Employee of the government" includes

(1) officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard while engaged in training or duty under section 115, 316, 502, 503, 504, or 505 of title 32, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation, and

(2) any officer or employee of a Federal public defender organization, except when such officer or employee performs professional services in the course of providing representation under section 3006A of title 18.

"Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States or a member of the National Guard as defined in section 101 (3) of title 32, means acting in line of duty.

### **Administrative adjustment of claims:**

The head of each Federal agency or his designee, in accordance with regulations prescribed by the Attorney General, may consider, ascertain, adjust, determine, compromise, and settle any claim for money damages against the United States 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 agency 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: Provided, That any award, compromise, or settlement in excess of \$25,000 shall be effected only with the prior written approval of the Attorney General or his designee. Notwithstanding the proviso contained in

the preceding sentence, any award, compromise, or settlement may be effected without the prior written approval of the Attorney General or his or her designee, to the extent that the Attorney General delegates to the head of the agency the authority to make such award, compromise, or settlement. Such delegations may not exceed the authority delegated by the Attorney General to the United States attorneys to settle claims for money damages against the United States. Each Federal agency may use arbitration, or other alternative means of dispute resolution under the provisions of subchapter IV of chapter 5 of title 5, to settle any tort claim against the United States, to the extent of the agency's authority to award, compromise, or settle such claim without the prior written approval of the Attorney General or his or her designee.

Subject to the provisions of this title relating to civil actions on tort claims against the United States, any such award, compromise, settlement, or determination shall be final and conclusive on all officers of the Government, except when procured by means of fraud.

Any award, compromise, or settlement in an amount of \$2,500 or less made pursuant to this section shall be paid by the head of the Federal agency concerned out of appropriations available to that agency. Payment of any award, compromise, or settlement in an amount in excess of \$2,500 made pursuant to this section or made by the Attorney General in any amount pursuant to section 2677 of this title shall be paid in a manner similar to judgments and compromises in like causes and appropriations or funds available for the payment of such judgments and compromises are hereby made available for the payment of awards, compromises, or settlements under this chapter.

The acceptance by the claimant of any such award, compromise, or settlement shall be final and conclusive on the claimant, and shall constitute a complete release of any claim against the United States and against the employee of the government whose act or omission gave rise to the claim, by reason of the same subject matter.

### **Reports to Congress**

The head of each federal agency shall report annually to Congress all claims paid by it under section 2672 of this title, stating the name of each claimant, the amount claimed, the amount awarded, and a brief description of the claim.

### **Liability of United States**

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private

individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

With respect to any claim to which this section applies, the Tennessee Valley Authority shall be entitled to assert any defense which otherwise would have been available to the employee based upon judicial or legislative immunity, which otherwise would have been available to the employee of the Tennessee Valley Authority whose act or omission gave rise to the claim as well as any other defenses to which the Tennessee Valley Authority is entitled under this chapter.

### **Disposition by federal agency as prerequisite; evidence**

(a) An action shall not be instituted upon a claim against the United States for money damages 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, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.

(b) Action under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the

claim.

(c) Disposition of any claim by the Attorney General or other head of a federal agency shall not be competent evidence of liability or amount of damages.

### **Judgment as bar**

The judgment in an action under section 1346 (b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.

### **Compromise**

The Attorney General or his designee may arbitrate, compromise, or settle any claim cognizable under section 1346 (b) of this title, after the commencement of an action thereon.

### **Attorney fees; penalty**

No attorney shall charge, demand, receive, or collect for services rendered, fees in excess of 25 per centum of any judgment rendered pursuant to section 1346 (b) of this title or any settlement made pursuant to section 2677 of this title, or in excess of 20 per centum of any award, compromise, or settlement made pursuant to section 2672 of this title.

Any attorney who charges, demands, receives, or collects for services rendered in connection with such claim any amount in excess of that allowed under this section, if recovery be had, shall be fined not more than \$2,000 or imprisoned not more than one year, or both.

### **Exclusiveness of remedy**

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346 (b) of this title, and the remedies provided by this title in such cases shall be exclusive.

(b)

(1) The remedy against the United States provided by sections 1346 (b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money

damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

(2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government-

(A) which is brought for a violation of the Constitution of the United States, or

(B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.

(c) The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person shall promptly furnish copies of the pleadings and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.

(d)

(1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

(2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively estab-

lish scope of office or employment for purposes of removal.

**(3)** In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. A copy of the petition shall be served upon the United States in accordance with the provisions of Rule 4(d)(4) of the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

**(4)** Upon certification, any action or proceeding subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1346 (b) of this title and shall be subject to the limitations and exceptions applicable to those actions.

**(5)** Whenever an action or proceeding in which the United States is substituted as the party defendant under this subsection is dismissed for failure first to present a claim pursuant to section 2675 (a) of this title, such a claim shall be deemed to be timely presented under section 2401 (b) of this title if-

**(A)** the claim would have been timely had it been filed on the date the underlying civil action was commenced, and

**(B)** the claim is presented to the appropriate Federal agency within 60 days after dismissal of the civil action.

**(e)** The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677, and with the same effect.

## **Exceptions**

The provisions of this chapter and section 1346 (b) of this title shall not apply to-

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer, except that the provisions of this chapter and section 1346 (b) of this title apply to any claim based on injury or loss of goods, merchandise, or other property, while in the possession of any officer of customs or excise or any other law enforcement officer, if-

(1) the property was seized for the purpose of forfeiture under any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense;

(2) the interest of the claimant was not forfeited;

(3) the interest of the claimant was not remitted or mitigated (if the property was subject to forfeiture); and

(4) the claimant was not convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law..<sup>[1]</sup>

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

[(g) Repealed. Sept. 26, 1950, ch. 1049, § 13 (5), 64 Stat. 1043.]

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: Provided, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346 (b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives

Source: "Federal Tort Claims Act (FTCA)." U.S. Code. Accessed on May 11, 2005. [http://www4.law.cornell.edu/uscode/html/uscode28/usc\\_sup\\_01\\_28\\_10\\_VI\\_20\\_171.html](http://www4.law.cornell.edu/uscode/html/uscode28/usc_sup_01_28_10_VI_20_171.html)>

## About TheNetwork

TheNetwork was founded in 1992 as a non-governmental organization with focus on medicines and public health, later expanded its attention to consumer protection in general, governance and citizens' access to justice. Over the years, the organization has emerged as an effective advocacy group, working at the local, national and international levels. TheNetwork activities include public policy advocacy, building of informed opinion, action-oriented research and publications. Its programmes are aimed at influencing public policies including legislation in keeping with the needs, rights and aspirations of citizens-consumers on a range of key issues. A Consumer Complaint Cell in the organization is dedicated to addressing people's complaints against public and private bodies/services including necessary legal guidance and support. TheNetwork enjoys a robust track record in compiling, analyzing and disseminating information, mobilizing action around key public policy issues and promoting citizens-consumers rights and interests as part of the civil society struggle in Pakistan. For further information including membership of TheNetwork contact: (051) 2261085 or [main@thenetwork.org.pk](mailto:main@thenetwork.org.pk)

## Website [insaaf.org.pk](http://insaaf.org.pk)

The website [insaaf.org.pk](http://insaaf.org.pk) is aimed at improving access to justice for citizens-consumers in Pakistan. This bilingual (English/Urdu) and interactive site provides information on laws and citizens' rights vis-à-vis public bodies, and is being developed into an alternate and independent grievance redress channel with relevant links for the citizens-consumers to access and activate the appropriate online official public grievance websites.

## Monthly [insaaf](http://insaaf.org.pk) newsletter

The monthly [insaaf](http://insaaf.org.pk) is a bilingual (English/Urdu) newsletter intended to inform citizens-consumers on significant developments and critical issues pertaining to justice sector in Pakistan. Besides awareness raising, monthly [insaaf](http://insaaf.org.pk) serves as a dedicated forum to encourage discussion and debate and mobilize public opinion towards improving the state of justice services in Pakistan. For further information contact: [monthlyinsaaf@insaaf.org.pk](mailto:monthlyinsaaf@insaaf.org.pk)

“ Citizens are recognized as consumers who need to be protected against the acts of civil servants under Article 212 (1) (b) of the Constitution. But unfortunately...this clause has not been allowed to operate...

“ ...existing laws and regulatory mechanisms are more inclined towards protecting and providing immunities to the public servants who often tend to disregard citizens-consumers' rights and concerns...

“ Public servant can be held accountable to the people by adopting different strategies such as establishing public grievance redress mechanisms at administrative level and judicial or administrative review of executive decision-making. It is also necessary to rationalize the public servants' immunities and privileges to encourage private tort actions against their misfeasance.”