The 2005 South Asian Earthquake: Natural Calamity or Failure of State? State Liability and Remedies for Victims of Defective Construction in Pakistan

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The massive earthquake that hit South Asia on 8 October 2005 was recorded as 7.6 on the Richter Scale. It caused widespread destruction in the North West Frontier Province (NWFP) of Pakistan,[1] the State of Azad Jammu and Kashmir (AJK),[2] and Indian administered Kashmir. It was thus a 'major' earthquake of intensity roughly equivalent to the 1906 San Francisco earthquake, the 1935 Quetta earthquake and the 2001 Gujarat earthquake (*Magnitude 7.6 – Pakistan,* 2005).[3] The earthquake wreaked havoc, causing massive loss of life, injuries, psychiatric harm, damage and destruction of property and a displacement of approximately 3.5 million people.[4]

It turned out that prima facie unplanned and defective construction of public buildings made them highly vulnerable to the earthquake. This is the most logical explanation for the fact that a disproportionately high number of public sector buildings collapsed in the earthquake-hit areas, as compared to private sector buildings. The primary focus of this article is therefore a detailed review and evaluation of the various potential legal remedies that may be available to the victims of the tragedy against public officials, state institutions and the state itself. It argues that such private and public interest litigation may establish accountability for the failures of the past and possibly provide recourse for those affected to seek additional compensation as damages, as well as compel the state to put in place adequate regulatory mechanisms for the future.

On the one hand are tort remedies which, though neglected and underdeveloped in Pakistan, may provide the impetus for public interest and class action litigation based on similar advancements in foreign common law jurisdictions, including the United Kingdom and India. On the other hand are criminal remedies which, based on Islamic Law concepts of *Qisas* and *Diyat*, may be amenable to the provision of some form of monetary palliation for damage resulting from defective construction. A third avenue is that of the constitutional writ procedure in the High Courts and Supreme Court of Pakistan. The article scrutinises all these possibilities

within the framework of Pakistani law, simultaneously drawing from comparative frameworks for perspective, with a view to delineating the most appropriate route in Pakistan for establishing accountability for failures of the state, and thus for pursuing compensatory remedies for damage resulting from the defective construction of buildings.

The Aftermath of the 2005 South Asian Earthquake

In the immediate aftermath of the 2005 South Asian earthquake, the scale of the disaster was not fully appreciated. Instead, the attention of the Government of Pakistan, the media and the public remained fixed on the more proximate and visible tragedy of the Margalla Towers in Islamabad.[5] This was in some measure due to the shock suffered by government institutions in the affected areas and a breakdown in communications (Environmental Emergency Response, 2006). The Pakistan Army played a very important role in the early rescue and relief operations and is now a major player in the continuing rehabilitation operations (UN Office for the Coordination of Humanitarian Affairs, 2006). At the same time, Pakistan's media played an unprecedented role in bringing the magnitude of the tragedy to the public's attention and mobilised the nation into action.[6] Citizens all over the country began collecting funds, medical supplies and relief goods; truckloads of relief supplies and volunteers started pouring into the earthquake-affected areas.[7] Foreign nations and donor agencies pledged billions of dollars in soft loans or aid, and a host of local, as well as international, non-government organisations set up medical camps and relief operations.[8] The enormity of the event, the myriad coordination issues that surfaced in terms of rescue and relief efforts and the multiplicity of local as well as foreign agencies involved in the effort with little or no central cohesion or coordination to the entire effort, ensured that not much attention was paid to the logic, rationale and fairness of dispensation of compensation and rehabilitation assistance to the survivors of the earthquake.[9]

Evidence of Defective Construction Leading to a Higher Human Cost

As the events quickly unfolded, prima facie evidence was compiled from three main sources: visual inspections,[10] newspaper and media reports (Munir, 2005; Husain, 2005; Montero, 2005; Pennington, 2005) and independent assessments of structural damage. Collectively, these showed that a disproportionately higher number of public buildings including public schools, hospitals and government offices, as opposed to private buildings and residences, had collapsed in most of the earthquake hit areas.

Deaths of a large number of young children were attributed to the collapse of public school buildings.[11] Illustrative examples include Durrani et al (2005), the 2005 Earthquake ADB/World Bank Report and the US Team Report, 2005. Durrani et al (2005) focus on severe damage to the public education and health facilities and analyse and document various design and construction defects that led to their susceptibility.

According to the US Team Report (2005), the estimated damage to the education sector in the earthquake affected areas is estimated to be US$335 million, with as many as 7669 schools affected (of which approximately 5690 were primary and middle schools). Half of the damaged school structures collapsed or were beyond repair. According to preliminary estimates 18,095 students and 853 teachers and academic staff died. The damage to the health sector was estimated to be US$120 million. Approximately 574 health facilities were partially damaged or destroyed. The authors emphasise the overall lack of implementation of building codes by governmental authorities in construction of public buildings, especially schools and hospitals.

For a general evaluation of the extent and causes of the destruction of buildings in the earthquake affected areas, see Muzaffarabad Earthquake (2005) and EEFIT Mission (2005). The report of the Peshawar Earthquake Engineering Center (Muzaffarabad Earthquake, 2005) is an undated technical assessment of damaged buildings in Muzaffarabad and the surrounding areas. The report concludes that 60 per cent of the buildings in the urban areas were un-reinforced solid concrete block masonry structures and that it was the collapse of more than 60 per cent of these buildings that was responsible for the majority of deaths and injuries in Muzaffarabad.

Moreover, the independent field mission report by the Earthquake Engineering Field Investigation Team of the Institution of Structural Engineers, London (EEFIT Mission, 2005) found that, in almost all the earthquake-affected areas, the collapse of buildings was caused, in varying degrees, by poor construction practices and lack of proper structural detailing.

In response to this prima facie evidence, the consensus amongst various civil society sectors in the immediate aftermath of the earthquake was that the disproportionate collapse of public buildings was a proximate and material result not of the earthquake but of the negligent construction of buildings by building contractors contracted by the government authorities and their functionaries, and the negligent planning, supervision, inspection and licensing of these buildings by those authorities.[12] These preliminary observations and deductions acquired further credence when the Supreme Court of Pakistan took up the matter of the negligent

construction of Margalla Towers (*Saad Mazhar v Capital Development Authority*, SCMR 1973 (2005) (Pak) (*Saad Mazhar*)).[13] This case, though finally disposed of through a settlement, has nevertheless resulted in a very significant judicial ruling on public and private negligence and criminal liability in this context, as discussed later in this article.

Reliable official statistics are still hard to procure as the state machinery remains overwhelmed with the task of rehabilitating earthquake-affected people and rebuilding its own governance infrastructure. Furthermore, the removal of debris from most of the destroyed or subsequently demolished sites makes a technical assessment of the quality of construction of the collapsed buildings rather difficult.[14] However, there is a strong impression that the enormity of the disaster could have been lessened had proper construction techniques and quality standards been adopted by the concerned parties.

State Assistance for Victims: Too Little for Too Few

Before exploring legal remedies available to those victims of the earthquake whose losses were potentially caused or exacerbated by the high vulnerability of public buildings to earthquake damage, it is useful to gauge the nature, imperatives and efficacy of the compensation package introduced by the government, in response to mounting public pressure. From the outset, the government's Cash Assistance Program[15] for compensation for deaths, injuries and house damage was marred by unclear objectives, hasty planning, lack of transparency, unclear ownership, ineffective management, obvious gaps and oversights, and cumbersome, drawn-out execution.[16] The ethos and framework of compensation also departed from already existing precedents for compensation of victims in situations of mass disaster, often at the expense of the victims.[17] Indeed, it can be argued that the initial haste is excusable, given the scale of the disaster, the impending winter and resultant governmental preoccupation with search and rescue operations, as well as provision of adequate shelters to people still trapped in narrow, inaccessible valleys (Cheema, 2006). However, the ultimate lack of clarity in terms of identification of the various types of affected persons, and the development, as well as implementation, of a scheme for comprehensive and adequate compensation that would ensure that large numbers of affected people did not miss out, is much less defensible (Bari, 2005; Zaidi, 2006). The eventual Cash Assistance Program had many obvious drawbacks and inequitable aspects that reinforce the underlying argument of this article: that in the absence of a clear legal framework, sustained public scrutiny and rigorously spelled-out rights and remedies, a voluntary governmental attempt to compensate the victims in such large-scale devastations is bound to end

up far short of desired results. Even for those who did manage successfully to access the full extent of the available handouts under all the designated categories of the Cash Assistance Program, it can be argued that the amounts actually awarded were more of a palliative, and fell well short of what was actually required for the victims to rebuild their lives.[18] However, since the compensation did not clearly embrace a legal right or remedy, the victims had no legal avenue for questioning the paucity of the amount and hence could only resort to political and social pressure.

Subsequent studies point out several serious and hotly contested issues that discredit the overall fairness and comprehensiveness of the Cash Assistance Program, owing to both design and implementation shortcomings (Cheema, 2006). For example, the Cash Assistance Program only compensated for one death within a family and hence unfairly equated a single death within a family with multiple deaths in another, seemingly oblivious to the magnitude of the emotional and economic impact in the latter scenario. This was also contrary to the initial promise made by the government as well as the historical precedent of the government compensating for every individual loss of life in other disaster situations or large accidents. Likewise, handouts were inconsistent, so that while in some cases compensation was awarded to the next of kin in accordance with the Islamic laws of inheritance, in others it was awarded to a family elder who could be regarded as the head of the family. Quite apart from the inconsistency of approach, the compensatory regime missed many of the most vulnerable survivors, most notably widows and orphans, as compensation fell directly into the hands of a senior male individual who was not legally bound to share it and may not always have felt morally or socially obliged to do so. Similarly, the Cash Assistance Program adopted a house as the objective parameter for awarding compensation for loss of an abode/home, regardless of the reality that in the poor and overpopulated areas, one housing structure could be home to multiple families. Once again, this had the obvious outcome of the entire compensation amount going at times to one individual head of a family, who was then not legally bound to ensure that its benefit flowed to all the families who had lived under one roof.

The lack of definitional clarity as to what constituted a destroyed, uninhabitable or irreparable house was also problematic, with too much discretion in the hands of the compensation awarding agencies. People who had suffered the loss of an abode but who were tenants or, in some cases, illegal occupants, were not legal titleholders and thus were also not compensated. Non-compensation for destroyed means of livelihood also occurred as the compensation regime purely focused on destroyed or uninhabitable houses and there was inadequate coverage of compensation for

injuries, as most of the injured had been transported to the bigger cities while compensation cheques were handed out in the relief camps in the disaster region. Finally, a lack of proper information dissemination and publicity meant that many victims who only heard about the scheme too late or had to travel long distances and go through cumbersome processes in order to stake their claims, slipped through the cracks. The less-than-efficient grievance redressal mechanisms have also meant that many of the claims have shifted to, and are now pending in, courts.[19]

What emerges is that the Government of Pakistan's compensation package, though well-intentioned, was hastily put together without the benefit of an exhaustive, deliberative and informed process and left in its wake several inequities.[20] At the same time, it did not at all address the 'defective construction' dimension of the disaster, which is the focal point of this article. The Cash Assistance Program essentially lumped together all those affected, regardless of the nature and extent of their loss, and regardless of whether they had ultimately suffered more because of regulatory errors in the construction of public sector buildings. The compensation package was thus more of a one-time relief, rather than a fair and discerning scheme for alleviating the losses of many.

This article is principally an academic, as opposed to an empirical, exercise in:

(a) exploring the possibility of making public authorities and the state legally accountable for regulatory oversight and negligent construction of public buildings;

(b) surveying and evaluating potential substantive and procedural remedies for compensation within a comparative framework; and

(c) undertaking a comparative analysis of the available remedies, with a view to recommending the most appropriate legal channel for mass compensation within the context of Pakistan.[21]

Part I focuses on tort liability – which is the mainstay of corrective justice and remedial compensation in developed common law jurisdictions, and hence assumes a pivotal position in the research – and analyses potential causes of action and compensatory remedies under the realm of tort law in Pakistan. Part II presents a critical examination of the constitutional writ procedure – as an alternative to both civil liability under tort law as well as criminal liability – and the body of law, known as public interest litigation, generated by judicial activism in Pakistan in recent decades. Part III provides a brief survey of the different forms of criminal offences under Pakistan's criminal law that may give rise to criminal liability for damage resulting from defective construction. Part IV outlines the main conclusions arising from the preceding analysis and

makes recommendations for legal reform in Pakistan regarding compensatory remedies for death, personal injury and property damage due to defective construction of buildings by state authorities.

I. The Legal Framework for Assigning Liability for Defective Construction in Pakistan: The Tort Law Regime

General State of the Law of Torts in Pakistan – Delineating Grounds of Liability

We can state at the outset that the law of torts, as a canon, suffers from acute neglect and underdevelopment in the Pakistani legal milieu.[22] It is beyond the scope of this article to investigate fully the multifarious historical, political and socio-legal forces contributing to the unsatisfactory state of this branch of the law,[23] which is rendered all the more complex because of the obfuscated boundaries and overlap between tort law and the criminal Shari'ah law in its present form.[24] Suffice it to say that a broad review of tortious liability for death and personal injury resulting from defective construction of buildings amply demonstrates the inadequacies that typify the existing tort framework in Pakistan. We present such a review in the following section with a view to realising dual objectives: first, to delineate suitable legal remedies for victims of mass torts resulting from widespread defective construction of public buildings ascribed to government agencies and functionaries; and, secondly, to identify a positive impetus for the meaningful development of tort liability in Pakistan.

These aims necessitate a comparative focus on the experience of other common law jurisdictions, especially those that share legal history. The two obvious jurisdictions that have historically, socially, politically and normatively influenced the legal system of Pakistan are those of the United Kingdom and India. They are thus the most relevant benchmarks for comparative analysis. The former, both as the institutor of the common law tradition in the Indian subcontinent during English colonial rule, and as a highly developed tort law regime, provides clarity for resolving ambiguities and plugging deficiencies in Pakistani tort law. It also allows us to formulate informed justifications for, or repudiations of, significant departures in Pakistani tort law from the established English position. On the other hand, India, with its many significant similarities with Pakistan, both in terms of historical, social and political experience as well as in relation to the nature of laws and the process of law-making, serves as a regional benchmark in gauging the progress, or lack thereof, of tort law in Pakistan.

Within the comparative framework laid out above, the following section outlines and discusses four different grounds of tort liability germane to compensatory remedies for death and injury resulting from defective construction of buildings, and analyses their current form and application in Pakistan. These grounds of liability are: (i) common law negligence, (ii) occupiers' liability, (iii) breach of statutory duty, and (iv) misfeasance in a public office. Of these, negligence provides the most attractive conceptual framework within which to examine the possibility of a civil tort action for negligent construction for two salient reasons. The first lies in the legal threshold for establishing an actionable breach of duty in negligence, which is generally lower than that under either breach of statutory duty or misfeasance in a public office. In negligence, the victim has to establish a 'proximate relationship' with the wrongdoer so as to justify a duty on the part of the latter, and that the wrongdoer failed to take 'reasonable care' in fulfilling this duty. An action for breach of statutory duty, however, additionally requires the victim to preliminarily establish a number of factors for determining *locus standi* including, *inter alia*, that he or she is within the class of persons that the statute in question intends to protect. The tort of misfeasance in a public office likewise puts a high onus on the victim in terms of showing an element of knowledge and bad faith on the part of the wrongdoer. Negligence thus assumes a particularly relevant position in circumstances where there is either no statute regulating the issue at hand, or where a statute exists but the victim is likely to fail on account of lack of *locus standi*. The same holds true for a situation where there are evidentiary impediments in establishing the requisite mental element for the tort of misfeasance in a public office. The relative simplicity of establishing a cause of action in negligence, on the other hand, means a higher likelihood of success for the victim.

The second justification for highlighting the tort of negligence relates to its emphasis on compensation of the victim, as opposed to deterrence of the tortfeasor. Although even in negligence the secondary object may be to punish the tortfeasor for his conduct in inflicting harm, the measure of monetary relief granted in typical negligence cases is indicative of its predominant aim of compensation. As a generic and broadly defined tort, negligence thus focuses on the restoration of the victim to the condition he was in before the tort was committed as much as possible in monetary terms, and the measure of damages thus awarded is ordinary. The position is different in cases where the tortfeasor's conduct is actuated by malice or bad faith, in which case imposition of exemplary or punitive damages over and above the compensatory measure of damages to penalise such conduct is an accepted position.[25] While we do ascribe importance

to deterrent and punitive measures, whether alternatively or in addition to compensatory remedies, our central focus in this article remains on monetary compensation for the large mass of those affected by the earthquake, who remain largely under-compensated or entirely uncompensated due to the lack of state accountability.

Before embarking on a discussion of the substantive law of tort in Pakistan, however, it is essential first to consider whether the law even recognises and accepts the notion of liability of the state and/or its officials for tortious acts.[26] This question is of fundamental consequence in Pakistan, where the socio-legal environment is characterised both by a lack of public awareness concerning liability for civil wrongs committed by government authorities and a lack of accountability on the part of these authorities in the absence of effective checks and balances on the exercise of their duties and powers. If the state and its various agencies are either immune from tortious liability or liberally cushioned by procedural and formalistic impediments in the law, then it would be a futile exercise to even consider remedies in tort in the presence of more well-developed, and perhaps more effectual, constitutional and criminal remedies. Accordingly, we now turn to a review of the doctrine of sovereign immunity, which has a direct bearing on tortious liability of the government and its officials.

Re-envisioning Tort Liability: A Comparative Framework

Liability of the state and its agencies

The original doctrine of sovereign immunity in the United Kingdom was premised on the argument that 'the King can do no wrong', the corollary of which was that the King cannot be sued in his own courts (see Dias, 1989: 142). After protracted debate, however, this blanket immunity was diluted considerably by the *Crown Proceedings Act 1947* (UK).[27] In Pakistan, on the other hand, the nature and extent of sovereign immunity in relation to tortious acts were delineated by the judiciary. One of the earliest cases on the subject is the 1953 judgment of *West Punjab Government v Pindi-Jhelum Valley Transport Ltd, Rawalpindi*, PLD 339 (1953) (Pak) (*Pindi-Jhelum Valley Transport*). This was a civil appeal in which the plaintiff – a private transport company – sued the provincial government for damages for unlawfully cancelling its permits to ply stage and contract carriages on specified routes so as to substitute the provincial government's own transport service for the plaintiff company. The Lahore High Court concluded that the provincial government was not immune from liability to be sued and, accordingly, upheld the lower court's award of damages. In placing primary reliance on the then leading pre-independence authority of *Peninsular and Oriental Steam Navigation Company v Secretary of State for India*, 5 Bom HCR APP 1 (1868-69)[28] – which was

applicable both in India and Pakistan – the court held that 'any acts avowedly done in the conduct of a business undertaking cannot assume the character of sovereign acts so as to confer immunity on the Government'.[29]

Six years later, in *Muhammadi Steamship v Federation of Pakistan*, PLD 232 (1959) (West Pak) (*Muhammadi Steamship*), the government's liability for the tortious acts of its servants was discussed in the context of negligence by a shipping authority acting under the orders of the government. The shipping authority negligently delayed issuing a licence to the plaintiff shipping company for taking out its vessels to sea, resulting in the detention of the plaintiff's ship, stoppage of its loading and monetary loss to the plaintiff. Though the plaintiff was unable to provide any conclusive proof on the question of damages and was, therefore, not awarded anything in monetary terms, the Sindh High Court categorically concluded that the government, having most obviously ratified the shipping authority's actions, could in principle be held liable for damages. The rationale for invoking civil liability in negligence against the government was expressed in the following terms:

> The speed of work and efficiency of the Government Departments must be, to a reasonable degree, equal to the business needs of the commercial pursuits which they control, for otherwise they can wreck and ruin the business of the citizens and yet sit snug in their offices as if they had nothing to do with the destruction brought about by them. The import of negligence must be taken to have been enlarged by the very fact that the Government has been entrusted with direct and delicate responsibilities towards the business and commercial interests of the citizens. The existence of an emergency is an answer but negligence in regarding it in proper time is an equally good counter reply. (at 251)

The court further explained that there were three exceptions to the general rule that the government is not liable for the tortious acts of its servants: (i) where the acts complained of were *not* acts of state but were done under the colour of a title conferred by municipal law; (ii) where such acts consisted in the detention by the state of lands, goods, or chattels belonging to the subject; and (iii) where it was provided that such acts were expressly authorised by the state or that the state profited by them (*Muhammadi Steamship*, at 232–3). The court held that the facts of the case under consideration brought it squarely within the third exception.

Although the court in *Muhammadi Steamship* did not directly deal with the first exception, it nevertheless unequivocally rejected the existence of sovereign immunity for tortious acts of the government, even in the exercise of sovereign functions, unless the latter amounted to 'acts of State'.[30] In doing so, it went a step further than *Pindi-Jhelum Valley Transport* in that it seemed to be saying that the government could

ostensibly be held liable in situations that were not necessarily characterised by purely commercial or contractual relationships between the government and the aggrieved party, but also where the government generally engaged with its citizens by acting upon municipal law. The nature of these engagements vis-à-vis 'acts of State', however, was as yet ambiguous.

The three exceptions to sovereign immunity enumerated in *Muhammadi Steamship* were affirmed and applied in later cases. Establishing liability under the second and third exceptions was relatively uncomplicated in view of the direct interference by the government and its officials in terms of detention of goods and authorisation of acts.[31] In contrast to the relative simplicity of the last two exceptions, however, the first exception was, on the face of it, more complex due to the nebulous distinction between 'acts of State' and acts done in accordance with municipal law.[32] Interesting illustrations of this distinction are to be found in the Indian context, where (at times contradictory) judicial developments on the meaning of 'acts of State' and the range of activities that such acts encompassed had the Indian judiciary and litigants tied up in knots.[33] Nevertheless, despite the Indian judiciary's seemingly more favourable posture in the 1960s towards the government and its officials in relation to tort actions, the Pakistani courts consistently took a more pro-litigant position on the issue by constricting the net of state activities that fell within 'acts of State'. So, for instance, in *Pakistan v Muhammad Yaqoob Butt*, PLD 627 (1963) (Pak) (*Muhammad Yaqoob Butt*), the court narrowed down the definition of a 'sovereign act' (or act of state) as 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. In the latter case the Government has authority to act only in accordance with the Municipal Law' (*Muhammad Yaqoob Butt,* 630). This definition was subsequently applied in *Malik Ramiz Ahmad v Punjab Province, PLD 736 (1964) (West Pak) (Malik Ramiz Ahmad),* where the court held that maintenance of public highways by a highway authority or the government was an exercise of power subject to municipal law and, as such, could not be treated as a 'sovereign act'. Accordingly, an individual who sustained injuries and property damage due to obstruction and lack of maintenance of a public highway was entitled to claim damages from the government. In view of several similar judicial pronouncements restricting the immunity of the government to a very narrow sphere of operation, it is fair to conclude that the doctrine of sovereign immunity in Pakistan is the exception rather than the norm in the realm of tort liability.[34] When conducting itself in relation to its own citizens, the government is thus constrained by municipal law, violation of which could expose the government and its agencies to liability in tort, whether principally or vicariously.[35]

Having established that the Government of Pakistan is an independent juristic person and does not enjoy blanket immunity from tortious liability, it is perhaps an opportune juncture to examine the notion of 'justiciability', which, in terms of its possible effect on tortious liability of public authorities, bears close resemblance to the doctrine of sovereign immunity. Justiciability is a principle invoked not uncommonly by the UK courts that operates to negate any liability in private tort actions of authorities and agencies that have been granted discretionary powers by statute in the exercise and performance of their functions. The logic of this principle is grounded in legislative supremacy: if the Parliament authorises a body to act according to a particular course, and that body exercises its discretion in a reasonable manner and acts within the scope of its function, then it follows that it cannot be held liable in damages for doing that which Parliament has authorised.[36] In the United Kingdom in recent years, the invocation of the justiciability principle has frequently resulted in non-liability of statutory authorities in civil actions for damages brought by private parties.[37] In providing for a preliminary filter against liability in instances where discretionary powers have been reasonably exercised by statutory authorities, justiciability is thus perceived almost as a kind of blanket immunity, akin to the original English doctrine of sovereign immunity that similarly operated to protect the actions and omissions of the sovereign and his agencies in civil proceedings.

The picture that emerges in the Pakistani context, on the other hand, is the reverse. There is no discernible use by the courts of the principle of justiciability or any other preliminary or additional filters against liability of statutory authorities with a view to protecting statutory exercise of power in tort actions.[38] Although, on the face of it, this pro-litigant approach mirrors the posture employed by these courts on the broader issue of sovereign immunity, the underlying reason for the almost wholesale absence of any legal discourse on justiciability in tort actions perhaps lies in our finding – which will be discussed later – that there is hardly any precedent in which the courts have awarded damages for a breach of statutory duty.[39] Therefore, the lack of any reference to the notion of justiciability in tort cases in Pakistan may be explicable on the basis that since the courts have rarely encountered claims for damages for breach of statutory duty, the question of justiciability has not yet taken root in the country's legal jurisprudence.

Be that as it may, on balance it appears that it is less cumbersome – purely from the standpoint of substantive precedent, though this may well be undermined in practice by procedural and larger systemic fetters and omissions – to sue the government as well as public authorities in

Pakistan as opposed to the UK and India. Quite apart from the significant attenuation of the doctrine of sovereign immunity, there is also an increasing corpus of case law on the liability of government authorities and agencies in common law negligence, to which we now turn.

Common law negligence

Examples of public institutions and bodies that have been the subject of successful negligence actions in Pakistan for damages for death and personal injury include, *inter alia*, government ministries and their employees, public transport corporations, municipal committees and local governments, public utility providers and government-regulated industrial concerns.

Civil suits for damages against provincial governments and government ministries and their employees are common, and judgments do not reveal any discomfiture or hesitation on the part of the courts to impose liability. For instance, in *Pakistan v Haji Abdul Razzaque*, SCMR 587 (2005) (Pak), the Ministry of Defence was held vicariously liable for the negligence of its employee who, in the course of his employment, caused the death of a motorcyclist in a road traffic accident. Similarly, in *Government of Pakistan v Ishrat Begum*, MLD 768 (1999) (Pak), the Ministry of Defence and the Pakistan Air Force were held jointly liable for causing the death of six individuals in an aircraft crash resulting from the employee pilot's negligence.[40] In *Shaukat Jan v Government of NWFP*, PLD 123 (1982) (Pak), a provincial government was held liable in very unequivocal terms for causing the death of two people through a collision that occurred at the level crossing that had been negligently left unmanned and unfenced by the railway authorities.[41] A provincial government was also held liable jointly with police officials in *Government of NWFP v Saidur Rehman*, CLC 1682 (2004) (Pak) for death resulting from negligent shooting. The Ministry of Planning was held liable in *Irfan Khan v Pakistan,* MLD 1409 (2005) (Pak) for causing death and injury due to negligent supervision of road works on a public highway.[42]

Negligence actions against municipal committees and local governments have also surfaced in recent years. They are characterised by a similar inclination on the part of the courts to establish liability in favour of individuals affected by the tortious acts of these governmental institutions. Notable examples include *Hassan Nawaz Khan v Municipal Corporation*, MLD 1495 (1994) (Pak), in which a municipal committee was held liable in damages for failing to maintain sewerage drains in areas within its jurisdiction, thereby causing sullage water running in the drain to seep into the plaintiff's house; *Naseem Rashid Mirza v Municipal Committee*, MLD 167 (1998) (Pak), where a municipal committee was held liable for damages for its failure to destroy stray dogs in order to protect

citizens from harm; *Fareeda v Government of Sindh*, YLR 362 (1999) (Pak) (*Fareeda*), in which liability was imposed on a local government department for harm resulting from its failure properly to maintain manholes; and, most pertinently, *Nazir Hussain v Government of Sindh*, CLC 719 (2001) (Pak) (*Nazir Hussain*) in which a municipal committee was held liable in damages for failing to take reasonable care in the construction and maintenance of a public latrine which collapsed, killing a person.[43]

Courts have also held public road transport corporations and their employees jointly liable for causing death and injury through negligent driving. Examples include *Karachi Transport Corporation v Qaisar Jehan*, CLC 196 (1995) (Pak) and *Punjab Road Transport Corporation v Zahida Afzal*, SCMR 207 (2006) (Pak) in which, respectively, the Karachi Transport Corporation (KTC) and the Punjab Road Transport Corporation (PRTC) – both statutory bodies – were held liable jointly with their employee drivers for causing death and injury to other road users in road traffic accidents.[44]

Negligence actions against public utility providers are typified by an endless string of suits against the Karachi Electric Supply Corporation (KESC), a government-controlled entity. Courts have repeatedly deprecated the KESC for failing properly to maintain electricity wires and for negligently omitting to take appropriate measures to prevent accidents, thus making the KESC liable in damages for personal injury and death.[45] A representative illustration is provided by *Karim Buksh v KESC*, CLC 507 (1997) (Pak) (*Karim*), in which the deceased was electrocuted when she came into contact with a live wire that had been disconnected from the electric pole due to some defect and was lying loose on a public pathway in the rain. The plaintiffs – dependants of the deceased – alleged that the KESC had a common law duty to ensure maintenance of electric wires. Relying almost exclusively on the seminal English judgment of *Donoghue v Stevenson* [1932] AC 562, Justice Rana Bhagwan Das declaimed KESC's liability in negligence in the following terms:

> [I]t is evident that the defendant KESC who is the manufacturer, distributor and supplier of electricity failed to perform its duty towards its consumers by reason of its gross neglect, improper maintenance and not taking adequate safeguards for the citizens in the event of snapping live wires. (*Karim*, at 512)

Apart from the KESC, other government-controlled utility providers such as the Karachi Water and Sewerage Board (see *Aqeela Bano v Government of Sindh*, MLD 1750 (2002) (Pak) and *Muhammad Moosa v Karachi Water and Sewerage Board*, CLC 925 (1997) (Pak)) and the Water and Power Development Authority (WAPDA)[46] have also been held liable in negligence.

Further, industrial concerns established and regulated by the government have also been the subject of negligence actions. In *Pakistan Steel Mills Corporation Ltd v Malik Abdul Habib*, SCMR 848 (1993) (Pak), for instance, the Pakistan Steel Mills Corporation (PSMC) was held liable in damages for causing the death of one its workers, due to lack of reasonable care in maintaining the workplace.[47]

This body of case law provides an informative framework within which an action against public institutions may be contemplated for obtaining compensatory remedies for the earthquake victims. However, although the cases deal with the liability of public authorities for negligent performance of their assigned tasks, they are not helpful in founding a general legal duty on such authorities for keeping public premises safe for lawful entrants, and it is this duty to protect lawful visitors that concerns us. As argued above, the worst-affected structures in the wake of the South Asian earthquake were public school buildings, public hospitals and health clinics, and various government buildings. The casualties resultantly included sizeable numbers of students and teachers, hospital patients and medical staff, and civil servants and other public employees: all lawful visitors. In the absence of clear precedent, one could contend that a duty to maintain electricity wires or sewerage drains, or a duty to destroy stray dogs – and similar situations where duties are already established by law – do not mechanically, or even analogously, translate into a duty on public authorities to take reasonable care to ensure the safety of lawful entrants in public buildings. Arguably, there is a qualitative difference between the former situations, where the duties relate directly to the nature of work undertaken by the concerned public authorities, and the latter situation, in which the safety of lawful visitors has no direct nexus with the activities of these authorities or the facilities they are assigned to provide such as education, health care, etc.

Consideration of whether or not a specific duty exists in the law of negligence for ensuring the safety of individuals lawfully entering public premises is exceedingly important for two reasons. First, in order that the legal responsibility of public authorities entrusted with the construction, repair and the general upkeep and maintenance of public buildings is clearly and effectively delineated for subsisting as well as future instances of regulatory oversight, it is essential to identify a definite duty in negligence for safety of public premises that is expressly and properly attributed by the law to such authorities. Second, judicial formulation of a precise duty of care for safety of public premises would also contribute towards a much-needed impetus for expedient legislative reform regarding the structural safety of buildings and governmental accountability for defective construction and lack of proper maintenance of public buildings.

In the next section we explore the possibility of extending the duty of care in Pakistani negligence law to the factual scenario of the earthquake aftermath: loss and damage sustained by lawful visitors in public premises that were owned or occupied by government authorities. In the UK, this extension of the law of negligence is afforded by the special tort of 'occupiers' liability', as well as other torts relating particularly to builders, vendors and lessors of property. The main thrust of the following analysis is to ascertain whether the English law on these torts, in its current statutory form, is applicable to Pakistan and, if so, whether we can readily conclude that government authorities in Pakistan can be held liable in damages in their capacity as occupiers, builders, vendors or lessors of public buildings.

Occupiers' liability and other special torts

Pakistani legal jurisprudence is not entirely devoid of the application of common law principles of occupiers' liability. For instance, in *Federation of Pakistan v Ali Ihsan*, PLD 249 (1967) (Pak) (*Ali Ihsan*), in which the plaintiff was injured as he attempted to cross over a railway line by a moving railway wagon that had been negligently left unsecured, the Supreme Court recognised the liability of the railway authority and its employees in their capacity as occupiers of the railway line on recognised common law principles, in the following terms:

> In the case of such an invitee, there can be no manner of doubt that a duty is cast upon the occupier of the premises to take such care as in all the circumstances of the case is reasonable to see that the invitee will be reasonably safe in using the premises for the purposes for which he is invited or permitted to be there. The degree of care necessary in the case of such a person lawfully coming on the premises will depend upon the nature of the danger or hazard to which the person so invited is likely to be exposed. This duty is not confined only to maintaining what has often been described as the 'static condition' of the property, free from danger but it extends also to the taking of reasonable care to safeguard the invitee from any special hazard or danger to which he may be likely to be exposed by reason of any danger inherent in the activity carried on by the occupier on the premises. (at 257)

Ali Ihsan is, however, the only authoritative judgment that attempts to develop and elaborate the law on an occupier's duty to ensure the safety of a lawful visitor on its premises. Later cases, which concern themselves exclusively with the liability of railway authorities, only appear to cite verbatim from this judgment and do not proffer further guidance on the meaning of an occupier or an invitee, or generally the circumstances in which an occupier-invitee relationship may be established.[48] There are also some cases concerning an occupier's liability vis-à-vis trespassers, but these are not particularly helpful in elucidating the law.[49]

Handicapped by the paucity of local precedents, we must direct our attention once again to English jurisprudence for assistance. In the UK, if death and personal injury result from any danger arising from the state of the premises, the occupier of the premises may be held liable for failing to secure the safety of lawful visitors under the *Occupier's Liability Act 1957* (UK) (OLA).[50] An 'occupier' is a person who has 'a sufficient degree of control over premises that he ought to realise that any failure on his part to use care may result in injury'.[51] The key words are 'sufficient degree of control', so that an owner in possession is an occupier just as an absentee owner who occupies the premises through his or her servant. It is not a necessary condition, though, for a person to have an estate in the land or exclusive possession of it for him or her to be an occupier.[52] If the OLA definition of an occupier was to have direct application in Pakistan, the concerned government authorities could conceivably be held liable as occupiers of the earthquake-affected public schools, hospitals and offices if they were either owners of these dwellings – whether directly or through their servants and agents – or were in exclusive possession of the buildings as tenants, and/or were otherwise in physical occupation of the buildings through the routine presence of administrative representatives and staff.

Carrying the presumed application of the OLA principles to Pakistani law further, the duty owed by government authorities as occupiers of public buildings would be 'to take such care as in all circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he or she is invited or permitted by the occupier to be there'.[53] Under the OLA, this duty relates to risks arising from 'any danger due to the state of the premises or to things done or omitted to be done on them' (OLA s 1(1)). It appears that structural defects in buildings are included in 'dangers arising from the state of the premises', and hence an occupier would be liable to visitors for failing to take reasonable care for death or personal injury resulting from a structurally defective dwelling (*Wheat v Lacon* [1966] 1 All ER 582).

English tort law does not stop at imposing a duty of care exclusively on occupiers for damage and injury resulting from structural defects of premises. It likewise saddles builders – and possibly architects, surveyors and sub-contractors – under the *Defective Premises Act 1972* (UK) (DPA) with the duty to 'see that the work is done in a workmanlike or, as the case may be, professional manner and so that as regards that work the dwelling will be fit for habitation when completed' (DPA s 1(1)).[54] Similarly, vendors and lessors who are responsible for the design and construction of buildings also have a duty to take reasonable care that the premises are free from defects likely to cause injury to any person who might 'reasonably be expected to be affected by defects in the state of the

premises' created by construction, repair, maintenance, demolition or other work in relation to the premises.[55] Applied to the Pakistani context, this would mean that, even in cases in which government authorities are not occupiers of the defective premises, they may yet be held liable in tort if they are responsible for the design and construction of the premises and subsequently lease the premises, or even sell them, to non-governmental parties. Such government authorities would include building authorities as well as those entrusted with the supervision and inspection of construction, repair and maintenance of public premises.

If it could thus be ascertained that the legal provisions in the OLA and the DPA can be imported, as it were, into Pakistani law on the question of occupiers' liability as well as the liability of builders, vendors and lessors towards lawful visitors, the liability of the government and the relevant public authorities could be readily established. There is no bar on such importation of English common law principles as is evident from the existing Pakistani precedents on occupiers' liability. But can the same elasticity be expected in the importation of statutory law? The answer to this question is not straightforward. Case authority in Pakistan generally appears to indicate that, though an English Act of Parliament cannot be given the force of law in Pakistan, principles derived from both English common law and statutory law may be consulted and followed if they are consistent with 'justice, equity and good conscience'[56] in the absence of any 'statutory provision, precedent or peculiar circumstances' prevailing in Pakistan (*National Bank of Pakistan v Muhammad Mobin Siddiqui*, PLD 107 at 108 (1973) (Pak) (*National Bank of Pakistan*)). In that case, the court had to consider whether certain provisions of an English statute on marine insurance (*Marine Insurance Act 1906* (6 Edw 7 c 41)) could be made applicable in Pakistan in the absence of any existing law on the subject. Relying on earlier precedents,[57] and arming itself with art 225 of the Constitution of Pakistan, 1962[58] – which granted the force of law to custom, practice and usage – the court in *National Bank of Pakistan* held that the definitions and rules of interpretation contained in the English legislation were usages relating to the interpretation of expressions generally employed in marine insurance policies, and hence could be applied in Pakistan so far as they were not repugnant to Pakistani laws (at 108). However, the court added that Pakistani law could not be 'affected by the technical provisions in the Marine Insurance Act and the decisions of the English courts in respect of those provisions' and that such provisions were 'of help only in determining what is consistent with equity, justice and good conscience' (at 109). In other words, though English statutes could not be grafted in a wholesale fashion onto Pakistani law, the interpretive clauses had the force of law as customs and usage,

while other provisions were of persuasive authority and provided guidance in determining the most just solution in the presence of a legal vacuum.[59]

The judgment in *National Bank of Pakistan,* however, appears to have been thrown into doubt by the Supreme Court judgments of *AM Qureshi v Union of Soviet Socialist Republics*, PLD 377 (1981) (Pak) (*Qureshi*) and *Hitachi Ltd v Rupali Polyester*, SCMR 1618 (1998) (Pak) (*Hitachi Ltd*). In *Qureshi*, the Supreme Court was of the view that, wherever there was a legal vacuum in Pakistani law, guidance had to be sought from Islamic jurisprudence and philosophy and that the notion of 'justice, equity and good conscience' did not operate in favour of the application of English law in Pakistan.[60] Subsequently, in *Hitachi*, the Supreme Court, anchoring itself in art 175(2) of the Constitution of Pakistan, 1973, held that the 'principles of common law or equity and good conscience cannot confer jurisdiction on the Courts in Pakistan which has not been vested in them by law' and 'cannot be pressed into service in Pakistan as having statutory force' (at 1620).[61] The court, nevertheless, softened its stance by adding, '[b]ut a Court may adopt a procedure, which is not prohibited by any law if the dictates of justice so demand' (at 1620), thereby preserving the discretionary powers of Pakistani courts to adopt foreign legal principles when faced with a legal vacuum.

Despite the strong assertions in the judgments of *Qureshi* and *Hitachi Ltd* against adoption of English law in Pakistan, the above discussion compels us to the conclusion that there is a strong case to be made in favour of importing English tort law, as contained in the OLA and the DPA, into Pakistani law, based on the cumulative consideration of the following grounds. First, some precedents based on English common law already exist in Pakistan concerning the duty of occupiers, though there appears to be a complete vacuum in the law of tort as regards the duty of builders, vendors and lessors to lawful visitors. Secondly, rejecting the application of English principles on occupiers' liability towards lawful visitors in Pakistan would not be tenable in light of existing precedent. Thirdly, though English legislation does not have statutory force in Pakistan, the provisions of the OLA and the DPA are founded on common law principles with certain modifications whose function is to settle definitively contradictions in the common law itself. Fourthly, clear precedents do exist for importing English statutory principles specifically in the realm of tort law, which is evidently susceptible to vacuums in several areas.[62] Fifthly, importing English law into Pakistan is not inherently or unavoidably contrary to Islamic jurisprudence, especially in light of the fact that principles of English law on occupiers' liability towards trespassers have been held to be in conformity with Islamic norms (*Javed Iqbal v Province of West Pakistan*, CLC 2369 (1992) (Pak)). Sixthly, there

is no statutory or other law in Pakistan that contradicts the OLA or the DPA. Accordingly, the 'dictates of justice' (*Hitachi Ltd*) necessitate that Pakistani courts adopt the English statutory principles in the OLA and the DPA.

In these circumstances, an action in negligence, either pursuant to the principles of common law negligence in general or occupiers' liability in particular, would afford a viable tortious remedy resulting in damages against the government and government authorities. Nonetheless, in our endeavour to identify all plausible compensatory remedies, we now turn to an alternative cause of action in tort for breach of statutory duty. Breach of statutory duty is distinct from negligence in that the former is concerned with non-compliance or breach of statutes or statutory provisions that are primarily regulatory or criminal in their purpose.[63] As its name implies, the tort only has relevance in the context of a duty that is derived from an existing regulatory statute, which when breached, results in loss or damage to a private party, who then sues the party guilty of breach for damages in tort.

The following section presents a comparative analysis of the tort of breach of statutory duty in the backdrop of loss and damage resulting from defective construction of public buildings in the South Asian earthquake.

Breach of statutory duty

In 1935 a major earthquake jolted Quetta (the present day capital city of the Pakistani south-western province of Baluchistan), causing severe structural damage that in turn took the lives of an estimated 30,000 to 40,000 people (Brown, nd). It perhaps served as a premonition of the even more devastating earthquake that was to strike the northern areas of the country almost 70 years later. Like the many cities and towns that were reduced to rubble in northern Pakistan in the South Asian earthquake in 2005, Quetta is also situated in an area of high seismic activity. Faced with this reality, it did not take the Indian legislature long to enact building regulations in Quetta that would address the deficiencies and omissions in construction techniques in the context of earthquake proofing of buildings. The result was the Quetta Municipal Earthquake Proof Building Code, 1937 (the Quetta Code) which, *inter alia*, banned the construction of multi-storeyed buildings in Quetta.[64] A preliminary survey of legislation pertaining to building regulations in Pakistan reveals that the Quetta Code is perhaps the only law that relates specially to earthquake-proof construction. There is thus a general dearth of relevant legislation on building regulations and, wherever legislation exists, it is largely outdated and insufficient in terms of providing a reasonable standard of protection against building damage and collapse in an earth-

quake scenario.[65] Though Pakistani jurisprudence seems to recognise breach of statutory duty as a distinct tort,[66] the foremost impediment in contemplating an action under this tort is the inadequacy, or sometimes the absence, of relevant statutory law.

Nonetheless, proceeding on the possibility that an identifiable breach of a statutory duty could be made out – such as non-compliance with applicable building regulations – resulting in structural damage leading to personal injury, we are faced yet again with lack of precedent for awarding damages as compensation to a plaintiff against a statutory authority for breach of a statutory provision. The seemingly lone judgment on the subject is the early Lahore High Court case of *Pindi-Jhelum Valley Transport,* which, quite apart from being an authority on the liability of the government for tortious acts (as discussed above), is also significant for its ruling on the essential factors to be taken into account for upholding a claim under breach of statutory duty. It will be recalled that the plaintiff in the case was a private transport company that sued the provincial government for damages for unlawfully cancelling its permits under the prevailing Motor Vehicles Act, 1939 to ply stage and contract carriages on specified routes. In addition to declaratory and injunctive relief, the plaintiff was awarded damages in tort by the court of first instance. The High Court upheld this award on the grounds that: (i) a statutory duty had been breached by the provincial government; (ii) there was no effective provision for an appeal within the Act; (iii) the Act did not expressly or impliedly bar the jurisdiction of the civil court; (iv) refusal to grant the permits by the provincial government was based on extraneous considerations that were found to be *ultra vires*; and (v) most importantly, since the Act did not provide for any adequate remedy for compensating the monetary loss sustained by the plaintiff company, the court had the jurisdiction to uphold the award of damages pursuant to a claim in tort.

From these grounds we can glean certain legal presumptions and principles that would seem to influence the outcome of any action for breach of statutory duty. The first step is to determine the legislative intent or object of the statute through a holistic consideration of its provisions as well as the circumstances of the case, and to ascertain whether the statute – which is essentially regulatory in nature and cannot be presumed in all cases to provide for civil remedies – enables a private party aggrieved by the statutory breach to recover damages for the loss resulting from the breach. This is, understandably, an important preliminary consideration, since if all statutory breaches of a regulatory nature resulted in an award of damages to private litigants, statutory authorities would be subjected to a deluge of liability and the overall function of regulation would be severely disrupted.[67] In order to thus circumscribe the

liability of statutory authorities, *Pindi-Jhelum Valley Transport* posits several presumptions in aid of deciding whether damages should be allowed to a private plaintiff. The first of these is that a 'Civil Court has jurisdiction in all suits of a civil nature unless its jurisdiction is either expressly or impliedly barred' (at 340). The second presumption, which is closely connected to the first, is that 'if a statute creates a right and also provides a machinery for enforcing that right the jurisdiction of the Civil Courts is excluded in matters relating to the right created by the statute' (at 349). The next presumption is that 'where the act in question is *ultra vires*, illegal or *mala fide*, a suit would lie' (at 349). The final presumption is that where the statute in question does not provide for an adequate remedy or redress, the civil court will have the power to award damages (at 350). None of these presumptions appears to be conclusive on its own – incidentally, all the presumptions were in favour of the plaintiff in *Pindi-Jhelum Valley Transport* – and it is necessary to consider all the circumstances of the case.[68]

Without a detailed review of relevant local building regulations, it is debatable whether breach of, or non-compliance with, a duty under building laws – if such a duty does exist – would persuade the courts to award damages to the earthquake victims.[69] Suffice it to say that the preliminary *locus standi* hurdles that the plaintiff is required to overcome in an action for breach of statutory duty – namely, whether the statute intended a civil action to lie in favour of a private litigant and whether the plaintiff is within the class of persons which the statute intends to protect – as well as the possibility of a 'good faith' clause providing immunity to the concerned building authority (Dias, 1989), make it very cumbersome to establish liability against statutory authorities and obtain adequate compensation. However, this is perhaps not of the utmost significance, because regardless of an existing statutory duty, the two actions of breach of statutory duty and common law negligence may lie concurrently in respect of the same act or omission.[70] A cause of action in negligence is essentially separate in nature[71] and, provided that a duty of care can be shown to exist under common law principles, it is inconsequential whether a corresponding duty also exists under a statute.[72] Equally, there may be cases where the defendant may have fulfilled his or her duty under a statute or where the statutory breach is not civilly actionable, but the defendant is held liable for negligence because a common law duty existed in the context of which he or she failed to take reasonable care.[73]

Having identified ostensibly strong causes of action in negligence and occupiers' liability, and a relatively encumbered claim in breach of statutory duty, we now turn to a brief discussion of the tort of misfeasance in a public office which may be helpful in cases where a public authority's or

individual public officer's bad faith in the performance, or non-performance, of public functions may attract punitive or exemplary damages, thereby focusing not simply on compensation of the victim but also on the need for deterring the reprehensible conduct of the defendant.

Misfeasance in a public office

The English courts have been the early progenitors of the tort of misfeasance in a public office.[74] The object of the tort is to provide compensation to those who have suffered harm as a result of abuse of public power, regardless of whether a statutory duty has been breached.[75] The seminal House of Lords judgment in *Three Rivers District Council v Governor and Company of the Bank of England* [2001] 2 All ER 513 (*Three Rivers*) provides a definitive exposition of the ingredients of the tort and canvasses, in much detail, the mental element necessary not only for establishing liability, but also for justifying an award of exemplary damages (at 514). If a public officer is to be liable for the tort of misfeasance, it must be proved either that the officer's conduct was directly intended to injure a person – that is, he possessed 'targeted malice' – or alternatively that the officer knew that his act was outside the ambit of his power and that it would probably cause injury to the person who ultimately suffered loss.[76] The mental element of misfeasance is thus split into a disjunctive two-pronged test, though both tests have a 'unifying element of conduct amounting to an abuse of power accompanied by subjective bad faith' (at 516 per Lord Steyn). While the 'targeted malice' limb requires a direct intent to harm or injure, the alternative form of the tort necessitates the existence of knowledge or *subjective* recklessness on the part of the public officer regarding both the authority to act and the harm that is known, or foreseen, to result from his or her act or omission. Liability for misfeasance, therefore, does not extend to a case where the public officer 'ought to have known' that his or her act was unlawful.

In India, the Supreme Court took cognisance of the tort of misfeasance in *Common Cause, A Registered Society v Union of India*, AIR SC 3538 (1996) (*Common Cause*)[77] – public interest litigation under art 32 of the Indian Constitution (Bakshi, 2003) – within two years of its first appearance in Indian jurisprudence.[78] The court observed that an action of *mala fide* exercise of discretion by a public servant – in other words where the public servant 'deliberately acted in a wholly arbitrary and unjust manner' (at 3550) – would come under the umbrella of the tort of misfeasance and would attract an award of exemplary damages. Subsequently, a review petition was filed (*Common Cause, A Registered Society v Union of India*, AIR 1999 SC 2977). Among the grounds of review was the question of whether, in the absence of an identifiable plaintiff who had suffered tangible injury or loss, liability could be established under the

special tort. On a detailed and systematic survey of case precedents, as well as scholarly accounts on the tort of misfeasance in both the UK and other common law jurisdictions,[79] the court concluded that a necessary ingredient for proving the tort of misfeasance was the existence of actual damage caused by the concerned public officer to a particular person or persons. In the petition before it, the court found there was no identifiable person who could claim to have suffered loss and accordingly no occasion for an award of exemplary damages arose. Despite this conclusion, the court – in a well-reasoned and comprehensive judgment – adopted into Indian law the formulation of the tort of misfeasance as enunciated in *Three Rivers*. But it did not stop at expounding the elements of misfeasance; the *dicta* also embraced and elucidated the grounds adopted by English law for the grant of exemplary damages in cases of misfeasance. The English authority of *Three Rivers* has thus found a formidable niche in Indian jurisprudence.

Almost a decade on from *Common Cause*, Pakistani law remains devoid of any noteworthy reference to the tort of misfeasance in a public office. That is not to say, however, that Pakistani courts have been constrained by lack of precedent to exonerate public officials who have exercised bad faith in the performance of their duties and functions. Though judicial review of executive action under administrative law is a more commonly embraced remedy for censuring such behaviour, Pakistani case law is also speckled with private civil liability for *mala fide* acts on the part of public officials. The Supreme Court of Pakistan has defined a *mala fide* act as one which is by its very nature 'an act without jurisdiction' (*Abdul Rauf v Abdul Hamid Khan*, PLD 671 (1965) (Pak)). A later case further deliberated on the definition of *mala fide* and advanced the following formulation:

> *Mala fides* literally means 'in bad faith'. Action taken in bad faith is usually action taken maliciously in fact, that is to say, in which the person taking the action does so out of personal motives either to hurt the person against whom the action is taken or to benefit oneself. Action taken in colourable exercise of powers, that is to say, for collateral purposes not authorized by the law under which the action is taken or actions taken in fraud of law are also *mala fide*. (*Federation of Pakistan v Saeed Ahmad Khan*, PLD 151 at 170 (1974) (Pak))[80]

The recent Supreme Court case of *Yaqoob Shah v WAPDA*, PLD 667 (2002) (Pak) (*Yaqoob Shah*) is significant not only for its vociferous denunciation of *mala fide* acts of government functionaries but, more importantly, for saddling them with tortious pecuniary damages for transgressing their jurisdiction. The case concerned the arbitrary and wrongful termination of an employee of a government authority by two senior

public officers. While reinstating the employee in service and making the concerned public officers jointly liable for payment of all back benefits to the employee as remuneration for the period during which he remained out of employment, the court proclaimed:

> [I]t is the duty of all Government functionaries to discharge their functions rightly unless it is shown that mistake is *bona fide* and when such functionaries transgress their jurisdiction and violate the provisions of law then subject to statutory exceptions in criminal cases, they cannot claim indemnity for doing civil wrong, intentionally, and if they do so, then they have to bear burden on their shoulders, severally and individually, including sharing of financial burden. If fixing of such liability upon Government officials is adhered [to] strictly, it would not only set [a] trend to do things and discharge duty in accordance with law, without malice and *mala fides* but would also serve a deterrent for like-minded officers. (at 676)

Another relevant recent case is *Pakistan Telecommunication Company Ltd v Rizwana Shaheen*, YLR 999 (2004) (Pak) (*Rizwana Shaheen*) in which an award of tortious damages was upheld against the country's largest public telecommunications services provider for exercising unlawful authority in terminating the telephone connection of the aggrieved individual. The Lahore High Court declared that awarding damages 'is the only process to save the poor people of Pakistan from the clutches of the public functionaries who are usually taking the law in their own hands and shall not proceed in terms of the law which is the need of the day' and, seemingly yearning for a more effective tort law regime, that 'public functionaries and other authorities shall run the country smoothly in case the law of tort is established in this country' (at 1001). Similarly, in *Dost Muhammad v WAPDA*, 2005 YLR 2520 (*Dost Muhammad*), WAPDA was held vicariously liable for its employees by the Lahore High Court for deliberately and falsely refusing to install an electric connection in the plaintiff's house even after the requisite payment had been made by the plaintiff (see also *Nazir Ahmad v WAPDA*, YLR 816 (2006) (Pak)). The court awarded damages in tort to the plaintiff for mental agony caused by the 'malfeasance and misfeasance' of WAPDA's employees.[81]

From the wilful nature of the acts (and omissions) committed by public officers in the foregoing illustrations, a *mala fide* act or an act without lawful authority may be construed as 'targeted malice' – the principal mental element of bad faith described in *Three Rivers* as necessitating a direct intention to cause harm to another person. It has to be determined, however, whether subjective recklessness would suffice for a *mala fide* act. If it be the case that the term *mala fide* is synonymous only with a direct intent to cause injury to a person or specific group of persons, the cause of action would not be appropriate in the context of injuries occasioned

during the South Asian earthquake from defective construction. It would be absurd to allege that building authorities and concerned public officers procured the inadequate construction of public buildings with the intent of causing bodily harm to visitors and inhabitants of these premises. On the other hand, if the alternative mental element of the tort – subjective recklessness – established by *Three Rivers* and affirmed in India by *Common Cause*, could be identified in Pakistani law, a case could be made out for suing public authorities and officers for non-compliance with building regulations and other statutory and non-statutory obligations in instances where they knew their act was unlawful and would probably cause injury to others. It appears that the solution may lie in a cause of action under 'malice in law', which is distinguished in Pakistani legal jurisprudence from 'malice in fact' or *mala fides* on the facts – the latter being synonymous with a *mala fide* act as discussed above. One of the earlier cases that discussed the consequential distinction between 'malice in law' and 'malice in fact' is *Muhammad Yasin Khan v Secretary, Ministry of Education*, PLC (CS) 66 (1986) (Pak) (*Muhammad Yasin Khan*), in which the Federal Services Tribunal held:

> It is a well-established legal position that a public authority who inflicts a wrong or a loss upon a person in contravention of the law cannot be allowed to say that he did so with an innocent mind because it is evidently malice in law, although so far as his mind is concerned, he may have acted honestly or innocently. For, malice in law is to be inferred when an order is made or omission is committed contrary to the object and purposes of the relevant law or rules. (at 72)[82]

Later cases have further clarified that while *mala fide* (or 'malice in fact') requires an element of ill-will, animosity or an intention to benefit oneself, 'malice in law' may simply be inferred from a wrongful act done intentionally without just cause or excuse, even if it was done with 'good faith'.[83] Significantly, the doctrine of 'malice in law' has recently been employed by the Lahore High Court in *Muhammad Yusuf Saleem v Muhammad Yasin*, YLR 1684 (2002) (Pak) (*Muhammad Yusuf Saleem*) – a tort action for false imprisonment. The court upheld an award of damages on the basis that public officers from the Punjab Social Security Institution had acted outside the parameters of the law when they falsely arrested and imprisoned a brick kiln company employee for three days for non-payment of social security contribution. The court quoted the following passage – resonant of the subjective recklessness limb in *Three Rivers* – from an authoritative text:

> The question of 'malice in law' does not necessarily include the imputation of dishonest motive. But it includes the want of necessary care and caution … Malice in law further includes a non-application of mind on the part of the authority vested with powers. (at 1686)

In view of the above, a cause of action for misfeasance in a public office grounded in the authority of *Three Rivers* may therefore be formulated by Pakistani courts on the premises that: (i) misfeasance is an evolving tort in Pakistan as borne out by several civil cases in recent years on the liability of public officers for both *mala fide* performance of official functions and 'malice in law' resulting in damages in favour of the plaintiff; (ii) the existing Pakistani precedents emphasise the need for deterring unlawful acts of public functionaries through tortious damages; (iii) persuasive authorities in both the UK and India recognise that the mental element of 'targeted malice' alone is inadequate for deterring public officers from exercising unlawful authority, and this is supported by the use of the doctrine of 'malice in law' in Pakistani jurisprudence in a recent tort action; and (iv) there is legal precedent in Pakistan to suggest that wrongful and *mala fide* exercise of authority may attract an award of damages over and above the normal compensatory measure, quite like exemplary damages.[84]

The Emerging Picture

From this analysis, we deduce that, although the law of tort in Pakistan is generally ill-equipped – both in terms of a lack of precedent and, at times, lack of clarity – to capture the nuances and complexities surrounding widespread loss of life and limb brought about by defective construction of public buildings by governmental authorities, the seeming vacuity created by underdevelopment of, and ambiguity in, the law is not insurmountable. Lacunae and voids within the law may be plugged by logical extensions in the law – as in negligence; by importation of persuasive and relevant foreign jurisprudence and common law authorities – as in occupiers' liability and misfeasance in a public office; or by a combination of legislative reform and development of jurisprudence through comparative analyses – as in breach of statutory duty. In terms of mass compensation for the victims of the South Asian earthquake, it appears that the most efficacious and expedient remedy is provided by a cause of action in negligence or occupiers' liability. But then the question arises, does Pakistani law provide for class action litigation?

Class action suits are a well-recognised instrument for bringing mass claims for damages under tort, as they allow the aggregation of a group of claimants and their claims into a single class or multiple related classes.[85] This device is largely unique to US courts, where it was promulgated for the first time in the 1930s (H, 1965). The fundamental requirements of a class action procedure have been amended and refined over the years, and are presently found in Rule 23 of the US Federal Rules of Civil Procedure.[86] Evidently, India and Pakistan do not have any legislative

procedures earmarked for class action suits. The statutory mechanism in Pakistan that could ostensibly be employed by courts to mirror the US procedure is found in Order 1, Rule 8 of the Pakistani Civil Procedure Code, 1908 (the CPC),[87] and reads as follows:

> Parties to suits. (1) Where there are *numerous persons* having the *same interest* in one suit, one or more of such persons may, with the permission of the Court, sue or be sued, or may defend, in such suit, *on behalf of or for the benefit of all persons so interested* … [emphasis added]

According to this provision, the determining factor for bringing what is known as a 'representative suit' is the 'sameness' of interest, which has been interpreted to mean not just the same or common cause of action (*Rangal Shah v Mula Jadal*, PLD 512 (1960) (West Pak)), but also the same interest in the subject matter or an injury which is similar to that suffered by all other members of the class to be represented (*Malik Khanan v Malik Baz,* PLD 30 (1983) (Pak)). A copious body of case authority exists on the proper use of this mechanism, including illustrations of the kinds of factual circumstances that would attract the rule, the types of remedies allowed and the enabling nature of the mechanism. Although the predominant remedies sought under the rule are declarations and injunctions,[88] and to a lesser extent, rendition of accounts (*Khialdas v Mahraj Gop*i, PLD Karachi 646 (1969) (Pak)) and orders for possession of land (*Adam Khan v Gulla Mir*, PLD 120 (1982) (Pak)), representative suits for recovery of damages are markedly rare. However, the courts have unequivocally declaimed that the nature of the claim is immaterial, and that the rule is applicable to suits for monetary compensation just as it is to suits for declaratory and injunctive relief.[89] Further, the provision extends equally to plaintiffs and defendants,[90] provided the size of the class being represented is 'numerous'.[91]

An equivalent provision also exists in the Indian Civil Procedure Code, 1908.[92] However, in neither jurisdiction do these provisions appear to have been used for a representative suit in a civil tort claim. Interestingly, however, the Indian jurisdiction provides a prominent example of innovatively combining Order 1, Rule 8 with the constitutional writ procedure thus allowing several defendants, including industries and municipal authorities, to enter appearance through a representative suit in a case of industrial disaster.[93] In fact, in both Pakistan and India, the lack of an active class action mechanism has been compensated for to some extent by judicial activism, which has led to the adoption of the constitutional writ procedure for public interest litigation (with or without Order 1, Rule 8). In the following section, we turn to a detailed analysis of this alternative remedy for compensating the earthquake victims, while keeping in mind the possibility of extending the representative suit

vehicle into a proper class action mechanism under a tort claim for negligence and/or occupiers' liability.

II. The Right to Life under the Constitution: The Public Interest Litigation Regime in Pakistan

The Emergence of Public Interest Litigation in Pakistan – The Constitutional Framework for Protection of Fundamental Rights

Over the past three decades, South Asia and, more particularly, India and Pakistan, have seen the emergence of the highly interesting phenomenon of 'public interest litigation'.[94] In what may seem unusual to observers in other jurisdictions, this phenomenon has been characterised by activist judges revisiting, relaxing and amending the existing trial systems and procedures, as well as their own conventional roles in trial adjudication, in order actively to intervene and adjudicate in areas where they find injustice and persecution to be prevalent in society to an unacceptable level.[95] Justifying this innovative approach, they have argued that the socio-economic and political inequities of these countries preclude the most vulnerable from accessing the courts for seeking justice, which problem is exacerbated by dependence on, at times, unapproachable lawyers, intricate and often forbiddingly complex procedural requirements, the expense of litigation, and traditional legal and judicial attitudes.[96] While a certain amount of restraint has characterised this movement in more recent years, it has definitely opened up an entirely new arena for recourse to justice for many who had been hitherto unable to pursue legal remedies in a similar fashion. The emergence of public interest litigation in South Asia and its current trends and challenges are fast-developing and extensive areas of study, but we shall restrict our analysis to gauging whether the avenue of public interest litigation is amenable to providing a legal remedy to Pakistani victims of the 2005 South Asian earthquake.

The substantive edifice that underpins the pursuit of this new breed of litigation and its remedies are the provisions of South Asian constitutions that extend protection to a diversity of human rights under the category of 'Fundamental Rights'. The Pakistani Constitution contains a comprehensive list of such Fundamental Rights, around which the judiciary has incrementally developed a body of jurisprudence that it has diligently attempted to extend and defend, in spite of periods of praetorian intervention that have temporarily precluded it from doing so.[97] There are several important Pakistani judgments that underline the importance of interpreting the Constitution in such a manner that the ambit of the Fundamental Rights is not curtailed but indeed expanded.[98] The development and protection of Fundamental Rights jurisprudence in Pakistan

has largely taken place due to the existence of special constitutional provisions for accessing the appellate courts for the protection of such rights. Article 199(1) of the Constitution bestows jurisdiction on the provincial High Courts, on the application of 'any aggrieved party' or 'on the application of any person' and where 'it is satisfied that no other adequate remedy is provided by law', not only to issue the usual writs of *prohibition, mandamus, certiorari, quo warranto,* and *habeas corpus* but, additionally, 'on the application of any aggrieved person, [to] make an order giving such directions to any person or authority including any Government exercising any power or performing any function in, or in relation to any territory within the jurisdiction of that Court as may be appropriate for the enforcement of any of the Fundamental Rights' (Pakistani Constitution, art 199(a), (b) and (c)).

Article 184(3) of the Constitution enshrines the original jurisdiction of the Supreme Court and also grants it *suo motu* powers to intervene in areas of 'public importance' for the enforcement of the Fundamental Rights.[99] The Supreme Court can utilise the same powers as the High Courts to issue various writs, as well as their power to issue any order to any person for the enforcement of any Fundamental Rights. This power is further bolstered by art 187(1) of the Constitution which gives the Supreme Court the 'power to issue such directions, orders or decrees as may be necessary for doing complete justice in any case or matter pending before it, including an order for the purpose of securing the attendance of any person or the discovery or production of any document'. Over the past almost three decades, these provisions of the Constitution have been extensively invoked for rights protection. Therefore, it would be useful to conduct a brief overview of the nature of the resultant jurisprudence, in order to gauge its relevance in the context of this article.

The Growth and Development of Public Interest Litigation in Pakistan – New Approaches and Adjudicative Techniques

To trace how the Pakistani courts have developed and implemented a regime of relaxed rules and procedures to facilitate public interest litigation, we briefly analyse some key cases. In *Begum Nusrat Bhutto v Chief of Army Staff*, PLD 657 (1977) (Pak) (*Begum Nusrat Bhutto*), the Supreme Court faced the preliminary question of whether Nusrat Bhutto – the wife of the deposed and incarcerated Prime Minister Zulfiqar Ali Bhutto – had the *locus standi* to approach the court through the invocation of art 184(3) in order to challenge the detention of her husband and the violation of his Fundamental Rights.[100] The Supreme Court was swift in its disposal of the respondents' preliminary objection as to her *locus standi*.[101] The judgment disregarded the direct violation of one's own

Fundamental Rights as a prerequisite for enjoying *locus standi* under arts 184(3) and 199, allowing for next of kin and political party associates to approach the court as 'aggrieved persons'. This was an important expansion in the ambit of the term 'aggrieved person'.

The case of *Benazir Bhutto v Federation of Pakistan*, PLD 416 (1988) (Pak) (*Benazir Bhutto*),[102] which came a decade later, is widely regarded as the high-profile culmination of the higher judiciary extensively critiquing and revising the traditional litigation approach due to the imperatives of public interest and rights protection.[103] The petitioner – who was then the co-chairperson of a political party – had invoked art 184(3) to challenge certain new legislation governing the area of elections, as violating, *inter alia*, the Fundamental Right of 'Freedom of Association' under art 17 of the Constitution (at 464–5). Once again, the respondent questioned the petitioner's *locus standi* and argued that she was not an 'aggrieved person' as the laws could only be questioned by someone in relation to whom an action had been taken, whereas the respondent's claim was in the abstract, as no cause of action had arisen vis-à-vis her (at 477). The Supreme Court rejected this objection and, in a progression from *Begum Nusrat Bhutto*, stated that the initiation of proceedings under art 184(3) was no longer confined to an 'aggrieved person' (at 480).[104] This made art 184(3) even more accessible as a remedy to any concerned citizen, by doing away with the requirement of such person being an 'aggrieved party', as required by art 199. In words that have since proved resonant of a new, liberal and progressive approach to public interest litigation in Pakistan, the Supreme Court stated:

> Any person acting *bona fide* can activise the Court for the infraction of the Fundamental Rights of a class or a group of persons in addition to an aggrieved person whose individual rights are violated. As a result of this innovation a new form of litigation has come into existence which is gaining momentum as is evident … [T]his is a creative and beneficial approach not only for the enforcement of Fundamental Rights, but also for securing social and economic justice. (at 480)

The Supreme Court thus heralded its departure from the earlier rigid notion of a legal right to exist as a pre-condition for maintaining an application for constitutional redress (at 483). The Supreme Court stated that art 184(3) empowered it to enforce the Fundamental Rights where a question of public importance arose in relation thereto, and from this perspective it hardly mattered whether the executive had passed a prejudicial order or not when the infraction of Fundamental Rights took place by the operation of the law itself (at 483). Given the constitutional superiority of Fundamental Rights over ordinary legislation, if impugned legislation *ex facie* violated the Fundamental Rights of an individual or

political parties or associations or unions, proceedings were available for the enforcement of such rights, irrespective of whether any prejudicial order had been passed under such law (at 483).

The Supreme Court judgment in *Benazir Bhutto* was path-breaking in other ways. While analysing the nature and rationale of traditional adversarial proceedings, *locus standi* and other requirements, it charted the course for the future of public interest litigation in Pakistan by laying down its philosophical and moral justification with a strong critique of the traditional adversarial litigation system. It said:

> [T]he adversary procedure, where a person wronged is the main actor if it's rigidly followed … for enforcing Fundamental Rights, would become self-defeating as it will not then be available to provide 'access to justice to all' as this right is not only an internationally recognized human right but has also assumed constitutional importance as it provides a broad based remedy against the violation of human rights and also serves to promote socio-economic justice which is pivotal in advancing national hopes and aspirations of the people permeating the Constitution and the basic values incorporated therein, one of which is social solidarity, i.e. national integration and social cohesion by creating an egalitarian society through a new legal order. (at 489)

The Supreme Court then underlined the justification and importance of the flexibility of proceedings that were to characterise art 184(3) jurisprudence in the coming years and said that their nature was to be determined in light of the purpose – a 'rigid formula of proceedings' was wholly inappropriate for public interest proceedings, as the framers of the Constitution had not intended such proceedings to be in a 'strait-jacket' (*Benazir Bhutto*, 491). Article 184(3), the Supreme Court stated, provided 'abundant scope for the enforcement of the Fundamental Rights' and it was up to the Supreme Court 'to lay down the contours … in order to regulate the proceedings' (at 491).[105] The wide wording of art 184(3), according to it, was a clear manifestation of the intention of the framers of the Constitution not to place any procedural technicalities in the way of the enforcement of Fundamental Rights (at 491*)*. The Supreme Court further said that the requirement of 'public interest' under art 184(3) 'should not be understood in a limited sense, but in the gamut of the constitutional rights of freedoms and liberties, their protection and invasion of such freedoms in a manner which raises a serious question regarding their enforcement' (at 491). Public interest matters, it elaborated, could emerge from infraction of individual rights or that of a class or group of persons, and it was ultimately up to the Supreme Court to make that determination (at 491–2).

The Supreme Court also pointed out that, as there was no element of 'public importance' required under art 199, as opposed to art 184(3), the

scope of the powers of the High Court for dealing with such matters was vast as compared to the Supreme Court (at 488). By bifurcating arts 184(3) and 199 as distinct provisions in terms of their ambit and reach (in spite of language that ostensibly connected the two) the Supreme Court thus ingeniously liberated both from constraining language in either, thereby vastly expanding their ambits. Article 199 was not constrained by the requirement of 'public importance' under art 184(3) and art 184(3) was not constrained by the requirement of 'an aggrieved person' under art 199 (Menski et al, 2000: 54).[106]

Benazir Bhutto thus laid out the field and set the tone for what was to come (Menski et al, 2000: 44–63, 86–96). In the important case of *Darshan Masih alias Rehmatay v The State*, PLD 513 (1990) (Pak) (*Darshan Masih*), the Supreme Court took cognisance of a letter addressed to it that highlighted the plight of bonded labourers in the brick kiln industry.[107] This was the birth of the Supreme Court's *epistolary* jurisdiction – a sub-set of its *suo moto* jurisdiction under art 184(3). The Supreme Court reiterated that, quite apart from passing the kind of orders that could be passed by the High Courts under art 199, any just and proper order could be passed by the Supreme Court under art 184(3); and not only could this ambit not be abridged but how far it could be extended also depended on the nature of the case before the court (at 544–5).

The High Courts have also kept pace with the Supreme Court in terms of broadening and entrenching their powers under Article 199 in the realm of public interest litigation (*Ameer Bano v SE Highway*s, PLD 592 at 596 (1996) (Pak) (*Ameer Bano*)).[108] The courts also declared that, in public interest litigation cases, the litigation is inquisitorial in nature and that the appellate court may, unlike in traditional adversarial proceedings, even delve into fact-finding so as to promote public interest (*Philips Electrical Industries v Pakistan*, YLR 2724 at 2730 (2000) (Pak) (*Phillips Electrical*)). The precondition of public interest litigation and effective enforcement of rights and obligations, courts have said, lay in judicial activism, which essentially amounted to keeping abreast of the times and offering an interpretation of law that would make it workable rather than render it obsolete (*Phillips Electrical* at 2731). Cases like *Shehla Zia v WAPDA*, PLD 693 (1994) (Pak) (*Shehla Zia*) further display how judicial proceedings in public interest litigation can look very much like inquisitorial proceedings, with the court relying on the research and recommendations of special commissions and area experts to assist it in its fact-finding in cases involving highly technical, and at times contentious, areas.[109]

Recent case law shows that the High Courts have also justified their extended powers under art 199 due to a variety of factors such as social

and educational backwardness of public, the dwarfed development of the law of tort, lack of developed institutions to address public concerns, and the general level of inefficiency and corruption at various levels of governance. These courts have stated that in such circumstances non-intervention by the courts would amount to an abdication of judicial authority.[110] Furthermore, they have also clearly moved towards a more liberal approach to the *locus standi* requirement in spite of the wording of art 199, which contains the words 'aggrieved party' or 'aggrieved person'.[111]

After the initial spate of activity in public interest litigation in Pakistan, some of the courts did begin taking a slightly cautious approach to public interest petitions for fear of breaching flood gates, the wasting of court time and interference in policy matters as well as situations where the petitioner was not found to have any nexus with the matter.[112] However, the courts maintained that being an 'outsider' does not preclude a petitioner from approaching the court under art 184(3), so long as he or she is raising a public interest question and pointing out a violation of a Fundamental Right.[113] The recent trend is once again one of tremendous activity and growth in public interest litigation, particularly in the areas of environmental protection, urban planning and social regulation (Alam, 2006).

Quite often Fundamental Rights have not been at stake directly, but have emerged as a side issue in political cases, as in *Begum Nusrat Bhutto* and *Benazir Bhutto*. In *Malik Asad Ali v Federation of Pakistan*, PLD 161 (1998) (Pak) (*Malik Asad Ali*), the issue at stake was that of the legality of the appointment of the Chief Justice of Pakistan. The petitioner argued that the impugned appointment impeded his right to have free and equal access to independent courts – which in turn was a sub-set of the art 9 'right to life' (at 161). The Supreme Court agreed with this line of argument and declared that the right of access to impartial and independent courts/tribunals was the fundamental right of every citizen. Such a right, it said, could only be secured through the appointment to judicial offices of persons of high integrity, repute and competence, and strictly in accordance with the Constitution: any deviation from this would give rise to the infringement of arts 9 and 25 of the Constitution (right of equality of citizens) (at 189). Similarly, in *Muhammad Nawaz Sharif v President of Pakistan* PLD 473 (1993) (Pak) the issue at stake was that of the legality of the dissolution of the Nawaz Sharif Government by the President. Applicable law mandated that new elections had to be held within ninety days of such dissolution, regardless of any pending legal challenges to the same. To avoid delays, the petitioner side-stepped the High Courts (in the past such dissolutions had been first challenged before the High Courts, which had led to appeals before the Supreme Court and new elections

were held while such challenges were still pending before the courts) and directly approached the Supreme Court for urgent relief (at 555). However, in order successfully to invoke art 184(3) for gaining access to the Supreme Court, the petitioner had to show the violation of a Fundamental Right. The Supreme Court was successfully persuaded that a Fundamental Right had indeed been violated and it, therefore, admitted the petition.[114] The Supreme Court managed this by controversially interpreting the Fundamental Right enshrined in art 17 of the Constitution (which safeguards freedom of association) to be inclusive of not just 'the right to form and become member of a political party', but also the right of a political party, winning majority, to form a government and implement its mandate (at 555–60).

The 'Right to Life' under Article 9 of the Constitution and Judicial Expansion of the Concept of Life

Article 9 of the Pakistani Constitution states: 'No person shall be deprived of life or liberty save in accordance with law'. In the important case of *Shehla Zia*, which is also significant for its contribution to the protection of environmental rights in Pakistan, the Supreme Court greatly increased the ambit of the 'right to life'. The case arose through a challenge to the construction of a high voltage grid station in a residential area of Islamabad, Pakistan's capital city. The petitioners, who were residents of that area, were apprehensive of the public health impact of electro-magnetic radiation generated by such grid stations as well as the violation of the city's regulations for maintenance of green belts and vegetation in prescribed public areas. We will come to other important aspects of this case shortly but focusing here on its constitutional dimension, in its elaboration of the art 9 'right to life' Justice Saleem Akhtar said:[115]

> The word 'life' has not been defined in the Constitution but it does not mean nor can it be restricted only to the vegetative or animal life or mere existence from conception to death. Life includes all such amenities and facilities which a person in a free country is entitled to enjoy with dignity, legally and constitutionally. (at 712)[116]

Other contemporaneous jurisprudence emerging through art 184(3) has subsumed 'adequate levels of living' within the ambit of art 9. The Supreme Court has said that '[l]ife has a larger concept which includes the enjoyment of life, maintaining adequate level of living for full enjoyment of freedom and rights' (*Employees of Pakistan Law Commission, Islamabad v Ministry of Works*, SCMR 1548 at 1553 (1994) (Pak) (*Employees of Pakistan Law Commission*));[117] and, *inter alia*, categorised access to clean and unpolluted water as 'a right to life itself' (*General Secretary, West Pakistan Salt Miners Labour Union (CBA) v Director, Industries and*

Mineral Development, SCMR 2061 at 2070 (1994) (Pak) (*West Pakistan Salt Miners Labour Union*)). These cases are also significant for their resolute support for adoption of relaxed procedures under public interest litigation (*Employees of Pakistan Law Commission* at 1553; *West Pakistan Salt Miners Labour Union* at 2071).[118] In subsequent cases, the 'right to life' has received further elaboration and expansion as the courts declared, *inter alia*, that non-payment of wages on time to an employee/servant by the government eroded his ability to lead a proper life and was thus in violation of his 'right to life', as well as his 'right to dignity' (*Metropolitan Corporation, Lahore v Imtiaz Hussain Kazmi*, PLD 499 at 505 (1996) (Pak)); that the existence of extra-judicial killings in a state was in sheer breach of art 9 and hence a justifiable reason for the presidential dissolution of a political government (*Benazir Bhutto v President of Pakistan*, PLD 388 at 607 (1998) (Pak)) (*Benazir Bhutto II*);[119] that a faulty sewerage system in a city that posed the threat of spreading diseases and inconvenience was violative of the 'right to life' (*Ameer Bano* at 597); that 'right to life' included a right to dignified existence which in turn was not possible without a certain level of education (*Ahmad Abdullah v Government of the Punjab*, PLD 752 at 791 (2003) (Pak));[120] that 'right to life' included a right of access to justice to all and included the right to be treated according to law, the right to have a fair and proper trial and the right to have an impartial court or tribunal, and the violation of such a right could be invoked by any citizen (*Malik Asad Ali*, 190–2); that the word 'life' in art 9 also meant a happy life which a married couple was entitled to lead and enjoy, including the right of a married couple to establish home and live together without fear or hindrance and that life without personal rights was not worth living (*Sajida Bibi v Incharge, Chowki No 2 Police Station Sadar, Sahiwal*, PLD 666 at 670–1 (1997) (Pak)); that the political abuse of wire tapping was an assault on the 'right to life' (*Benazir Bhutto II* at 388); and that vehicular pollution led to degradation of life, an adverse affect on the quality of life, health hazards affecting a large number of people and hence a deprivation of life which is prohibited under art 9 (*Syed Mansoor Ali Shah v Government of Punjab*, CLD 533 (2007) (Pak)).

Reading Fundamental Rights with Principles of Policy and the Objectives Resolution – A Technique to Broaden the Ambit of Rights Protection

An important dimension of the Fundamental Rights jurisprudence in Pakistan has been the courts' increasing attempts to expand the ambit of these rights as well as their powers to implement them by reading these in conjunction with the Directive Principles of State Policy under the

Constitution, which are otherwise non-justiciable.[121] The case of *Nizam Khan v Additional District Judge, Lyallpur*, PLD 930 (1976) (Pak) (*Nizam Khan*) is seminal in this regard, as the judiciary in that case ingeniously created jurisdiction for itself to protect and promote Principles of Policy from a constitutional provision that was ostensibly limiting such jurisdiction. The court adopted a clever reading of art 30 of the Constitution,[122] that the responsibility for gauging compliance with the Principles of Policy vis-à-vis any actions of an organ of the state lies with that organ itself, and that the validity of an action or of a law could not be called into question on the ground that it was in violation of the Principles of State Policy. Thus no action lay against such violation – in other words such non-compliance is non-justiciable. The court, however, made some innovative definitional distinctions regarding the use of the word 'State' in art 30 to conclude that the judiciary could both set down rules for itself and the subordinate judiciary to comply with the Principles of State Policy; and that, furthermore, the judiciary was immune from attack by any other organs of the state over such protection and promotion of the Principles of Policy through its adoption of the aforementioned steps (*Nizam Khan* at 978–80).[123] The court said:

> If the negation is immune from attack, it cannot at all be canvassed that affirmation of a principle of policy would be prohibited. Thus there is no bar to the superior judiciary in the performance of its functions and duties and in exercise of its jurisdiction and powers to act or to declare law in accordance with those principles. This discussion … leads to an irresistible conclusion that qua the judiciary (though it cannot direct other organs of the State to act in accordance with the principles of policy) there is nothing to prevent itself from acting on those principles subject of course to some other constitutional limitations and important compulsions qua the statute law. (at 978–80)

This approach received further force when the Supreme Court said in *Benazir Bhutto* that 'while construing art 184(3) … [the] interpretive approach must receive inspiration from the triad of provisions which saturate and invigorate the entire Constitution, namely the Objectives Resolution (art 2-A), the Fundamental Rights and the directive principles of State Policy so as to achieve democracy, tolerance, equality and social justice according to Islam' (*Benazir Bhutto* at 489).[124] It went further to advance the idea of indirect enforcement of certain Principles of State Policy within the scope of the enforcement of Fundamental Rights by 'enlarging the scope and meaning of liberties, by juridically defining them and testing the law on its anvil'. This, the court, thought would bring about 'a phenomenal change in the idea of the co-relation of Fundamental Rights and the Directive Principles of State Policy' (*Benazir Bhutto* at 490).[125] Subsequent cases bolster this mode of interpretation and advocate

the interpretation of Fundamental Rights in conjunction with the Principles of Policy in order to extend the ambit and reach of rights protection (*Shirin Munir v Government of Punjab*, PLD 295 at 312 (1990) (Pak); and *Farhat Jaleel v Province of Sindh*, PLD 342 at 354 (1990) (Pak)).[126]

Quite apart from the Principles of State Policy, the Pakistani courts have also relied on the Islamic provisions – most notably art 2-A of the Constitution[127] – to both bolster their justification for expanding the ambit of Fundamental Rights as well as their power to protect and implement them (Khan, 1993: 48–53).[128] What used to be the preamble to previous constitutions[129] is now an operative part of the current Constitution as art 2-A, and very much defines its ethos as a non-secular one. Recent Pakistani judgments have, however, put to rest the argument that art 2-A can trump other constitutional provisions, thus acting as a sort of *grundnorm*, and have declared instead that it stands on an equal footing with other provisions of the Constitution (*Sharaf Faridi v Federation of Pakistan,* PLD 430 at 452 (1989) (Pak)). Indeed, they have firmly precluded and strongly warned against an interpretation of art 2-A which would raise it to being a litmus test for gauging, evaluating and potentially striking down any other constitutional provisions. While acknowledging that various such provisions may be inconsistent with art 2-A, the courts clearly warn that such an interpretive approach would undermine the entire Constitution (*Hakim Khan v Government of Pakistan*, PLD 595 at 612, 617, 620, 634–5 (1992) (Pak)).[130] However, regardless of this, art 2-A has also been used frequently to underline the courts' commitment to a notion of justice that permeates the Constitution.[131]

Some commentators have noted that the harmonious construction of Islam and human rights in Pakistani law has considerably widened the concept of public interest litigation in Pakistan (Lau, 1996: 295). Others have commented that unlike India, where the judges have to abide by the secular ground rules of their constitutional foundations and can only talk about public interest litigation as a technique to improve the living conditions for people without bringing in ancient Hindu theological and philosophical concepts for fear of making reference to the majority's religious concepts, the Pakistani judges in their approach to the interrelation of religion and law are being guided by a Constitution which now virtually requires them to expand on religion, since they have to test their decisions against Islamic norms all the time (Menski et al, 2000: 15–16).[132] This judicial strategy is not merely a simple device to legitimise individual judgments, but seems to have given Pakistani judges new food for thought about what justice means in contemporary circumstances (Menski et al, 2000: 16). This has led to, *inter alia*, specific Islamic reinterpretations of what public interest litigation means and how it may or may not be used

through a conscious attempt to combine and harmonise Islamic law and Fundamental Rights that may be regarded as secular (Menski et al, 2000: 16, 36–8). This religious dimension of public interest litigation activism, in its various manifestations, has given it added strength and created an extra dimension of power for those who seek to apply its concepts to oppose bad behaviour, blatant injustice and abuses of power, thus expanding the jurisdiction of the Supreme Court and providing more effective checks on human rights abuses (Menski et al, 2000: 16–17).

The Emerging Picture

The kinds of cases which have been taken up by the Pakistani courts, as well as the innovations in procedures and processes to enhance public interest litigation, have grown progressively over the past couple of decades.[133] Some scholarship in this area takes the view that there are trends to suggest that in recent years the focus of public interest litigation in Pakistan seems to have almost invisibly shifted to petitions that defend one private interest against another, so that it looks once again like old adversarial, private interest-focused litigation (Menski et al, 2000: 112–25). There is also reason to suggest that comparatively less public interest litigation cases are being reported now. This, however, is probably explicable by the view that the Pakistani legal system has authoritatively spoken in the past about relaxation of procedures for such cases, and they have now become routine. Since new cases have no new law to divulge, they are not reported. Even if this is true it nevertheless poses the danger of lack of publicity leading to diminished interest and public awareness of human rights problems caused by poverty and socio-economic deprivation (Menski et al, 2000: 123).

There is a concern, therefore, that public interest litigation in its developed form may have been hijacked by middle-class interests, and thus diverted from what it looked like at the time of its emergence (Menski et al, 2000: 125). There is, however, the caveat that public interest litigation has never been only about giving relief to the most deprived. It has always also been concerned with the protection of wider constitutional and legal rights, guaranteed in the Constitution and other legal provisions (Menski et al, 2000: 125).[134] Recent case law shows increase both in the vigour as well as the diversity of the judicial approaches to public interest litigation.

Coming back to the focus of this particular article, the victims of the Pakistan earthquake potentially have a viable remedy in the form of public interest litigation given the wide ambit of the courts' jurisdiction under arts 199 and 184(3); strong judicial commitment to, and innovation in dealing with, matters of public concern under these provisions; the

considerable definitional expansion of the 'right to life' under art 9; and the judicial approach of broadening the outreach of Fundamental Rights by reading them in conjunction with the Principles of Policy and the Islamic provisions of the Constitution. To date, there have been no known attempts to invoke the aforementioned provisions for seeking collective redress for those who may have suffered in the earthquake due to faulty construction of government buildings, though one such action has been brought against a private builder and constructor and its government regulator in a recent case (*Saad Mazhar*). The residents of the badly earthquake damaged up-scale Margalla Towers apartment buildings in Islamabad approached the Supreme Court through art 184(3) as they had been rendered homeless due to the dangerous condition of the buildings. They alleged prima facie substandard construction as an important causal factor.[135] The Supreme Court admitted their petition for the enforcement of the Fundamental Rights of life, liberty and property under arts 9, 14, 15, 23 and 24 of the Constitution, and took note that the residents had been complaining of construction defects and cracks that posed a potential danger to their lives, before the earthquake, but to no avail. The petitioners also claimed compensation for all those affected, as well as punitive damages for all loss of life and injuries caused due to the collapse of the buildings. They further asked for a direction to the respondents to provide them with temporary accommodation and sought the constitution of a committee of architects and engineers to review the applicable building laws in order to suggest suitable provisions and amendments for factoring in such situations.

In its interim order, the Supreme Court, *inter alia*, directed the respondent regulatory authority to provide temporary accommodation of a standard equivalent to that of the vacated building to the displaced families (or else an appropriate monthly rent payment for them to make their own arrangements); restrained the regulatory authority from transferring/alienating any plots of land on which the damaged/collapsed buildings were located; and further directed the regulatory authority to present before the court the complete record of ownership in the buildings and the land they were built on. The court also required the production of all the documentation pertaining to the construction of the buildings, including details of all the requisite regulatory approvals and certifications extended during and after the construction, as well as information about the public officials who had issued such approvals and certifications. At the same time, it directed the police to arrest expeditiously those involved in the construction and supervision of Margalla Towers, against whom First Information Reports (FIR) had been registered (*Saad Mazhar* at 1977).

The final judgment in the Margalla Towers case has not been officially reported, because, as mentioned, the constitutional petition has been disposed of through a court settlement between the petitioners and the respondent regulatory authority.[136] Despite the settlement, the interim judgment serves as a potentially replicable modus for victims of the earthquake elsewhere in the country. Article 184(3) was successfully invoked and the court adopted a relaxed approach and an inquisitorial method in the proceedings. Further, violations of art 9 'right to life', as well as constitutional provisions protecting human dignity, freedom of movement and property rights were successfully pleaded and relied on, and multiple remedies explored for protection of various rights as well as for the potential criminal prosecution of those involved in, and those inadequately regulating, defective construction. This case may provide a very useful precedent for other earthquake victims who have been forgotten after a one-time government compensation payment.

It is also worth noting that there has been a spate of cases in the recent past where concerned citizens have successfully invoked arts 184(3) and 199 to challenge the growing trend of low quality high-rise construction in major Pakistani cities. The appellate courts have shown zeal in scrutinising the buildings regulations, by-laws and governmental approvals governing such construction,[137] as well as the quality and rigour of supervision of such construction by the concerned building regulatory authorities. Several recent judgments display a judicial commitment to upholding public safety as well as addressing environmental and urban planning concerns raised by construction of commercial buildings in residential areas (*Excell Builders v Ardeshir Cowasjee* SCMR, 2089 (1999) (Pak)).[138]

It merits mentioning again that Pakistani law does allow for representative suits by multiple civil litigants having the 'same interest' under the CPC, which of course is of great relevance and potential use in the context of the mass tort claims of which we spoke in Part I of this article. However, in the context of constitutional petitions under art 184(3), the Supreme Court clarified in *IA Sherwani v Government of Pakistan*, SCMR 1041 at 1065 (1991) (Pak) that this provision does not have any application in the context of art 184(3), which already provides the court with a very wide ambit to take cognisance of the violation of a Fundamental Right at the behest of individuals or a group of persons represented through an association or a political party (at 1064). The court then reiterated that in cases involving public interest litigation, in order to advance the causes of justice and public good, the power given to the court under art 184(3) ought to be exercised liberally and unfettered by technicalities. This is a further affirmation of the potential under art 184(3)

for the victims of the earthquake to bring mass claims and to pursue remedies.

Furthermore, in a significant recent case involving a habeas corpus petition the Sindh High Court identified and emphasised the importance of the courts' constitutional jurisdiction of awarding compensation for the violation of a Fundamental Right and clarified that it was altogether different from a private law remedy under tort law, but that this did not mean that the two remedies were mutually exclusive or substitutes for each other (*Mazharuddin v The State* CrLJ 1035 (1998) (Pak)).[139] This, of course, further opens up the possibility of multiple remedies for certain kinds of violations of Fundamental Rights, highly relevant in the context of this article.[140] Additionally, the court said that in suitable cases involving violation of Fundamental Rights, the damages should not just be actual and compensatory but also deterrent or penal, and that the quantum of such damages would depend upon the discretion of the court (*Mazharuddin at* 1056–7).[141] The justification given for this approach was that the 'public law duty' of granting such compensation advanced the judicial imperative of upholding Fundamental Rights, which further necessitated that, in such situations, both the state as well as the concerned functionary be held jointly and severally liable. This, it was elaborated, would ensure that the state is not allowed to extricate itself from all liabilities in such situations, thus forcing the victim to resort only to private remedies under the law against the public functionary (*Mazharuddin* at 1065).[142] This development has been followed in recent judicial pronouncements, albeit, also involving illegal detention situations. The principle of extension of both public and private remedies in a Fundamental Rights violation scenario, as well as the discretionary process for assessing the quantum of damages that can be awarded under the courts' constitutional jurisdiction, present a promising remedial avenue for the victims of the earthquake (*Afsana v District Police Officer (Operation) Khairpur*, YLR 1618 (2007) (Pak)).

III. The Legal Framework for Assigning Liability for Defective Construction in Pakistan: The Criminal Law Regime

Applicable Provisions under the Penal Code

The Pakistan Penal Code (the PPC) underwent several amendments during the regime of General Zia-ul-Haq (1977–88), which embarked on an Islamisation of laws and political institutions.[143] Chapter XVI of the PPC deals with 'offences affecting life' (PPC, s 174). A brief perusal of the Chapter reveals that the offences that have replaced the offences that

existed in the pre-Zia era, and that are usually defined in common law penal codes as 'culpable homicide' and 'murder', are not readily recognisable in the currently applicable version of the PPC in the same form (although these offences are reflected in some of the newly introduced Islamic offences). The pre-Zia amendment offences of culpable homicide and murder etc were replaced with the generic offence of *Qatl*. *Qatl* has been defined as 'causing the death of a person' and four kinds of *Qatl* have been delineated in the PPC along with their respective punishments, namely: (i) *Qatl-e-Amd*, (ii) *Qatl Shibh-e-Amd*, (iii) *Qatl-e-Khata*, and (iv) *Qatl-bis-Sabab* (PPC s 299). According to the Supreme Court, *Qatl* essentially means the death of a person and its meaning does not include the words 'intention' or 'act'. The word *Qatl* as a generic term used in the PPC, therefore, cannot be conveniently translated as 'murder' or 'culpable homicide' (*Taus Khan v The State*, MLD 1775 (1995) (Pak)).

This, however, merits a further detailed discussion of the different types of *Qatl*. The offence of *Qatl-i-Amd* covers the causing of death with:

> [T]he intention of causing death or with the intention of causing bodily injury to a person, by doing an act which in the ordinary course of nature is likely to cause death, or with the knowledge that his act is so imminently dangerous that it must in all probability cause death. (PPC s 300)

In the context of this article, it is apparent that, if the victims of the earthquake were to allege *Qatl-i-Amd* on the part of negligent constructors etc, the *actus reus* component of the offence may be extendable to the act of negligent supervision and regulation of the construction of public buildings, but it would be very difficult to prove the requisite *mens rea.*[144]

The offence of *Qatl Shibh i-Amd,* which encompasses the causing of death by means of a weapon or an act that in the ordinary course of nature is not likely to cause death, also requires 'the intent to cause harm to the body or mind of any person' (PPC s 315).[145] Once again, the importance of the *mens rea* component of this offence has been highlighted by the courts. In a recent case, the Federal Shariat Court, while drawing a distinction between the offences of *Qatl-i-Amd* and *Qatl Shibh-i-Amd*, underlined the vital prerequisite of intention to cause death or such bodily injury as in the ordinary course of nature is likely to cause death (in the case of *Qatl-i-Amd*) or the intention to cause such harm to body or mind as in the ordinary course of nature is not likely to cause death (in the case of '*Qatl Shibh-i-Amd*') (*Bashir Ahmad v The State*, P CrLJ, 662 (2006) (Pak)).[146] Therefore, the intent to commit a crime is a vital prerequisite for proving an offence of *Qatl Shibh-i-Amd* as that poses a hurdle in its exploration as a possible remedy for the victims of the earthquake.

Another offence introduced in Chapter XVI of the PPC that is of greater relevance in the current context is that of *Qatl-i-Khata*, which is committed if a person 'without any intention to cause the death of or cause harm to a person, causes death of such person, either by mistake of act or by mistake of fact', and also 'by any rash or negligent act' (PPC s 318). The courts have elaborated on this provision and declared that despite containing an element of suddenness, and lacking preparation and deliberation, an act of *Qatl-i-Khata* is nevertheless an act of *Qatl*, that is, murder, and hence a 'major sin'.[147] In other words, the nature of the 'sin' will remain unaltered despite a reduction in the quantum of applicable punishment. Finally, another relevant offence is that of *Qatl-bis-Sabab*, which does not require the intent to cause death or harm and deals with homicide caused where any unlawful act becomes a cause for the death of another person (PPC s 321). In drawing a distinction between *Qatl-bis-Sabab* and *Qatl Shibh-i-Amd* the courts have clarified that the former offence lacks the requirement of an intent to cause death or harm to the victim, whereas the latter offence requires intent to cause harm to the body or mind of the victim but not his death (*Khuda Bukhsh v The State*, PLD, 442 (1994) (Pak)).

It is also significant to point out here that the PPC also criminalises causing 'hurt' to anyone, and 'hurt' includes within its ambit the causing of pain, harm, disease, infirmity or injury to any person, or the impairment, disability or dismemberment of any organ of the body or part thereof of a person, without causing his death (PPC s 332). Additional provisions of the PPC deal with the punishment for causing 'hurt' by a rash or negligent act, other than rash or negligent driving (which is dealt with separately under the PPC), further laying out the punishment for doing an act so rashly or negligently as to endanger human life or the personal safety of others, and also the punishment for causing hurt by mistake (PPC ss 337-H-I). The PPC provisions covering 'hurt' categorise injuries according to the location and severity of the injury. Therefore, if one is able to succeed in a claim brought under these provisions, a remedy will exist, even if the eventual outcome was not death (PPC ss 332-338).

Assessment of Criminal Liability

It is apparent from the brief review above that the more relevant remedies available under the PPC are the ones provided for the offences of *Qatl-i-Khata*, *Qatl-bis-Sabab* and 'hurt' caused by a rash or negligent act or by mistake. The main obstacle for any potential earthquake victims pursuing criminal liability against negligent constructors, supervisors of construction etc is, however, always going to be that of establishing a causal link between the act of construction and supervision of public

buildings and their eventual collapse in the earthquake. In the case of *Qatl-i-Khata*, they will have to establish a 'mistake of act' or 'mistake of fact' or a 'rash or negligent act', and then establish its causal link with the deaths due to the collapse of buildings. In the case of *Qatl-bis-Sabab*, they will have to establish first an 'unlawful act', and then establish its causal link with the deaths due to the collapse of buildings. Similarly, a 'rash or negligent act' or a 'mistake' will have to be proved in the case of proving 'hurt'. It can be said that these remedies are more realistic for potential litigators as, unlike *Qatl-i-Amd* and *Qatl Shibh-i-Amd*, at least criminal intent is not something that is required under these offences – which, as said before, would be very hard to prove on the current facts. However, the burden of proof is always heavier in criminal prosecutions as compared to civil or tort actions.

How realistic these options are is hard to gauge, as the relevant Pakistani case law on these offences does not elaborate on the requisite ingredients for establishing their commission. In the relevant case law, after conducting an evaluation of the facts and available evidence, the courts resort to handing out penalties (or modifying sentences for convictions under more serious offences) under these provisions where there is insufficient evidence to prove intent which is a prerequisite for both *Qatl-i-Amd* and *Qatl Shibh-i-Amd* (*Fazla v The State*, P CrLJ 403 (2001) (Pak); *Mukhtar Ahmed v The State*, MLD 930 (2001) (Pak)). In other words, these offences emerge as relevant where the more serious offences of *Qatl-i-Amd* and *Qatl Shibh-i-Amd* cannot be successfully proved by the prosecution.

The Emerging Picture

The existing Pakistani jurisprudence on *Qatl-i-Khata* and *Qatl-bis-Sabab* is deficient for its non-elaboration of any general principles and guidelines that define and clarify the constituent ingredients of these offences, as well as the causal link required to be established between the commission of certain acts and the attachment of criminal liability to the same under the rubric of these offences. They have been essentially invoked in situations where *Qatl-i-Amd* and *Qatl Shibh-i-Amd* were found to be inapplicable due to the prosecutions' failure to establish requisite criminal intent on the available facts and admissible evidence. While convictions under *Qatl-i-Khata* and *Qatl-bis-Sabab* have been determined on the basis of fact patterns and available evidence, the context has invariably been individual acts of crime rather than crimes affecting a large group of people, as is the case in the context of this article. Therefore, the potential ambit of the successful invocation and proof of the commission of these offences for group or mass situations, such as the one presented by the earthquake tragedy, remains unexplored and unclear.

From the perspective of the victims of the earthquake, a desirable remedy would be one that adequately compensates them for their loss, enables them to rehabilitate and, to a lesser extent, also metes out punishment to the guilty parties and creates deterrence against such future negligent construction. This last limb is, however, also a larger policy imperative for the state and its citizens, and does not necessarily outweigh the essential imperative of compensation on part of the victims. In this context, the pursuit of a criminal remedy is arguably not the most appropriate strategy for the victims of the earthquake, as the regime of penalties prescribed for *Qatl-i-Khata* and *Qatl-bis-Sabab* under the PPC is not designed for seeking the quantum of compensation that the victims would hope for. The applicable regime of Islamic punishments under Chapter XVI of the PPC that pertains to 'offences against the human body' is subdivided into the categories of *arsh*, *daman*, *diyat*, *qisas*, and *tazir* (PPC s 299).[148] In the case of *Qatl-i-Khata*, the PPC prescribes a *diyat* punishment and where *Qatl-i-Khata* is committed by any rash or negligent act, then in addition to *diyat* the perpetrator of the crime may also be imprisoned for a term which may extend to five years – as a *tazir* punishment (PPC s 319). For the offence of *Qatl-bis-Sabab*, the prescribed punishment is once again that of *diyat* (PPC s 322). Focusing on the compensatory element of the punishment, the process of calculation of *diyat* has been laid out in the PPC, which says that the applicable amount will be determined by the courts subject to the 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 – but that it will not be less than the value of 30,630 grams of silver (PPC s 323). The PPC further elaborates that for purposes of determining the value of *diyat* the Federal Government shall announce in the official Gazette each year the value of silver, which shall be the value payable during a financial year (PPC s 323). Based on the average current market value for silver, the value of the minimum amount of *diyat* comes out to be approximately Pak Rupees 831,788 (US$13,863).[149]

In the past few months the Supreme Court has observed, in the context of cases against constructors of faulty and dangerous buildings, that lack of proper supervision and control by the concerned regulatory authorities was a 'criminal neglect of duties' on part of the responsible officials. This is a significant development that should also make the option of pursuing criminal actions more attractive for the victims of the earthquake (Sheikh, 2007).[150] These cases are currently *sub judice* but have already created anticipation amongst environmentalists and urban planning activists in Pakistan (Cowasjee, 2007).

Conclusion

Given the enormity of the earthquake disaster and the vast number of Pakistani citizens it affected, the Cash Assistance Program falls well short of adequate compensation, both in terms of comprehensive coverage, and the amount of compensation. It also ignores the prima facie defective construction of public buildings that has most likely contributed to the escalation of loss of life and damage to property. Under these circumstances, it is imperative that available legal remedies in tort, constitutional and criminal laws be actively explored by public interest litigation organisations, pro bono lawyers and activist judges in order to expeditiously bridge the wide gulf between actual humanitarian needs and official response in the wake of the 2005 South Asian earthquake. The issue assumes further importance because of the legal rights of citizens requiring active advocacy and adjudication. What is also at stake is the public policy imperative of ensuring that the state does not knowingly, negligently or carelessly endanger the lives and property of its citizens by less than professional performance of its duties and functions.

Related to this imperative is the goal of state accountability, which goes to the very heart of ensuring and maintaining responsible, democratic governance. This article has attempted to explore available legal remedies and their relative merits and demerits, both to present helpful direction and impetus for such future legal actions, and also critically to analyse the individual and relative limitations of such remedies (especially in the area of the law of torts in Pakistan), with a view to trigger urgent legal reform.

Notes

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1 The five most affected districts in the NWFP were Abbottabad, Battagram, Kohistan, Mansehra and Shangla.

2 The three most affected districts in AJK were Muzaffarabad, Bagh and Rawalakot. Formally, AJK is neither a sovereign state nor a province of Pakistan. According to the Azad Jammu and Kashmir Interim Constitution Act, 1974, AJK has a parliamentary form of government with its own Legislative Assembly, Supreme Court and High Court, though the Government of Pakistan exercises political dominion in respect of foreign affairs and, to a certain extent, parliamentary representation and legislative activity.

3 Earthquakes of magnitude 7 to 7.9 on the Richter Scale are classified as 'major'. The classification of the South Asian earthquake as a major earthquake raises the question of whether it was, as the legal aphorism goes, an 'Act of God', and thereby not amenable

to legal action for compensation against the state or its officials. Much as the nomenclature appears to provide an absolute defence to all damage and loss somehow consequent to a natural disaster, the 'Act of God' defence has been stringently circumscribed in both definition and operation by American and English legal jurisprudence. See, for example, Eagle, 2007, in which the author furnishes a detailed examination of the requirements for establishing the statutory defence in the US. An Act of God is thus defined as 'an unanticipated grave natural disaster or other natural phenomenon of an exceptional, inevitable, and irresistible character, the effects of which could not have been prevented or avoided by the exercise of due care of foresight' and which was 'the sole cause' of the damage caused. Eagle argues that this creates an exceptionally difficult uphill struggle for defendants who wish to rely on the defence, and that this is borne out by the fact that since the statutory defence was made available in the US three decades ago, it has not once been successfully pleaded, despite innumerable natural disaster situations in North America: at 475–6. See also Binder, 1996, in which the author has argued for extinguishing the defence altogether in view of its anachronistic nature. To add to this is the general observation in Pakistan that the 2005 South Asian earthquake was foreseeable, if not inevitable, and that the collapse of defective buildings was the immediate cause of injury and death. See, for example, October 08 Earthquake, 2006. For a comprehensive account of the seismic zonation of Pakistan and its historical earthquakes, see Seismic Hazard Analysis, 2007.

4 The official death toll, as calculated by the Earthquake Reconstruction and Rehabilitation Authority (ERRA) in its first Annual Review, was 73,338. See Rebuild, Revive with Dignity and Hope, 2006. ERRA was formed within days of the earthquake in October 2005 by the Government of Pakistan to work on a comprehensive response to devastation caused by the earthquake. The Annual Review of ERRA also estimates that aside from the fatalities about 69,412 people were injured and nearly 3.5 million people were displaced. As concerns property and structural damage, 600,000 houses, 796 health care facilities and 6298 educational institutions were either destroyed or seriously damaged, in addition to damage to various other government buildings and communications infrastructure.

5 Islamabad experienced only moderate ground shaking from the earthquake, since it is situated approximately 100 kilometres southwest of the epicentre. The only significant property damage observed in Islamabad was the total collapse of a recently constructed apartment building in the Margalla Towers complex, an upscale 11-story residential apartment block.

6 See Rehmat, 2006. See also *10 000 Families in Pakistan's Quake Regions get Radio Sets* (2006) *ReliefWeb* <http://www.reliefweb.int/rw/rwb.nsf/db900sid/YAOI-6TL958>.

7 See <http://www.paktribune.com/news/index.shtml?121991>.

8 See 2005 Earthquake ADB/World Bank Report. See also <http://www.un.org/events/tenstories/story.asp?storyID=2700>.

9 See the observations in Annex 4 of the 2005 Earthquake ADB/World Bank Report, concerning the deficient institutional structure and legal framework for hazard risk management in Pakistan.

10 These include post-earthquake visual inspections of damage to public and private buildings, interviews with federal, provincial and local government authorities, private parties, army, government, non-government and civil society rescue teams and relief providers, as well as inspection of damage-related public and army data by one of the authors during field trips for relief provision and technical assistance to the earthquake affected districts of Rawalakot, Bagh and Muzaffarabad in AJK and the districts of Abbottabad and Mansehra in NWFP. It was very obvious during these trips that public sector buildings had been disproportionately affected.

11 According to preliminary damage and needs assessment surveys, 53 per cent (or 3984 out of 7577) of all educational institutions in the five most affected districts of NWFP were destroyed by the earthquake, while in AJK, 95 per cent (or 3685 out of 3879) of the educational institutions in the three most affected districts were damaged or destroyed. See 2005 Earthquake ADB/World Bank Report. A subsequent Unicef Report describes

the disaster as a 'children's catastrophe' and estimates, on the basis of information provided by the Government of Pakistan, that some 8000 schools collapsed, resulting in the death of 17,000 students and 900 teachers. See Unicef, 2006. For a special account of the damage assessment of educational institutions in AJK, see Shaheen, 2007.

12 NGOs, private newspapers and media, various independent research and engineering institutes, and international agencies are just some of the civil society institutions that played an active role in informing public debate about state accountability for defective construction of public buildings in the shadow of the earthquake.

13 Under art 175 of the *Constitution of Pakistan 1973*, the apex court of the country is the Supreme Court of Pakistan <http://www.pakistanconstitution-law.com/theconst_1973.asp>. See also *Constitution of the Islamic Republic of Pakistan, Zain Shaikh* (1973) (Pakistan Law House 2004) (Pakistani Constitution). The Pakistani Constitution also provides for High Courts for the four provinces of Punjab, Sindh, NWFP, and Balochistan, which are known respectively as the Lahore High Court, the Sindh High Court, the Peshawar High Court and the Balochistan High Court: arts 192–203. In addition, it provides for a Federal Shariat Court to decide, inter alia, whether or not any law or provision of law is repugnant to the injunctions of Islam: arts 203A-203J.

14 It should be noted, however, that a World Bank funded project is soon to be underway, which will attempt to conduct an engineering analysis of the debris of the collapsed buildings, and is likely to divulge important information about the quality standards of construction, especially those of public buildings.

15 See **n 20**. See also the longer term social protection strategy for vulnerable groups in the wake of the earthquake being pursued by ERRA (see above **n 4**) <http://www.erra.gov.pk/Reports/DraftStrategy-SocialP12OCT.pdf>. For the latest official figures on governmental compensation, see *October Progress Report*, 2007.

16 Though evaluations attribute some success to the relief provision and compensation efforts, largely due to the generous international and local monetary and manpower contributions, and also acknowledge the enormity of the task, they also identify many constraints and drawbacks. These include the negative fallouts of the ultimate decision-making lying with the military authorities rather than the more locally entrenched and informed civilian authorities; the lack of coordination and information sharing between the various military, civil, international and local non-government agencies involved in the effort that impeded and impaired efficiencies, synergies and overall impact; poor information dissemination and disclosure leading to public insecurity and dissatisfaction; the absence of a centralised, effective, professional and publicly accountable disaster management agency in the country and the delay and vacillation in creating such an agency even after the fact. See Cheema, 2006 and Cheema, 2007.

17 The government routinely extends compensation to victims of mass disasters in Pakistan under a range of laws including the West Pakistan National Calamities (Prevention and Relief) Act, 1958.

18 The process of cash assistance began with deaths, the government providing Pak Rupees 100,000 (US$1667) per death but only compensating for one death per family. Those who suffered injuries were given one-time payments of Pak Rupees 50,000 (US$833) for permanent disability (including amputation or paralysis), Pak Rupees 25,000 (US$417) for fractures, minor amputations such as fingers/toes, abdominal injuries, or injuries requiring hospitalisation of more than two weeks; and Pak Rupees 15,000 (US$250) for injuries requiring less than two weeks of hospitalisation. The government also announced that it would pay a total grant of Pak Rupees 175,000 (US$2917) for houses destroyed or irreparably damaged by the earthquake, with an initial payment of Pak Rupees 25,000 (US$417) in the first phase: Cheema, 2006.

19 This summary of the several issues with the Cash Assistance Program is based on the sources, above **n 20**.

20 For a general account of the perceptions of the earthquake affectees in respect of the overall assistance provided to them, see Surviving the Pakistan Earthquake, 2006.

21 The extent to which Pakistani law has direct application in AJK depends on the subject matter in question. Certain statutory laws in Pakistan have been made applicable in

AJK periodically through special legislation – subject to subsequent repeal by the AJK Legislature – such as the Azad Kashmir Adaptation of Laws Act, 1959 and the Azad Kashmir Adaptation of Laws Act, 1988. As far as common law principles are concerned, suffice it to say that Pakistani jurisprudence is commonly cited as authority by AJK courts unless there is a statutory provision to the contrary prevailing within the jurisdiction of AJK. In this article, our main focus remains on Pakistan with the understanding that much of the analysis presented in it may also apply to AJK.

22 It is rather telling that, 60 years after independence, there has been no discernible impetus created by the legislative or law reform machinery towards the reform or development of tort law in Pakistan. The Law & Justice Commission of Pakistan – a statutory institution, comprising mainly serving judges, and entrusted with the broad function of reform and modernisation of laws in the country since 1979 – has published two reports that touch upon this area of the law, but which are confined almost exclusively to the Fatal Accidents Act, 1855. These reports are the Law & Justice Commission of Pakistan, *Uniform Court Fee for Claims under Fatal Accidents Act, 1855,* Report Paper No 1 which recommended a minimum uniform court fee in respect of proceedings for recovery of compensation under the Fatal Accidents legislation in view of hardships faced by plaintiffs, and the Law & Justice Commission of Pakistan, *Recovery of Compensation under the Fatal Accidents Act, 1855*, Report No 2 which recommended amendments in the law for, inter alia, rationalisation of monetary compensation payable on death or injury resulting from road traffic negligence. Neither of these reports directly or expressly broaches the subject of tort law development in Pakistan. On the other hand, judicial recognition of the unsatisfactory state of tort law, and the attendant need for its reform, has increased in more recent years. For instance, in *Pakistan Telecommunication Company Ltd v Rizwana Shaheen*, YLR 999 at 1001 (2004) (Pak), the court, in the context of abuse of power by public officers, recognised that 'public functionaries and other authorities shall run the country smoothly in case the law of tort is established in the country'. Similarly, in *Punjab Road Transport Corporation v Zahida Afzal*, SCMR 207 at 215 (2006) (Pak), a case of negligence on the part of a public authority, the Supreme Court declared that 'a person who is violating the law and Constitution works against the welfare of the people that is why it is high time to promote the law of tort so that the people must understand that we cannot live as a nation without performing our duties within the framework of law'. And again that, '[i]t is the duty of the members of the Bar Associations and Bar Council to educate the people and to file suits for damages against the offenders apart from the criminal proceedings. It is also the duty and obligation of media to provide to cultivate awareness of rights specially law of tort which will ultimately bring/compel every authority and functionary including the Chief Executive of the country to work within the framework of law and Constitution': at 216.

23 Scholars have advanced various compelling arguments for the current 'underdeveloped' state of tort law in the Indian subcontinent. For instance, Ananyo Basu, 2001, offers three main reasons for this chasm in the law. The first concerns the economic and political history of the region and its experience of extended colonial subjugation by the British, which ensured a legal system that privileged the elites to the exclusion of the uneducated, poor and non-influential natives – this being symptomatic of the general 'underdevelopment' of 'Third World countries'. The second flows from the first, namely, lack of a legally aware consumer population, the backbone upon which the standard common law model of torts is predicated. The third attributes the lack of specific legal development in torts to the non-consequentialist and duty-centric (as opposed to rights-centric) belief system advanced by theological norms and various aspects of Indian traditional justice systems. See Basu, 2001. See also Araham and Abraham, 1991 regarding tort law development in India.

24 See *Jehangir Services v Bibi Rukhsana Begum*, PLD 329 (1995) (Pak) for an example of a Pakistani case where the court preferred to apply principles of criminal Shari'ah Law for compensation for death resulting from negligence. In particular, the court found that a claim in negligence resembled the offence of *Qatl-i-Khata* under s 38 of the Pakistan Penal Code, 1860 and that, accordingly, compensation could be assessed on the basis of the existing value of *Diyat*. See below Part III.

25 Tortious damages are typically categorised as contemptuous, nominal, ordinary, aggravated, or exemplary (punitive). According to English law, the last category of damages is properly the domain of criminal law unless 'an award of exemplary damages can serve a useful purpose in vindicating the strength of the law, and thus affording a practical justification for admitting into the civil law a principle which ought logically to belong to the criminal', as per Lord Devlin in *Rookes v Barnard* [1964] AC 1129 at 1225–6. This proposition was subsequently approved by the House of Lords in *Cassell v Broome* [1972] 1 All ER 801. Accordingly, only the following categories of cases are amenable to an award of exemplary damages in tort actions: '(1) where there has been oppressive, arbitrary or unconstitutional action by the servants of the Government; (2) when the defendant's conduct has been calculated by him to make a profit which may well exceed the compensation payable to the plaintiff; and (3) where such damages are expressly authorized by statute', *Rookes v Barnard* at 1225–6.

26 Article 174 of the Pakistani Constitution deals generically with the power of the Federation and its constituent Provinces to sue and be sued. The question under consideration, however, is more nuanced, as it refers to the civil liability of the government specifically under tort law. Pakistani Constitution art 175. See above **n 17**.

27 <http://www.swarb.co.uk/acts/1947CrownProceedingsAct.shtml>. This was considered necessary by the British Legislature in view of the inadequacy of compensation for victims of tort in a socio-political environment where the Crown had become one of the largest employers of labour and occupiers of the property in the country. See above **n 35**, 142–3.

28 In this case, a navigation company had instituted a suit against the Secretary of State for India for recovery of damages resulting from injuries to one of their horses in consequence of a negligent act of some workmen employed in a workshop attached to the government dockyard in Calcutta harbour. One of the pleas raised on behalf of the defendant government was that the action was not maintainable against the Secretary of State for India. The court distinguished between torts committed by the servants of the government in the exercise of sovereign powers and torts committed in the course of a trading or commercial activity, and expressed the view that, as concerns the latter type of activity, government officials were subject to the same liabilities as ordinary individuals.

29 See also National Commission, 2001. This conclusion was based on the recognition that the constitutional status of the Crown of England was wholly different from that of the Government of Pakistan and an argument based on the equality of such status would be ill-conceived. The court reasoned that under the Government of India Act, 1935, in pre-partition India, the remedies open to a person against the Secretary of State for India were the same as would have been available against the East India Company, and not the Crown of England.

30 This statement of the law was essentially part of the *dicta*, but of highly persuasive authority, as borne out by subsequent judgments.

31 See generally *Sardar Muhammad Ali v Pakistan*, PLD 88 (1961) (West Pak); *Pakistan v Muhammad Yaqoob Butt*, PLD 627 (1963) (Pak) (*Muhammad Yaqoob Butt*); and *Malik Ramiz Ahmad v Punjab Province*, PLD 736 (1964) (West Pak) (*Malik Ramiz Ahmad*). A relatively recent case on the same point is *Muhammad Zubair Qureshi v Munir Hussain Shirazi*, YLR 955 (1999) (Pak). It is evident from these cases that the three exceptions to sovereign immunity overlap considerably in practical terms. So, for instance, in *Muhammad Yaqoob Butt*, 632 where the proceeds of the illegally detained property of the plaintiff were in the possession of the government itself, the court held that the government could be held liable under any one exception to sovereign immunity or all three.

32 An early but well-articulated attempt at making this distinction is found in *Muhammad Ibrahim v Government of Pakistan*, PLD 1073 (1960) (West Pak) – a case which concerned the liability of the government under the writ jurisdiction of the High Courts. See also *Provincial Government, NWFP Province v Muhammad Afzal Khan*, PLD 34 (1959) (West Pak). The constitutional writ procedure is discussed in detail later. See below Part II.

33 For a comprehensive review of the convoluted and evidently circuitous evolution of the doctrine of sovereign immunity in India, see National Commission, 2001.

34 In fact, art 212(1) of the Pakistani Constitution provides for the establishment of special tribunals for adjudicating cases relating to the tortious acts of the government or its employees in the following terms: '[T]he appropriate Legislature may by Act establish one or more Administrative Courts or Tribunals to exercise exclusive jurisdiction in respect of: … b) matters relating to claims arising from tortious acts of Government …'. Further, the Asian Development Bank's (ADB) Access to Justice Program contains in its agenda the re-examination of immunity of public servants and establishment of legal and institutional frameworks to hold public servants accountable and liable for both omissions and commissions, <http://www.ajp.gov.pk/aj_reforms/tort_law/tort_law_03.asp>. However, neither the constitutional provision nor ADB's agenda has as yet been implemented.

35 See *Federation of Pakistan v Ehsan Ellahi*, PLD 303 at 338 (1955) (Pak) for an authoritative judgment on the vicarious liability of the government. This was followed and affirmed by the court in *Malik Ramiz Ahmad*.

36 The notion of justiciability is governed by the well-recognised 'Wednesbury' principle, which is derived from *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

37 See, for example, *Dorset Yacht v Home Office* [1970] AC 1004; *Hill v Chief Constable of West Yorkshire* [1989] AC 53; *X v Bedfordshire County Council* [1995] 2 AC 633; and *Stovin v Wise* [1996] 3 WLR 388. The case of *Barrett v Enfield* [1999] 3 All ER 193, however, seems to have declared that a common law duty could very well exist in an area of broad policy depending on the statutory context and the nature of the tasks involved. To add to this, the general effect of the *Human Rights Act 1998* (UK) c 42, <http://www.england-legislation.hmso.gov.uk/acts/acts1998/19980042.htm> – which has essentially imported the European Convention for the Protection of Human Rights and Fundamental Freedoms into UK law – is to erode the immunity of public authorities (specifically s 6 of the Act which creates important new obligations un such authorities). See Wadham and Mountfield, 2000.

38 It must be noted, however, that certain statutes contain provisions that purport to grant immunity to public authorities and officers who act in 'good faith'. Two prominent statutes concerning building regulatory authorities which provide for such clauses are the Capital Development Authority Ordinance, 1960 (CDA Ordinance) <http://www.cda.gov.pk/cda-latest/documents/CDA-ordinance-1960.pdf> and the Lahore Development Authority Act, 1975 (LDA Act) <http://www.lda.gop.pk/act2.html>. Section 40 of the CDA Ordinance states: 'No suit, prosecution or other legal proceedings shall lie against the 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'. This provision is reproduced verbatim in s 42 of the LDA Act. The phrase 'good faith' is defined by s 3(20) of the General Clauses Act, 1897 (which applies to all Central Acts enacted after its commencement only if there is nothing repugnant in the subject or context) <http://www.taxmann.net/sm2006/GENERAL_CLAUSES_ACT> in the following terms: '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'. Though the 'good faith' immunity clause does not ever seem to have been invoked under the CDA Ordinance or the LDA Act, precedents do exist under similar clauses in other statutes. See, for example, *Sadruddin Ansari v Haji Dost Ali*, PLD 673 (1968) (Pak), in which it was held that the public official in question was immune from a suit for damages because he acted honestly and therefore, in good faith, even though his action may have been negligent. Additionally, many statutes also contain ouster clauses, the purported aim of which is to oust the jurisdiction of civil courts. However, it is a well-recognised principle that if the exercise of executive function is discriminatory, arbitrary, *mala fide*, or *ultra vires*, it cannot generally be immune from scrutiny of civil courts. For examples of cases where the jurisdiction of a civil court was upheld despite the existence of a statutory provision that purported to bar the jurisdiction of courts, see *Sajjad Ali Mazumder v Province of East Pakistan*, PLD 854 (1960) (Dacca); *Lahore Development Authority v*

Fayyaz Ahmad Butt, CLC 2119 (1986) (Pak); and *Qadri Begum v Province of Sindh*, CLC 2023 (1999) (Pak).

39 The only judgment where an award of damages flowing from a breach of statutory duty by the government appears to have been upheld is that of *Pindi-Jhelum Transport Company*.

40 For a similar precedent in India, see *Pushpa Thakur v Union of India*, AIR 1986 SC 1199.

41 More recent cases include *Pakistan Railways v Abdul Haqique*, MLD 1259 (1988) (Pak); *Muhammad Yousaf v Pakistan*, YLR 3241 (2003) (Pak); and *Pakistan v Rokhsana Perveen*, MLD 335 (2005) (Pak), in which the Ministry of Railways and its employees were held jointly liable for negligently causing death and personal injury.

42 Other examples include *Punjab Province v Muhammad Ashraf*, PLD 1184 (1960) (West Pak); *Government of West Pakistan v Sakina Begum*, PLD 70 (1962) (West Pak); *Nazar Ali Siddiqui v Pakistan*, CLC 1370 (1986) (Pak); *Shahjehan Begum v Government of Sind*, CLC 2325 (1988) (Pak); *Husan Jehan v Pakistan*, MLD 752 (2005) (Pak); *Hafeeza Bibi v Pakistan*, MLD 1804 (2005) (Pak); *Farzana Shabbir v Pakistan,* MLD 401(2005) (Pak); *Feroza Wajid v Government of Sindh*, MLD 786 (2006) (Pak); and *Akhtar Ali Khan v Pakistan*, MLD 851 (2007) (Pak).

43 The defendant municipal committee in this case attempted to shift the responsibility of maintaining the latrine in safe condition to the building contractor. The court held that when a party denied liability on account of the involvement of an independent contractor, the burden of proving the existence of the contract and its terms lay on the shoulders of the owner of the building or structure, and where the owner had no evidence to prove such a contract, the owner would be liable to pay compensation to the plaintiffs, dependants of the deceased. *Nazir Hussain* at 723.

44 Other examples include *Hashmat Ali v KTC*, MLD 538 (1984) (Pak); *PRTC v Muhammad Sadiq*, CLC 933 (1987) (Pak); *KTC v Begum Ayesha*, MLD 1020 (1988) (Pak); *Mukhtiar Begum v KTC*, MLD 1711 (1992) (Pak); *KTC v Qaisar Jehan*, CLC 196 (1995) (Pak); *Chaman Baig v KTC*, CLC 1714 (1995) (Pak); *Shadman v KTC*, CLC 986 (1995) (Pak); *NWFP Road Transport Board v Gul Zarina*, CLC 83 (1995) (Pak); *Muhammad Jaleel v KTC*, CLC 1510 (1997) (Pak); *Shanti v KTC*, MLD 2556 (1997) (Pak); *KTC v Mukhtar Begum*, SCMR 807 (1998) (Pak); *PRTC v Gardner*, CLC 199 (1998) (Pak); *Sadiq Masih v KTC*, CLC 1985 (2002) (Pak); *Bakhtawar Shah v KTC*, MLD 528 (2004) (Pak); *Najma Perveen v KTC*, MLD 518 (2004) (Pak); *Aijaz v KTC*, MLD 491 (2004) (Pak); *Amna Bibi v KTC*, MLD 195 (2007) (Pak); and *Taj Muhammad v KTC*, MLD 182 (2007) (Pak). An Indian Supreme Court authority on the subject is *Hardeo Kaur v Rajasthan State Transport Corporation*, AIR 1992 Supreme Court 1261.

45 See generally *Iqbal Hussain Jaffery v KESC*, CLC 1903 (1994) (Pak); *Rafiqan v KESC*, CLC 1812 (1994) (Pak); *Shaukat Ali v KESC*, MLD 1845 (2001) (Pak); *KESC v Mir Zaman*, YLR 786 (2001) (Pak); and *KESC v Saghir Ahmad Ansari*, CLC 227 (2001) (Pak). Indian examples include *Sagar Chand v State of Jammu & Kashmir*, AIR 1999 J & K 154, and *Padma Behari Lal v Orissa State Electricity Boa*rd, AIR 1992 Orissa 68.

46 See *Ruqiya Begum v WAPDA*, MLD 942 (1985) (Pak); and *WAPDA v Shamim Akhtar*, MLD 518 (2006) (Pak), in which WAPDA was held liable for causing death resulting from lack of maintenance of electricity installations.

47 More recent cases include *Muhammad Usman v PSMC*, MLD 2763 (1997) (Pak); *Muhammad Saeed v PSMC*, YLR 883 (1999) (Pak); and *Ehteshamuddin Qureshi v PSMC*, MLD 361 (2004) (Pak).

48 Cases include *Federation of Pakistan v Mahjabeen*, CLC 2395 (1994) (Pak) (*Mahjabeen*) and *Federation of Pakistan v Khatoon Begum,* SCMR 406 (1996) (Pak) (*Khatoon Begum*). There are also some obscure references to occupiers' liability in the context of lawful visitors in *Shah Bashir Alam v Arokey Chemical Industries Ltd*, MLD 2308 (1997) (Pak), but the focus in that case was on the distinguishable issue of the standard of care to be exercised by an employer in respect of the protection of its employees from electrocution at the work premises.

49 See, for instance, *Javed Iqbal v Province of West Pakistan*, CLC 2369 (1992) (Pak) (*Javed Iqbal*), in which a railway authority was held liable in its capacity as the occupier of a railway line for negligence in maintaining a boundary fence around the railway line and resultantly causing injuries to a six-year-old child trespasser who had stepped onto the crossing while playing with a ball. There is also the case of *Saira v Zonal Municipal Corporation*, MLD 113 (1995) (Pak) (*Saira*), in which a municipal corporation was held liable, as the occupier of a public school and its surrounding compound, for negligence in not restricting access of young school children to a nearby unmanned and unguarded water tank into which two child trespassers jumped while playing and drowned. In these two cases, the legal principles that were applied without demur, in the absence of relevant law on the subject in Pakistan, were those of the English common law (significant reliance was placed on the English judgments of *Robert Addie & Sons v Dumbreck* [1929] AC 358; *Commissioner for Railways v Quinlan* [1964] AC 1054; *Herrington v British Railway* [1972] AC 877; and *Southern Portland Cement Ltd v Rodney John Cooper* [1974] AC 623). The fact that the plaintiffs were trespassers did not function to extinguish liability in view of English judgments that progressively maintained that wilful negligence on the part of occupiers even against trespassers – especially child trespassers – would give rise to a duty on the occupier to ensure their safety on its premises. It should be noted that in the mid-1980s the UK legislature enacted the *Occupiers' Liability Act 1984* in which the duty owed by occupiers to trespassers was clearly delineated with some modifications to the common law principles. However, consideration and discussion of these statutory modifications was entirely absent in *Javed Iqbal* and *Saira*, though both these cases arose after the 1984 English legislation.

50 <http://www.swarb.co.uk/acts/1957Occupiers_LiabilityAct.shtml>. The tort of occupiers' liability assumed statutory form in the UK in the 1950s with the introduction of the OLA. The OLA was enacted on the recommendations of the Law Reform Commission in order to eliminate the confusion that had been generated by common law principles that made tedious distinctions between four different classes of entrants. For an interesting account of the common law on occupiers' liability before the promulgation of the OLA, see Dias, 1989: 707–8. One of the main hallmarks of the OLA was to abolish the problematical distinction in common law between invitees and licensees. The occupiers' duty of care under the OLA governs liability of occupiers in respect of death, personal injury as well as damage to property, with the latter extending to property of persons not themselves visitors.

51 This definition was formulated in the authoritative post-OLA judgment of *Wheat v Lacon* [1966] 1 All ER 582 (Lord Denning) (*Wheat v Lacon*).

52 Thus, an independent contractor who has a significant degree of control of a building development may be held to be an occupier and, further, there is nothing to bar two or more people being considered as occupiers if they share control of the premises: *Wheat v Lacon* at 583. For the special case where the danger is created on the premises by an independent contractor, see s 2(4) of the OLA. See also *AMF International Ltd v Magnet Bowling Ltd* [1968] 1 WLR 1028.

53 See s 2(2) of the OLA. Note that the OLA preserves the old common law principles on the nature of the occupiers' duty and the standard of care required by an occupier – the provision in s 2(2) of the OLA appears almost verbatim in *Ali Ihsan*, see **n 79**. According to English principles, all the circumstances of the case must ultimately be taken into account in determining whether the occupier has fulfilled his or her duty of care to the visitor. No single factor, such as the purpose of the visit, can be conclusive on its own. This is especially the case where there are two or more persons in occupational control of the premises. In such circumstances, it is not imperative that each of them owes an identical duty to the visitor, since the duty of care may assume different meanings depending on, inter alia, the occupier's vocation or calling. For instance, an independent building contractor, in the capacity of an occupier, only owes a duty to take reasonable care to avoid harm to persons that he or she could reasonably expect to be affected by his or her work (see *AC Billings & Son v Riden* [1958] AC 240).

54 <http://www.statutelaw.gov.uk/content.aspx?LegType=All+Primary&PageNumber=55&NavFrom=2&parentActiveTextDocId=1372979&activetextdocid=1372985>.

55 DPA s 3. Oft-quoted precedents include *Rimmer v Liverpool City Council* [1984] 1 All ER 930, in which the tenant of a dwelling house, designed and built by a local authority, successfully sued the local authority for injuries suffered when he fell against a thin pane of glass within the house; and *Targett v Torfaen Borough Council* [1992] 3 All ER 27, in which the tenant of a council house, which had been designed and built by the council, received damages from the council for injuries suffered when he fell down the steps because of a defective handrail. Precedents from other common law jurisdictions also reveal the imposition of liability on parties other than builders, such as municipal authorities responsible for supervision and inspection of construction work. Examples include *City of Kamloops v Nielsen* (1984) 10 DLR (4th) 641, in which the Supreme Court of Canada imposed joint liability on a municipal authority, the builder and the building owner for defective construction of the foundation of the building; and *Invercargill City Council v Hamlin* [1994] 3 NZLR 513, in which the New Zealand Court of Appeal imposed liability on a local authority for negligent inspection of construction.

56 The notion of 'justice, equity and good conscience' was adopted in the Indian subcontinent as a way of harmonising the English and Indian systems of law in the 18th century when the early charters under British rule established courts in India. Essentially, all major areas of civil laws were governed by English law, which was modified or departed from only in cases where peculiar indigenous issues and circumstances warranted. In modern day India and Pakistan this ideological formula is still employed to adapt the system to meet new challenges. One significant example in India is the adoption of certain rules under the Supreme Court Rules in England, in the absence of any corresponding statutory rules in India, to enable the Madhya Pradesh High Court to order interim payment in a mass tort action (*Union Carbide Corporation v Union of India* (1988) MPLJ 540). See Abraham and Abraham, 1991: 334–65. See also *Nizam Khan v Additional District Judge, Lyallpur*, PLD 930 (1976) (Pak) (*Nizam Khan*), for an authoritative and detailed discussion of the historical background and evolution of the concept of 'justice, equity and good conscience' in both the pre-independence Indian subcontinent and post-independence Pakistan. Interesting scholarly sources on this subject include Ilbert, 1896-97: 212–16; and Skuy, 1998: 513–57.

57 See the Privy Council case of *Captain JA Cates Tug v Franklin Fire Insurance Co*, AIR 1927 PC 188; the Indian cases of *Saifuddin Muhammad Ibrahim v New India Insurance Co*, AIR 1949 E Pb 185 and *Hajee Peer Muhammad v Commercial Union Insurance Co*, AIR 1952 Tra-Co 58; and the earlier Pakistani case of *BK Rakshite & Co v Federation of Pakistan*, PLD 503 (1959) (Dacca).

58 The equivalent art 268 of the current Pakistani Constitution preserves the force of law vis-à-vis custom, practice and usage.

59 Note that this judgment dealt specifically with the application of English statutory law in Pakistan. Where the issue under consideration is the application of English common law principles as opposed to statutory law, there are a number of precedents in favour of importing the English principles. See, for instance, *Queensland Insurance v British India Steam Navigation Co Ltd*, PLD 389 (1958) (West Pak); and *Government of Punjab v Kamina*, CLC 404 (1990) (Pak). Interestingly, in *Ghayyur Hussain Shah v Gharib Alam*, PLD 432 (1990) (Pak), the Lahore High Court, in the context of a tort action for malicious prosecution, ruled that English common law cannot be the law of Pakistan. Nevertheless, the court recognised that such a tort did indeed exist and that it was applicable in Pakistan by virtue of a provision in the Code of Civil Procedure, 1908 (see **n 155**). Therefore, the net effect was that the English tort of malicious prosecution was assimilated into Pakistani law.

60 The Supreme Court relied heavily on the Lahore High Court judgment in *Nizam Khan*, which seemed to conclude categorically that, while the notion of 'justice, equity and good conscience' was originally introduced to enable the application of English law in pre-partition India, the circumstances had radically changed after the independence of the Indian subcontinent and the prevailing imperatives under the Pakistani Constitution dictated that all legal gaps in Pakistani law be filled by Islamic jurisprudence. For a

thorough account of the evolving application of Islamic Law in Pakistan since independence, see Lau, 2006.

61 The *Hitachi Ltd* judgment was directly quoted in the recent High Court case of *CIT Group/Capital Equipment Financing Inc v MT Eastern Navigator*, MLD 1135 (2007) (Pak).

62 A very common example of the application of principles of an English statute in Pakistan, when there is no corresponding legislation in Pakistan, can be seen in the domain of tort law itself, namely, the concept of contributory negligence. In England, before 1945 it was settled law that contributory negligence was a complete defence even in a case of absolute duty. But in 1945 the Law Reform (Contributory Negligence) Act was enacted enabling courts to apportion the responsibility and to award the plaintiff reduced damages. Precedent on contributory negligence in Pakistan follows the statutory position in England. See, for example, *Khatoon Begum* and *Fareeda*, in which it was held that a successful plea of contributory negligence would only mitigate the amount payable by way of compensation but would not wipe out liability for negligence. Similarly, in instances of maritime collision, Pakistani precedents seem to apply directly the special English statutory principle of contributory negligence in maritime cases found in the Maritime Conventions Act, 1911. In this respect, see *Muhammad Suraj Mia v The Vessel ML Madina*, PLD 21 at 35 (1970) (Dacca), in which the presiding judge commented: 'I am not aware of any legislation of the type of Maritime Convention Act of 1911 passed either by the Indian Legislature or Pakistan Legislature. But I do not see why the same principles should not be followed by this Court. This is a salutary piece of legislation in conformity with the modern tendency of legislation and judicial decisions'.

63 So, for instance, breach of duty under the OLA would not be considered as an action for breach of statutory duty for the reason that the OLA does not operate in the public law sphere and its principal objective is to provide a civil action for damages.

64 For a concise account of the background of the Quetta Code and its recent application within a public interest litigation, see *Begum Saida Qazi Isa v Quetta Municipal Corporation*, PLD 1 (1997) (Pak).

65 The Pakistan Public Works Department within the Ministry for Housing and Works is the responsible body for the proper design and construction of public buildings as well as the development and adoption of building codes at the federal level. The enforcement of building codes, on the other hand, rests with the provincial governments. According to the National Engineering Services of Pakistan (NESPAK) <http://www.nespakerp.com/>, the only building code applicable at the national level in Pakistan at the time of the earthquake – Pakistan Building Code, 1986 – was seldom implemented. Regional building codes such as the Islamabad Building Regulations, 1963 and the Lahore Development Authority Building Regulations, 1984 also exist, but the extent or quality of their implementation is also uncertain. The authors of the US Team Report, 2005: 41, observe that 'the building code in Pakistan was poorly implemented, with no formal review and updating process. Adding to the problem, much of the construction is undertaken by poorly trained and unskilled labor with little or no enforcement of the building code'. See also Annex 4 of the 2005 Earthquake ADB/World Bank Report. There is now a seismic code under preparation by the Ministry of Housing and Works in consultation with ERRA and NESPAK. The new code is meant to be an integral part of the Pakistan Building Code, 1986 and encapsulates international building standards for earthquake design and construction of buildings (see Building Code of Pakistan (Seismic Provisions – 2007), Government of Pakistan, Ministry of Housing and Works, Islamabad).

66 The *dictum* in *Trustees of Port of Karachi v Norwich Union Fire Insurance Society*, CLC 2412 (1992) (Pak) (*Trustees of Port of Karachi*) explained that an action for breach of statutory duty is an action in tort and not by way of an action for breach of contract.

67 In fact this is the current position in the UK. Until the 19th century, it was the practice in the UK that, whenever a statutory duty was breached, regardless of the nature of the statute, the person suffering harm as a result of the breach could bring a civil action for damages against the person on whom the duty was imposed by statute. However, this

position became untenable with the increase in legislative activity, especially in respect of liability against public authorities. Since the late 19th century, the plaintiff is required to show parliamentary intention, expressed or unexpressed, in the particular statute that confers a private cause of action. Legislation dealing with industrial safety is where the action for breach of statutory duty has been most prevalent in the UK. Conversely, claims based on child protection legislation, legislation for provision of sufficient education, and legislation for provision of housing for homeless persons have been firmly rejected by the courts on the ground that all these areas fall within the rubric of social welfare legislation which is intended to confer benefits at public expense in the wider public interest, and is not simply a private matter between a plaintiff and the statutory body. See Rogers, 2002: 265–6.

68 In the more recent case of *Datari Construction v Razak Adamjee*, CLC 846 at 858 (1995) (Pak) (*Datari Construction*) – which was ultimately argued on the basis of the tort of nuisance – the *dicta* expressly laid out the general ingredients for breach of statutory duty as follows: 'No universal rule can be formulated which will answer the question whether in any given case an individual can sue. In answering the question it is, however, relevant to consider whether the statute was intended to protect a limited class of persons or the public as a whole, whether the damage suffered by the person seeking to sue was of the kind which the statute was intended to prevent, whether a special statutory remedy by way of penalty or otherwise is prescribed for breach of the statute, the nature of the obligation imposed, and the general purview and intendment of the statute'. And further that 'broadly two important principles emerge, (1) though a statute may impose a public duty, it may at the same time impose a duty enforceable by an aggrieved individual in addition to the public duty; (2) the plaintiff to succeed must show that he is within the class of persons which is intended to be protected by the statute': at 858. The court relied on *Halsbury's Laws of England* for delineating these principles. It appears, therefore, that the Pakistani courts are amenable, as is the case with negligence and occupiers' liability, to applying English law on breach of statutory duty.

69 According to English law, a factor to keep in mind is the nature of the legislation. For instance, legislation that prescribes safety standards, such as the legislation for industrial safety, is much more likely to give rise to a private right as opposed to legislation on social welfare matters such as provision of education and health services, which necessarily involves wide discretionary powers. See Rogers, 2002: 267–9. In the absence of any direct precedent, it is difficult to surmise which category of statutes building laws and regulations would fall under.

70 A common example of a situation where the two actions may overlap is where a worker or employee suffers harm in the workplace. He may be able to claim either under negligence (for breach of a common law duty owed by the employer to his employees) or, alternatively, for breach of labour legislation.

71 Other common law jurisdictions employ varied approaches to the tort of breach of statutory duty. The majority of jurisdictions in the US have established that the breach of a statute is 'negligence *per se*'. Under this doctrine, while the breach of the statutory provision can create a cause of action independent of negligence, the standard of care set out in the legislative provision can be imported into an action in negligence. In other words, fault under negligence may be constituted by simple violation of a statutory duty. For a brief explanation of this position, see Matthews, 1984. A different approach is adopted by most jurisdictions in Canada, in which breach of statutory duty is not considered to be an independent tort. According to this approach, statutory violation is considered to be mere evidence of negligence (see *R v Saskatchewan Wheat Pool* (1983) 143 LR (3d) 9). On the other hand, Indian jurisprudence vastly reflects the UK and Pakistani positions in that it appears to distinguish actions in common law negligence from those for breach of statutory duty (see generally *Trustees Port of Bombay v Premier Automobiles*, AIR 1981 SC 1982).

72 Though where a statute imposes a higher standard than the negligence standard of reasonable care such as strict liability, the defendant may be held liable for breach of statutory duty and not negligence. In fact, the major respect in which plaintiffs benefit

from the availability of an action in breach of statutory duty is that liability may be stricter under the statute than in negligence.

73 A typical example is afforded by road accidents. Road traffic legislation generally does not give rise to an action for breach of statutory duty, but road accidents are almost entirely dealt with under negligence. An illuminating Pakistani judgment on this point is *Malik Ramiz Ahmad*, the subject matter of which concerned maintenance of the highway by a public authority. The court pronounced: 'As a general rule, if the statute expressly authorizes the doing of a specific act in a defined manner, no liability arises if the act is done in the manner defined, even if by taking some additional precaution a greater degree of safety could be attained. If, on the other hand, the Legislature authorizes the construction and maintenance of work, which will be safe or dangerous to the public according as reasonable care is or is not taken in its construction or maintenance, as the case may be, *the fact that no duty to take such care is expressly imposed by the statute cannot be relied on as showing that no such duty exists. The duty is one to take reasonable steps to prevent an obstruction becoming a danger to the public*' (at 741–2, emphasis added). Further, in a negligence claim, the breach of a statutory duty may provide evidence for establishing liability (for examples, see *Mahjabeen* and *Khatoon Begum*, in which breach of railway regulations was held to be evidence of negligence). However, if no civil claim arises on the proper construction and interpretation of a statute, and no common law duty exists in negligence, the plaintiff is left without a cause of action. In such circumstances, the plaintiff is not cushioned by an all-embracing common law tort of 'negligent performance of statutory duty'. In other words, the fact that a statutory duty is performed negligently does not in itself give rise to a civil claim for damages.

74 The tort first surfaced in the 18th century case of *Ashby v White* (1703) 1 Smith's Leading Cases (13th ed) 253. Despite its recognition in a number of cases through the 18th and 19th centuries, the tort was seemingly abandoned by the Court of Appeal in the early 20th century (see *Davis v Bromley Corporation* [1908] 1 KB 170), only to be resuscitated in *Dunlop v Woollahra Municipal Council* [1982] AC 158, as a 'well-established' tort and later in *Bourgion SA v Ministry of Agriculture, Fisheries and Food* [1985] 3 All ER 585, Court of Appeal. Finally, the House of Lords ruling in *Three Rivers District Council v Governor and Company of the Bank of England* [2001] 2 All ER 513 (*Three Rivers*) suggests that the protracted and oscillating evolution of the tort has culminated into a well-defined cause of action.

75 The tort of misfeasance includes liability for actual misfeasance in the sense of improper performance of a power or a duty, as well as nonfeasance in the sense of omission to perform a duty (but not a mere power).

76 A pithy explanation of the alternative mental element is provided by Lord Hope of Craighead in *Three Rivers* at 527: 'Where the tort takes this form the required mental element is satisfied where the act or omission was done or made intentionally by the public officer (a) in the knowledge that it was beyond his powers and that it would probably cause the claimant to suffer injury, or (b) recklessly because, although he was aware that there was a serious risk that the claimant would suffer loss due to an act or omission which he knew to be unlawful, he willfully chose to disregard that risk. In regard to this form of tort, the fact that the act or omission is done or made without an honest belief that it is lawful is sufficient to satisfy the requirement of bad faith. In regard to alternative (a), bad faith is demonstrated by knowledge of probable loss on the part of the public officer. In regard to alternative (b) it is demonstrated by recklessness on his part in disregarding that risk'.

77 The writ petition challenged multiple allotments of petrol pumps by the Minister of State for Petroleum and Natural Gas which were allegedly illegal and arbitrary.

78 The tort first surfaced in the Indian Supreme Court case of *Lucknow Development Authority v MK Gupta*, 1 SCC 243 (1994), but was not subjected to a detailed review. The court treated the case as one of misfeasance and awarded exemplary damages in tort to a consumer who had initiated proceedings under the Indian Consumer Protection Act, 1986.

79 Case precedents included the Australian High Court case of *Northern Territory v Mengel* (1995) 185 CLR 307, and the English Court of Appeal case of *Three Rivers District Council v Bank of England* [1996] 3 All ER 558 (which was later affirmed in *Three Rivers* by the House of Lords).

80 It was additionally held in this case that '*mala fide*' was a particularly onerous allegation to prove since there is a presumption of regularity in the law with respect to all official acts. In order to rebut this presumption, allegations of *mala fide* must be pleaded with particularity. See also *Muhammad Ashraf Khan v Revenue AC*, CLC 1504 (1980) (Pak); *Pir Sabir Shah v Federation of Pakistan*, PLD 738 (1994) (Pak); *Qadri Begum v Province of Sindh*, CLC 2023 (1999) (Pak); and *Imam Shah v Government of NWFP*, PLC 1522 (2003) (Pak).

81 Remarkably, the court omitted entirely to define these terms. Further guidance in this respect may be sought from the Sindh High Court judgment of *Trustees of Port of Karachi*, which explained the difference between nonfeasance, misfeasance and malfeasance, though in relation to bailment. The relevant passage may be advantageously reproduced as follows: 'nonfeasance applies where a person omits to do some act prescribed by law; misfeasance concerns a case where a lawful act is done in an improper manner; and malfeasance applies where the act done is prohibited in law' (at 2427). It must be noted, however, that these terms are not generally employed by Pakistani jurisprudence in the context of the special tort of misfeasance in a public office. A number of cases show that these terms are often invoked to describe the manner in which other torts, such as negligence, are committed. If, for instance, a negligent act results from the improper performance of a lawful act, it would be considered a case of misfeasance in negligence. This categorisation appears to be consequential only for the purposes of determining the period of limitation. See generally *Abdul Majid Butt v United Chemicals Ltd*, PLD 98 (1970) (Pak); *Nathey Khan v Government of West Pakistan*, SCMR 485 (1980) (Pak); *Manzoor Hussain v WAPDA*, CLC 285 (2000) (Pak); and *Electric Supply Corporation v Mir Zaman*, YLR 786 (2001) (Pak).

82 The case concerned the wrongful dismissal of an employee, which was held to be actionable under the principle of 'malice in law'. The employee was reinstated into employment and also granted all back benefits since the time of his dismissal till the time of reinstatement.

83 See, for example, *Ghulam Mustafa Khar v Pakistan,* PLD 49 (1988) (Pak), in which the court concluded that 'good faith' was an antonym of *mala fide* and that accordingly, while a 'good faith' clause in a statute (see **n 53**) could negate 'malice in law', it had no such effect on judicial review of *mala fide* acts which constituted 'malice in fact'. See also *Iqbal Wasti v Collector of Customs, Karachi*, PLC (CS) 758 (1987) (Pak); *Manzoor Ahmad Wattoo v Federation of Pakistan*, PLD 38 (1997) (Pak); *Board of Intermediate and Secondary Education v Ghias Gul Khan*, YLR 729 (2001) (Pak); *Karachi City Cricket Association v Mujeebur Rahman*, PLD 721 (2003) (Pak); and *Muhammad Riaz Awan v Capital Development Authority, Islamabad*, PLC (CS) 153 (2006) (Pak).

84 See *Government of Pakistan v Sardar Muhammad Ali*, PLD 1 (1965) (West Pak). The Sindh High Court proclaimed: 'in order that the authorities might know that they could not proceed illegally as a rule substantial damages should be awarded. In cases where the Government officers acted *bona fides*, the only possible consideration that can be shown would be that exemplary damages are not awarded': at 8. This case concerned the tort of false imprisonment, but the principle appears to apply to all cases where *mala fide* acts of government and public officers lead to injury and loss to a private plaintiff.

85 The class action device, despite its many advantages for the plaintiffs, continues to attract criticism in foreign jurisdictions mainly on the ground that the judgment of fault against the defendant(s) is given the force of *res judicata* in respect of all the members of the class, without establishing the defendants' culpability vis-à-vis each individual, thereby leading to ethical questions about equality of defendants before the law. See Glenn, 1985; Fleming, 1994; and Boyle, 1972.

86 Rule 23 of the US Federal Rules of Civil Procedure permits certification of parties as a class if: (a) a class of individual claimants (or defendants) can be adequately defined; (b)

the number of claimants are so numerous that joinder of all members is impracticable ('numerosity'); (c) there exist common questions of law or fact within the claimants' claims ('commonality'); (d) the claims or defences of the representative parties are typical of those of the class of claimants ('typicality'); and (e) the class representatives fairly and adequately protect the interests of the class as a whole ('adequacy of representation').

87 The Code of Civil Procedure (V OF 1908) (Manzoor Law Book House, 2006), Order 1, Rule 8.

88 See generally *Abdul Wahab v Karachi Municipal Corporation*, PLD 391 (1956) (Pak) (*Abdul Wahab*); *Muhammad Hussain v Walayat Shah*, PLD 526 (1959) (West Pak); *Abbas Khaleeli v Saifuddin V*alika, PLD 692 (1969) (Pak) (*Abbas Khaleeli*); *Shaukat Ali v District Council, Hyderabad*, PLD 760 (1978) (Pak); *Adam Khan v Gulla Mir*, PLD 120 (1982) (Pak) (*Adam Khan*); *Maulvi Zufran v Malik Nehmat*, MLD 1576 (1996) (Pak); *Fida Muhammad v All Residents of Rumboor Valley*, SCMR 846 (1997) (Pak) (*Fida Muhammad*); and *Marriage Halls Association v Karachi Buildings Control Authority*, YLR 2317 (1999) (Pak).

89 In *Azad Government v Abdullah,* PLD 30 (1969) (AJK) (*Abdullah*), the appellants, a group of people with 'joint community of interest' in a given area of land in a village, claimed monetary compensation under Order I, Rule 8 of the CPC in lieu of being dispossessed of that land by the Government of AJK under an earlier court order. The respondents – the Government of AJK – argued that the procedural rule was not amenable to monetary claims. This contention was vehemently rejected by the High Court of AJK on the basis of Indian precedent. The court quoted a decisive passage from a 1955 judgment of the Madras High Court as follows: 'The nature of the claim, whether it is a suit for declaration of a right or an injunction or an action for money on contract or on tort, is not very material in considering whether a suit could be filed under the simplified procedure under this Rule (Order I, Rule 8). It is the existence of sufficient community of interest among the persons on whose behalf or against whom the suit is instituted that should be the governing factor in deciding as to whether the procedure provided to this rule could be properly adopted or not': *Abdullah* at 35. Again, in *Muhammad Sarwar v Government of Pakistan*, SCMR 2197 (1998) (Pak), the Supreme Court of Pakistan affirmed the validity of an enhanced award of compensation to a group of 1070 landowners on whose behalf seven other landowners had brought a representative suit against the Government of Pakistan under the land acquisition legislation.

90 Examples of cases where the plaintiffs brought a suit in a representative capacity include *Abbas Khaleeli* and *Adam Khan*. On the other hand, *Abdul Wahab* is a case in which the defendants defended the suit in a representative capacity. It is also not uncommon to encounter cases where both the plaintiffs and defendants are suing and defending, respectively, in a representative capacity in the same suit (*Fida Muhammad*).

91 According to case law, 'numerous' appears to range from six persons (*Adam Khan*) to 1070 persons (*Muhammad Sarwar*). There are no express guidelines as to the minimum number of persons that would fulfil the requirement of 'numerosity'.

92 The Code of Civil Procedure (V OF 1908) (Ganj Shakar, Press 2000), Order 1, Rule 8 (Ind).

93 See *MC Mehta v Union of India* 4 SCC 463 (1987). For another example of mass compensation being awarded to a large number of litigants pursuant to the writ procedure in India, though not with the aid of Order 1, Rule 8 of the Indian Civil Procedure Code, 1908, see *Union Carbide Corporation v Union of India*, AIR SC 273 (1990) – a case concerning the Bhopal gas leak disaster. In the latter case, the Indian legislature enacted the Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985, allowing the Central Government exclusively to represent all aggrieved parties who were entitled to make a claim for compensation against the defendant corporation. See Appendix III of Ratanlal and Dhirajlal, 2004, for the full text of the aforementioned legislation.

94 A seminal article evaluating the emergence of this phenomenon in India is Baxi, 1985. Baxi argues that this phenomenon, which emerged in the late 1970s, is very much distinguishable from the public interest movement that occurred in the US. He is of the view that unlike the US movement that focused on 'civic participation in governmental decision making', and was geared towards 'greater fidelity to the parlous notions of legal liberalism and interest group pluralism in an advanced industrial capitalistic society', the Indian phenomenon was directed against 'state repression or governmental lawlessness' focusing 'pre-eminently on the rural poor': Baxi, 1985: 109. Distinguishing the US phenomenon, he describes it as one that represented 'interests without groups': Baxi, 1985: 109. Others are even more categorical in making this distinction. See Bhagwati, 1984. Bhagwati, 1984: 569, asserts that '[t]he substance of public interest litigation in India is much wider than that of public interest litigation in the United States' as, although embracing all the issues encompassed in the US movement, the Indian movement went beyond and focused on 'the disadvantaged and other vulnerable concerns'. He added to Baxi's categories of state oppression and governmental lawlessness, the additional areas of judicial interventions in India, such as administrative deviance and exploitation of disadvantaged groups and denial to them of their rights and entitlements: 1984: 569. It is not surprising, therefore, to note that both these writers propounded 'social action litigation' as a more appropriate term to describe this phenomenon.

95 Commentators on the Indian public interest litigation phenomenon have identified several methods and techniques which Indian courts have developed to bring about a relaxed and litigant friendly approach for facilitating such litigation. Specifically, they point out the enhancement of direct access to the courts and relaxed rules of standing, procedural flexibility in terms of commencement of legal actions, creative adjudication and elaboration of rights, and remedial flexibility. See, for example, Cassels, 1989. See also Peiris, 1991 who traces the emergence and discusses as remarkable and distinctive features of the Indian public interest litigation phenomenon: the dynamics and impact of the 'epistolary jurisdiction', the relegation of the doctrine of *locus standi*, the extenuation of adversarial postulates, direct judicial involvement in controversial policy issues, the emergence of detailed administrative adjudication, the innovation of mechanisms for fact-finding, the expanded scope of discovery, the instrument of issuance of Directions to Federal and State governments, and invocation of free legal aid.

96 See Justice Shah, 1993. See also Justice Mian, 1991; Justice Khosa, 1993.

97 Chapter 1 of Part II of the Pakistani Constitution lays out a comprehensive list of the Fundamental Rights enjoyed by the citizens of Pakistan. Article 3 says that the State shall ensure the elimination of all forms of exploitation and the gradual fulfilment of the fundamental principle, from each according to his ability, to each according to his work. Article 4 protects the right of individuals to be dealt with in accordance with the law. Article 8(1) protects these Fundamental Rights and declares any law inconsistent with them to be void to the extent of such inconsistency, and art 8(2) prohibits the State from passing any laws that take away or abridge the Fundamental Rights and says that any law made in contravention of this clause would be void to the extent of such contravention. See Pakistani Constitution arts 3, 4, 8–28.

98 For example, the Pakistani Supreme Court has held that constitutional interpretation should not just be ceremonious observance of the rules and usages of interpretation but instead inspired by, inter alia, Fundamental Rights, in order to achieve the goals of democracy, tolerance, equality and social justice (see *Benazir Bhutto v Federation of Pakistan*, PLD 416 at 489 (1988) (Pak)) (Benazir Bhutto); that the prescribed approach while interpreting Fundamental Rights is one that is dynamic, progressive and liberal, keeping in view the ideals of the people, and socio-economic and politico-cultural values, so as to extend the benefit of the same to the maximum possible people; that the role of the courts is to expand the scope of such a provision and not to attenuate the same (see *Muhammad Nawaz Sharif v Federation of Pakistan*, PLD 473 at 674 (1993) (Pak) (*Nawaz Sharif*); and, that a provision restricting Fundamental Rights or provincial autonomy ought not to be interpreted liberally so as to widen its scope. In the context of imposition of State Emergencies, Fundamental Rights cannot be suspended in routine,

and the citizens cannot be deprived of their liberties, unless deprivation is reasonably related to the object of the Proclamation of Emergency. In doing so, the Executive must apply its mind having regard to the object of the Proclamation of Emergency (see *Sardar Farooq Ahmed Khan Leghari v Federation of Pakistan*, PLD 57 at 307 (1999) (Pak)).

99 Article 184(3) essentially says that the Supreme Court shall, if it considers that a question of public importance with reference to the enforcement of any of the Fundamental Rights is involved, have the power to make an order of the nature mentioned in art 199.

100 The respondents had contested that the petitioner was not an 'aggrieved person' in terms of art 184(3) read with art 199, as she had not alleged any violation of her own Fundamental Rights, but only those of the detainees: *Begum Nusrat Bhutto* at 671. This case is additionally significant as it dealt with the legality of General Zia ul Haq's implementation of Martial Law in Pakistan in 1977. Zia deposed Zulfiqar Ali Bhutto (Prime Minister 1970-77).

101 The Supreme Court said that though the petitioner was not an 'aggrieved person' in the sense that she had not alleged the contravention of her own Fundamental Rights, but as the wife of one of the detainees, and as the Acting Chairman of Pakistan People's Party, to which all the detainees belonged, she was an 'aggrieved person' within the meaning of art 199: *Begum Nusrat Bhutto* at 674–5.

102 Coincidently, the petitioner this time was the daughter of Nusrat and Zulfiqar Ali Bhutto – the protagonists in *Begum Nusrat Bhutto*.

103 While agreeing that *Benazir Bhutto* is seminal in terms of the adoption of a new approach by the courts to protection of Fundamental Rights in the context of questions of public interest, some argue that there were clear trends in Pakistan's earlier jurisprudence that show that the judiciary had, through its continuous attempts to extend protection to the Fundamental Rights in spite of operating in an environment of political upheaval and military interventions, moved to this position in a considered, incremental manner. See Menski et al, 2000: 23–9, 38–44. See also Alam, 2006.

104 The Supreme Court conducted an exhaustive comparison of arts 199 and 184(3) to deduce that art 199 in no way limited the ambit of art 184(3), which was a distinct power with a different origin, and was exercisable on its own terminology. The plain language of art 184(3), said the Supreme Court, showed that it was open-ended: *Benazir Bhutto* at 488. For a more recent affirmation of, and elaboration on, this view, see *Malik Asad Ali v Federation of Pakistan*, PLD 161 at 290–5 (1998) (Pak) (*Malik Asad Ali*).

105 See also *IA Sherwani v Government of Pakistan*, SCMR 1041 at 1065 (1991) (Pak) in which it was held by the Supreme Court that when proceedings were in the nature of public interest litigation in order to advance the cause of justice and public good, the power conferred on the Supreme Court under art 184(3) was to be exercised liberally and unfettered with technicalities.

106 They further argue that recent case law has clarified that a similar matter relating to enforcement of Fundamental Rights can now be heard by both the High Courts and Supreme Court simultaneously.

107 A telegram was received by the Chief Justice of the Supreme Court complaining that bonded labour and illegal detention were practised by certain employers involved in the brick-kiln industry. The case was regarded as falling within the ambit of art 184(3) and what followed was an unprecedented process and proceedings, more akin to inquisitorial proceedings. The Chief Justice of the Supreme Court did advise, however, that for the use of this mechanism the telegrams should only be addressed and directed to him: at 544.

108 While elaborating on its power to issue directions to public functionaries for the enforcement of Fundamental Rights, the Lahore High Court said: 'The reason why unlimited powers have been granted to the High Court for issuing appropriate directions is that every other laws/rules/instructions have to yield to the Fundamental Rights enshrined in the Constitution' (at 596).

109 The Supreme Court was probing the question of whether credible evidence existed to support the petitioner's claim that exposure to high tension wires emitting electro-

magnetic radiation could cause cancer. The petitioners had challenged the construction of a high voltage grid station in a residential area. The Supreme Court sought and considered expert opinions from engineers, environmental experts and environmental lawyers and also reviewed international scientific and environmental policy literature on the subject presented by both parties. It also asked NESPAK (see above **n 68**) to provide its opinion on the matter. For details of the events leading to the filing of the petition, the people involved and the innovative process adopted by the Supreme Court, see Siddique, 2000.

110 See *State v MD WASA*, CLC 471 at 475 (2000) (Pak) (*MD WASA*). The case arose due to the tragic death of a girl who fell through an uncovered manhole. The Lahore High Court took direct notice of the matter as a violation of art 9 (right to life) and summoned responsible government authorities to investigate the problem of the hazards caused by open sewerage systems. The court said that such problems continued to exist because of the ignorance of the victims, their poverty and lack of courage to raise these issues with the functionaries of the state: at 472–3. The court set out a list of the diverse kinds of issues, which the courts had over the years directly and indirectly taken cognisance of, through formal petitions, letters or newspaper clips: at 473–5. The court awarded compensation to the victim's family and set a deadline for the covering of all manholes. It further directed that, if such a future accident took place, the respondent would be liable to pay compensation to the bereaved family if the latter had lodged a complaint with the respondent about an uncovered manhole immediately after coming to know of it and the respondent had not taken remedial action to cover it within 48 hours of the complaint. The court also directed that any criminal complaint about any such future event would be submitted before the trial court within two weeks of its being lodged and the trial would be conducted within a period of one month and that the local bar would provide free legal aid to the bereaved family through its free legal aid society: at 476–7.

111 See *Philips Electrical* at 2733–4, where the Sindh High Court said that though there had been some dispute after *Darshan Masih* regarding whether the High Courts enjoyed the powers and flexibility in terms of *locus standi* under art 199, as did the Supreme Court under art 184(3), certain recent Supreme Court decisions stressed the need to relax the requirement of *locus standi* in the High Courts as well. See also *Ardeshir Cowasjee v Karachi Building Control Authority*, SCMR 2883 at 2905 (1999) (Pak), where it was held that in order to maintain a writ petition in the High Court it was enough if the petitioner disclosed sufficient or personal interest for the performance of some legal duty – the term 'sufficient interest' had to be given a generous interpretation. See also *Muhammad Bashir v Abdul Karim*, PLD 271 at 283 (2004) (Pak), where the Supreme Court said that art 199 cast an obligation on the High Courts to act in aid of the law, and that whenever the acts of the executive were in violation of the law, an appropriate order could be granted to relieve the citizen of the effects of the illegal action. It further said that art 199 was an omnibus article under which relief could be granted to the citizens against the infringement of any provision of the law or of the Constitution.

112 See *MD WASA* at 476. The court cautioned that given the vastness of the realm that can be included in the field of public interest litigation, while taking notice of matters under art 199, the courts should proceed with the utmost caution and restraint in order to guard against frivolous petitions, petty domestic disputes and other such grievances that would lead to loss of valuable public time. Similarly, it cautioned against courts taking cognisance of matters requiring technical expertise, saying that in the absence of proper assistance the courts may end up issuing orders that may demoralise the administration, which has a crucial role to play in developing countries: at 476. This conservatism, however, has been displaced by a much more proactive approach in the last five to seven years.

113 See *Moulvi Iqbal Haider v Capital Development Authority*, PLD 394 at 413–15 (2006) (Pak). The petitioner had challenged the construction of an amusement park which charged an entrance fee, in an area classified as a public park with free entrance, as a violation of art 26 of the Constitution (non-discrimination in respect of access to public places). The petitioner was found to possess requisite *locus standi* for purposes of art

184(3) and was thus competent to pursue it *pro bono publico*. The court went on to say that the Supreme Court and High Courts had, in fact, encouraged such invocation of their jurisdiction by concerned citizens for the protection of rights and justice.

114 This was, once again, a political case, which saw the Supreme Court adjudicating the legality of the Nawaz Sharif government's dissolution by the President of Pakistan through his special powers under art 58(2)(b) of the Constitution.

115 See also Hassan and Azfar, 2004. The authors argue that by means of declaring that the right to life guaranteed by art 9 included the right to a healthy environment, the Supreme Court accorded environmental rights the highest status in Pakistani law – that of constitutional legitimacy. In subsequent cases the right to healthy environment (open spaces, parks, greenery, etc) as a sub-set of right to life has received further support and elaboration (see *Zahir Ansari v KDA*, PLD 168 (2000) (Pak)); and *SHEHRI v Province of Sindh*, YLR 1139 at 1146–7 (2001) (Pak)). *In re Human Rights case (Environment Pollution in Balochistan)*, PLD 102 (1994) (Pak), the Supreme Court took notice of a news item in a daily newspaper that nuclear or industrial waste was going to be dumped in the province of Balochistan in violation of art 9, and issued orders for investigation into the matter as well as to prohibit the allotment of any land to anyone for such purposes. See also *Re Pollution of Environment Caused by Smoke Emitting Vehicles, Traffic Muddle*, SCMR 543 (1996) (Pak), where the Supreme Court issued an exhaustive set of directions to address the problem of air pollution in the city of Karachi. See also *Anjum Irfan v LDA*, PLD 555 (2002) (Pak), where the court addressed the setting of air and noise pollution standards under new environmental legislation in the area.

116 The Supreme Court further said that, in providing a guarantee for the preservation and protection of the dignity of man under art 14, the Pakistani Constitution was unparalleled and such a right could be found in but few constitutions of the world. Furthermore, reading arts 9 and 14 together raised the question of whether a person could enjoy his constitutionally guaranteed right to dignity if his right to life was impeded, in that he did not even have bare necessities such as proper food, clothing, shelter, education, health care, clean atmosphere and unpolluted environment. *Shela Zia* at 714.

117 The petitioners, employees of the Federal Government, claimed that they were entitled to provision of accommodation during their tenure of service and denial of the same was a violation of art 9. While agreeing with the petitioners the Supreme Court said that art 9 was not to be construed in a restricted and pedantic manner. The Supreme Court did qualify that the petitioners were only entitled to such right to accommodation (even if their terms of employment did not require the respondent to provide such accommodation) if other government servants similarly placed were also being provided accommodation.

118 The Supreme Court said that flexible procedures gave it the position to extend the socio-economic benefits to all sections of society.

119 The case involved the dissolution of Prime Minister Benazir Bhutto's government through the invocation by the President of Pakistan of art 58(2)(b) of the Constitution, which gives him special powers to dissolve elected Assemblies under special circumstances. One of the allegations in the presidential charge sheet was that of the existence of wide-scale extra-judicial killings at the behest of the government. The Supreme Court said that the 'right to life' not only guaranteed genuine freedom but also freedom from wants, illiteracy, ignorance, poverty and, above all, freedom from arbitrary restraint from authority. The 'right to life' included the right of personal security and safety, the right to have clean and lawful administration, and the right to have honest and 'incorruptible actions' by the authorities. Furthermore, the 'right to life', the court said, included the right to live with respect, honour and dignity, and that in a state where extra-judicial killings were conducted at the orders of the government at the helm of the affairs, such a government could not be regarded as constitutional, legal or civilised: *Benazir Bhutto II* at 607.

120 Very interestingly, this judgment relied on the seminal US case of *Brown v Board of Education* (1953) 98 Law Ed 873.

121 Pakistani Constitution, Chapter 2 of Part II (arts 29–40) sets out a comprehensive list of the Principles of Policy. Through art 29(1), the Constitution requires the state to act in accordance with these Principles. Article 29(2) does qualify that in so far as the observance of a particular Principle of Policy may be dependent on resource availability, such a Principle shall be regarded as subject to such constraint. Article 30, however, makes non-compliance with the Principles of Policy to be non-justiciable and puts the responsibility for such compliance on the organ or authority of the state or on the person performing functions on their behalf.

122 Article 30 of the Pakistani Constitution states: '(1) The responsibility of deciding whether any action of an organ or authority of the state, or of a person performing functions on behalf of an organ or authority of the state, is in accordance with the Principles of Policy is that of the organ or authority of the state, or of the person, concerned. (2) The validity of an action or of a law shall not be called in question on the ground that it is not in accordance with the Principles of Policy, and no action shall lie against the state, any organ or authority of the state or any person on such ground'.

123 The court took the view that art 30 only precluded 'an organ or authority or person in the State' not included within the definition of the 'State' under art 7 of the Constitution, to direct organs, authorities and persons included within that definition to act in accordance with the Principles of Policy. Article 7 defines the 'State' as follows: 'the State means the Federal Government, Majlis-e-Shoora (Parliament), a Provincial government, a Provincial Assembly, and such local or other authorities in Pakistan as are by law empowered to impose any tax or cess'. The court went on to say that, therefore, it accepted the interpretation that since the judiciary was not included in the art 7 definition of the 'State', it could not direct other organs, authorities and persons included in the definition of the 'State' to act in accordance with the Principles of Policy. But this, the court concluded, did not preclude the judiciary from: (i) setting down a rule for itself to follow the Principles of State Policy, or (ii) to declare it for the subordinate judiciary to act in accordance therewith; and by doing so it would not be in violation of art 30(1)'s bar. As for the bar presented by art 30(2), the High Court read it as more of a protection that extended itself even to the judiciary, even though it was not included in the definition of the 'State' under art 7, as the language of art 30(2) had used the term 'State' in a wider sense and also independently and in addition to any organ or authority of the State, or any person. Hence its protection was not restricted to organs of the 'State' in the limited sense of art 7. The High Court concluded that this inclusion of the 'judiciary' in the wide definitional ambit of art 30(2) thus made it immune, like other organs of the 'State' mentioned therein, from any attacks in terms of non-compliance or negation of any Principles of State Policy. It went on to conclude that if the negation was immune from attack, it could not be said that affirmation of a Principle of State Policy was prohibited. This led the court to state that its capacity to make the rules for promotion and protection of the Principles of State Policy was thus also protected and immune from any criticism, due to the protection of art 30(2). This underlying impetus and reasoning to fill in legal and statutory voids through incorporation of Islamic jurisprudence found support in the subsequent Supreme Court judgment of *Muhammad Bashir v The State*, PLD 139 at 142–3 (1982) (Pak).

124 The Supreme Court went on to state that the Fundamental Rights and the directive Principles of State Policy occupied a place of pride in the scheme of the Constitution; and that they were the conscience of the Constitution as they constituted the main thrust of the commitment to socio-economic justice. The Principles of State Policy were to be regarded, according to it, as fundamentals to the governance of the state. Although they were not enforceable by any court, nonetheless, they were the basis of all legislative and executive actions by the state for implementing the principles laid down therein. To the authors of the Constitution, the proper and rational synthesis of the Fundamental Rights and the Principles of State Policy was meant to lead to the establishment of an egalitarian society under the rule of law. However, while implementing the Principles of State Policy, the state should not make any law which takes away or abridges the Fundamental Rights. Necessarily, therefore, the Principles of State Policy have to conform and to operate as a subsidiary to the Fundamental Rights, or else the latter would be a mere 'rope of sand'.

125 While considering the enforceability of art 3 (State shall ensure the elimination of all forms of exploitation and the gradual fulfilment of the principle, from each according to his ability to each according to his work), art 37 (promotion of social justice and eradication of social evils) and art 38 (promotion of social and economic well-being of the people), the Supreme Court said that these constitutional provisions juxtaposed to advance the cause of socio-economic principles and should be given a place of priority to mark the onward progress of democracy. These provisions, according to the Supreme Court, became in an indirect sense enforceable by law and thus brought about a 'phenomenal change' in the idea of co-relation of Fundamental Rights and the Principles of State Policy. The liberties enshrined in the Principles of Policy, if purposefully defined, the Supreme Court hoped, would serve to guarantee genuine freedom: freedom not only from arbitrary restraint of authority, but also freedom from want, poverty, destitution, ignorance and illiteracy.

126 See also *Shahab Matloob v Government of Sindh*, PLD 83 at 86 (1993) (Pak), where the Sindh High Court said that a Principle of Policy could always be called in aid for the interpretation of any legal provision or instrument and an interpretation which sought to comply with, or advance, such Principles of State Policy was always to be adopted as against an interpretation which went against such Principles. See also *Zohra v Government of Sindh*, PLD 1 at 11 (1996) (Pak).

127 Article 2-A of the Pakistani Constitution makes the Objectives Resolution a part of the substantive provisions of the Constitution. The controversial Objectives Resolution, which was opposed by all the minority members of the Constituent Assembly at the time of its adoption in 1949, apart from having an overtly religious tone, starts with the words: 'Whereas sovereignty over the entire universe belongs to Allah Almighty alone and authority which He has delegated to the State of Pakistan, through its people for being exercised within the limits prescribed by Him is a sacred trust', and extends protection to the Fundamental Rights under the Constitution subject to 'law and public morality'.

128 The author, Mansoor Hassan Khan, traces cases in which the Supreme Court has invoked Islamic principles and Islamic common law as well as relying on constitutional provisions such as art 268 of the Constitution, which allow the judiciary to construe the law with all such adaptations that are necessary to bring it in accordance with the Constitution (see above **n 60**), to make the argument that there is a general tendency of the Pakistani courts to fill the vacuums in the law with Islamic principles and Islamic common law.

129 We are referring here to the Constitutions of 1956 and 1962 and the un-amended version of the Constitution of 1973.

130 The Supreme Court found that the role of the Objectives Resolution, notwithstanding the insertion of art 2-A in the Constitution, had not been fundamentally transformed from the role envisaged for it at the outset, namely that it should serve as a 'beacon light' for the Constitution-makers and guide them to formulate such provisions for the Constitution that reflect the ideals and objectives set forth therein. So any impugned provision of the Constitution could only be corrected by a suitable amendment through the process laid down in the Constitution itself. The provisions of art 2-A, the court said, were never intended at any stage to be self-executory, or to be adopted as a test of repugnancy or of contrariety, and it was beyond the power of a court to apply the test of repugnancy by invoking art 2-A for striking down any other provision of the Constitution. Article 2-A was thus not a supra-constitutional provision. If it were, the court said, then it would require the framing of an entirely new Constitution. And if it were to be treated as a gauge for evaluating other provisions of the Constitution, the court went on, then most of the articles of the existing Constitution would become questionable on the ground of their alleged inconsistency with its provisions. And that, the court warned, would result in the undermining of the entire Constitution and pave the way for its eventual destruction, or at least its continuance in its present form. This view was subsequently upheld in *Zaheeruddin v The State*, SCMR 1718 (1993) (Pak).

131 Hussain, 1993: 77 who emphasises the role of art 2-A in the emergence of public interest litigation in Pakistan, along with the role played by the Fundamental Rights, the

Principles of Policy and arts 3, 4 and 187 of the Constitution, which respectively entrench the State imperatives to eliminate exploitation, uphold the right of individuals to be dealt with in accordance with law, and empower the Supreme Court to issue such directions, orders and decrees as may be necessary for doing complete justice in any case or matter before it.

132 Menski et al, 2000: 110–11, further argue that South Asian models of non-Western jurisprudence, including Islamic law, provide certain conceptual foundations for public interest litigation that are more solid than the rights-based paradigms of Western laws. They say that in the latter not only is divine or superhuman authority deemed to be absent or at least legally irrelevant, but also the concerns of the common people, or in other words the input of local customary laws and norms and their various manifestations, are overlooked and seriously undervalued. Through the incorporation of art 2-A in particular, they find multiple obligation systems operating for Pakistan's citizens, in particular for those who wield power.

133 For example, Shah, 1993: 32–3, even though he was writing in 1993, states that over 600 subjects had been identified and classified as appropriate for judicial intervention in public interest litigation cases. He further says that these subjects had been identified from: (1) letters written by individuals and groups to the Chief Justice of Pakistan pointing out violations of Fundamental Rights; (2) newspaper reports that indicated violations of Fundamental Rights, and (3) matters directly coming before the Supreme Court, in various cases, which involved violations of human rights. Hussain, 1993: 80–1, describes a variety of techniques adopted by the Pakistani courts for fact-finding such as launching investigations into matters, calling of official records, deputising of experts to probe the matter and constituting socio-legal commissions. In such cases, he says, the courts follow a certain pattern, namely regarding the reports emerging from such fact-finding as prima facie evidence and distributing copies to the parties, which are then required to rebut the same by providing affidavits. The court then considers these documents before proceeding with adjudication.

134 It must be noted, however, that this analysis is dated by seven years and considerable and diverse rights protection case law has emerged under the rubric of public interest litigation in that period. Even Menski et al, 2000, in spite of their reservations noted above, saw a strong potential in Pakistan, especially in the areas of consumer protection laws and environmental protection as well as rights protection against the backdrop of larger political battles fought through the modus of public interest litigation: at 125–30. Their conclusion is, '[g]iven the nature and the past development of public interest litigation in the country, there are bound to be phases of excitement and renewed activism again and again – the magnitude of the problems faced suggest that there is a continuing need for activist pursuit of justice': at 130. See also Alam, 2006, who classifies the body of public interest jurisprudence in Pakistan into the following categories: (1) 'Pure Public Interest Litigation cases' – where the procedure of the court is determined by the subject matter of the public issue at hand and which have caused the emergence of various 'Public Interest Litigation Tools' to relax the strict rules of the adversarial litigation system in order to promote the goals of public interest litigation; (2) 'Petitions with a Public Interest Component' – which have the same nature as regular writ petitions except that they contain a public interest component. Here there may or may not be a procedural relaxation as the public interest component may be difficult to discern. This category has also included many political cases that have been initiated through the use of public interest litigation mechanisms; and (3) '*Suo Moto* Jurisdiction' – here the courts have freed themselves entirely from the requirements of 'petitioners' or 'aggrieved persons' and through the use of the 'Public Interest Litigation Tools', evaded the bounds of procedural limitations. According to the author, though political cases have also been initiated under the rubric of public interest litigation, they too in some important ways nurture the foundations of a stable democracy.

135 The respondent building regulatory authority in this case was the Capital Development Authority (CDA). It is significant that the 'good faith' clause in s 40 of the CDA Ordinance was not invoked to provide immunity to the CDA.

136 Through a Court Order dated 3 October 2007, the Supreme Court of Pakistan has approved the settlement between the petitioners and the respondent regulatory authority whereby the latter has agreed to pay Pak Rupees 1.75 billion (US$29.1 million) as compensation to 148 affectees of the Margalla Towers' collapse, to be distributed in accordance with their entitlement on the basis of the area owned by them in the apartment building.

137 *Karachi Building Control Authority v Hashwani Sales and Services Ltd*, PLD 210 at 228 (1993) (Pak), where the Supreme Court said that the paramount consideration in interpreting and applying building regulations and rules should be public interest and public good.

138 See *Excell Builders v Ardeshir Cowasjee SCMR*, 2089 (1999) (Pak), where the Supreme Court, while highlighting the concerns of residents of an area facing inconvenience due to construction of commercial buildings and also the governmental imperative to gauge the availability of utilities in an area before approving the construction of a multi-storey building, upheld a High Court judgment that restrained a builder from constructing additional floors beyond the approved plan and also required him to demolish a portion of the building that could obstruct the future expansion of a road. See also *Abdul Razzak v Karachi Building Control Authority*, PLD 512 (1994) (Pak), where the Supreme Court held that the concerned building authority's approval of the construction of a commercial building adjacent, and opposite, to the petitioner's residence would cause a shortage of utilities, traffic congestion and invasion of privacy. It was thus prejudicial to safe and hygienic living and detrimental to health. Thus the regularisation of such construction by the building authority was in violation of applicable building regulations and rules. See also *Begum Saida Qazi Isa*.

139 The case involved a *habeas corpus* petition under art 199 challenging an illegal police detention. The Sindh High Court said that apart from the availability to the victim of a civil action in tort law to recover compensation for illegal detention, and also pursuit of compensation under relevant provisions of the CPC and the Criminal Procedure Code (see below Part III), the victim could also be awarded compensation under its constitutional jurisdiction as the violation of a Fundamental Right was a liability in public law. Such compensation was in addition to, and not in derogation of, any civil and criminal liability which the wrongdoer might have incurred. The court emphasised that this 'public law duty' was independent of the private rights that the victim may have for claiming damages through ordinary proceedings.

140 It is important to note the significant Indian case of *Nilabati Behera (smt) alias Lalita Behera v State of Orissa*, SCC 746 (1993) (Ind), which traces the development of this principle of monetary compensation for the violation of constitutional rights in India. The court said that the doctrine of sovereign immunity had no application in this context and could not be used as a defence. The *Mazharuddin* judgment relied on this Indian judgment amongst others in the enunciation of its rationale.

141 Importantly, the court said, after examining case law from the UK, India and other common law jurisdictions, that since illegal detention also amounted to a breach of the Fundamental Rights enshrined under arts 9 and 14, in suitable cases where a person had been imprisoned with mischievous or malicious intent and his constitutional and legal rights had been 'invaded', the court could award the victim a suitable monetary compensation that included general, as well as exemplary, damages.

142 Additionally, the court said that as long as a state functionary violated the Fundamental Rights of a citizen, and had acted illegally or in excess of lawful powers under the pretended colour of state authority, the state was equally bound to compensate the victim unless it was able to demonstrate that prompt action was taken against such functionary for the excess committed by him. The court added that a reckless misuse of power on part of a functionary, if not proceeded against by the state, was a ratification of unlawful acts and undermined the state's commitment to protect constitutional rights.

143 *Pakistan Penal Code* (XLV of 1860) in the *Major Acts* (Manzoor Law Book House, 2002) (PPC).

144 Under Pakistani evidence law, there is a general principle which puts a strict burden of proof on anyone desirous of a court judgment as to any legal right or liability dependent on the existence of facts that he asserts for proving the existence of those facts. Furthermore, it contains a specific provision that provides that, when a person is accused of any offence, the burden of proving the existence of circumstances that may bring that case within the general or special exceptions of the PPC, or any other law defining the offence, is on the accused and the court shall presume the absence of such circumstances. See *Qanun-e-Shahadat Order* (X of 1984) arts 117 and 121.

145 See also *Wazeer v The State*, MLD, 935 (2007) (Pak), where the Sindh High Court elaborated on the 'intention' and 'knowledge' requirements for the different limbs of the *Qatl-i-Amd* offence, and said that they had different meanings, as conceptualised by the legislature. The essential outcome of the use of these distinctive requirements for the different limbs of *Qatl-i-Amd*, however, was in the quantum of prescribed punishment. The court described 'intention' as a conscious state in which mental faculties are aroused into activity and summoned into action for the deliberate purpose of being towards a particular and specified end that the human mind conceives and perceives before it. On the other hand the court defined 'knowledge' as a bare state of conscious awareness of certain facts, when the human mind remains supine or inactive.

146 The controversial Federal Shariat Court (FSC) was established during the regime of General Zia-ul-Haq through an amendment to the Constitution. See Pakistani Constitution art 203-C(1). This was one of the most decisive steps by Zia towards the Islamisation of the legal system and the creation of a parallel judicial apparatus, comprising the FSC and the Shariat Appellate Bench of the Supreme Court (SAB). The FSC was authorised and mandated to ensure the conformity of all legislation to the Quran and Sunnah, and strike down any law it considered repugnant to either. Moreover, an appeal against a decision of the FSC was possible only to the SAB. The composition of the FSC and the SAB in itself cemented the formalisation of the role of the 'Ulema'– Islamic religious scholars – in this new graft onto the existing judicial system.

147 See *Ch Sabir Hussain v Mirza Mushtaq Ahmed,* YLR 2454 (2001) (Pak). The Lahore High Court invoked Islamic texts and scholarly works and conducted a comparison of the pre-Zia and post-Zia versions of the PPC, as well as a theological evaluation of the sinfulness of different categories of *Qatl.* The upshot of its argument was that even unpremeditated murder such as *Qatl-e-Khata* was *Qatl* and hence a major sin. This was regardless of the varying quantum of punishment delineated for different kinds of *Qatl* under the PPC. This is, however, a theological perspective and does not seem to have any impact on the fact that the PPC prescribes a lesser degree of punishment for this offence.

148 *Arsh* means the compensation specified in Chapter XVI to be paid to the victim or his heirs; *daman* means the compensation determined by the court to be paid by the offender to the victim for causing hurt not liable to *arsh*; *diyat* means the compensation specified in s 323 of the PPC, which is payable to the heirs of the victim; *qisas* means punishment by causing similar hurt at the same part of the body of the convict as he has caused to the victim or by causing his death if he has committed *Qatl-i-Amd* and in exercise of the right of the victim or a *wali* (a person entitled to claim *qisas*); and *tazir* means a punishment awarded by the court other than *qisas, diyat, arsh or daman.*

149 The average value for 10 grams of silver as of 24 May 2008 comes out to be Pak Rupees 366.425. The value for 30 630 grams of silver is thus Pak Rupees 1,122,359.725 (US$16,652 @ US 1 = Pak Rupees 67.40). See <http://www.brecorder.com>.

150 While some building laws contain criminal liability for certain violations, a brief overview seems to suggest that criminal liability is compoundable under such laws. See *Abdul Razak* at 526.

References

Books, Journals and Newspaper Articles

Abraham, C and Abraham, Sushila (1991) 'The Bhopal Case and the Development of Environmental Law in India' 40(2) *International and Comparative Law Quarterly* 334.

Alam, Ahmad Rafay (2006) *Public Interest Litigation and the Role of the Judiciary*, an unpublished paper delivered at The International Judicial Conference: Justice for All, Islamabad, 11–14 August.

Bari, Faisal (2005) 'Coordination Failure' 24 October, *The Nation*, <http://www.risepak.com/publications.htm>.

Bakshi, PM (2003) *The Constitution of India with Selective Comments*. Delhi: Universal Law Co.

Basu, Ananyo (2001) 'Torts in India: Dharmic Resignation, Colonial Subjugation, or 'Underdevelopment'?' 100 *South Atlantic Quarterly* 4.

Baxi, Upendra (1985) 'Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India' 1985 *Third World Legal Studies* 107.

Brown, Glynn (nd) 'The Great Quetta Earthquake, 31 May 1935', <http://www.warlinks.com/memories/brown_john/The%20Great%20Quetta1.htm>.

Bhagwati, PN (1984) 'Judicial Activism and Public Interest Litigation' 23 *Columbia Journal of Transnational Law* 561.

Binder, Denis (1996) 'Act of God? or Act of Man?: A Reappraisal of the Act of God Defense in Tort Law' 15 *Review of Litigation* 1.

Boyle, David (1972) 'Mass Accident Class Actions' 60(6) *California Law Review* 1615.

Cassels, Jamie (1989) 'Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?' 37(3) *American Journal of International Law* 495.

Cheema, Moeen H (2006) *The Appraisal of the Government Compensation Scheme for Citizens of Azad Jammu & Kashmir Affected by the October 8 Earthquake*, RISEPAK, <http://www.risepak.com/publications.htm>.

Cheema, Moeen H (2007) 'Forgotten Lessons: One Year After the Earthquake, South Asian Journal, Oct-Dec 2006 and Government's Compensation Scheme in Azad Kashmir: An Appraisal' *Pakistan Horizon* 74.

Cowasjee, Ardeshir (2007) 'The Supreme Court Helps Lahore', *Dawn – The Internet*, 26 August, <http://www.dawn.com/weekly/cowas/20070826.htm>.

Dias, RWM (ed) (1989) *Clerk and Lindsell on Torts*. 16th ed, London: Sweet and Maxwell.

Durrani, Ahmad et al (2005) *The Kashmir Earthquake of October 8, 2005: A Quick Look Report*, Mid-America Earthquake Center, Rice University, <http://mae.cee.uiuc.edu/publications/cd_rom_series_2005/cd_release_0504.html>.

Eagle, Joel (2007) 'Divine Intervention: Re-Examining the 'Act of God' Defense in a Post-Katrina World' 82 *Chicago-Kent Law Review* 459.

John Fleming (1994) 'Mass Torts' 42(3) *American Journal of Comparative Law* 507.

Glenn, H Patrick (1985) 'Class Actions and the Theory of Tort and Delict' 35(3) *University of Toronto Law Journal* 287.

H, WW (1965) 'Proposed Rule 23: Class Actions Reclassified' 51(4) *Virginia Law Review* 629.

Hassan, Parvez and Azfar, Azim (2004) 'Securing Environmental Rights through Public Interest Litigation in South Asia' 22(3) *Virginia Environmental Law Journal* 216.

Husain, Hammad (2005) 'Why Did the Margalla Towers Collapse?' *The News*, 10 October, <http://www.jang.com.pk/thenews/oct2005-daily/10-10-2005/national/n5.htm>

Hussain, Faqir (1993) *Public Interest Litigation in Pakistan*, PLD 72 (1993) (Pak).

Ilbert, Courtenay (1896-97) 'Application of European Law to Natives of India' 1 *Journal of the Society of Comparative Legislation* 212.

Khan, Mansoor Hassan (1993) *Public Interest Litigation: Growth of the Concept and its Meaning in Pakistan*. Karachi: Pakistan Law House.

Khosa, Asif Saeed Khan (1993) *High Courts and Expeditious Justice*, PLD 97 (Pak).

Lau, Martin (1996) 'Islam and Judicial Activism: Public Interest Litigation and Environmental Protection in the Islamic Republic of Pakistan' in Alan Boyle and Michael Anderson (eds), *Human Rights Approaches to Environmental Protection*. Oxford: Clarendon Press.

Lau, Martin (2006) *The Role of Islam in the Legal System of Pakistan*. Leiden: Martinus Nijhoff Publishers.

Matthews, MH (1984) 'Negligence and Breach of Statutory Duty' 4(3) *Oxford Journal of Legal Studies* 429.

Menski, Werner, Alam, Ahmad Rafay and Raza, Mehreen Kasuri (2000) *Public Interest Litigation in Pakistan*. Karachi: Pakistan Law House & Platinum Publishing Ltd.

Mian, Ajmal (1991) *Hardships to Litigants and Miscarriage of Justice caused by Delays in Courts*, PLD 103 (Pak).

Montero, David (2005) 'The Pakistan Quake: Why 10 000 Schools Collapse' *The Christian Science Monitor*, 8 November, <http://www.csmonitor.com/2005/1108/p01s03-wosc.html?s=hns>.

Munir, Kamal (2005) 'Act of Man' *The Guardian*, 11 November, <http://www.guardian.co.uk/comment/story/0,,1640526,00.html#article_continue>.

Peiris, GL (1991) 'Public Interest Litigation in the Indian Subcontinent: Current Dimensions' 40(1) *International and Comparative Law Quarterly* 66.

Pennington, Matthew (2005) 'Earthquake Survivors Say Buildings Were Unsafe' *The San Diego Union Tribune* 12 November, <http://www.signonsandiego.com/uniontrib/20051112/news_1n12quake.html>.

Rehmat, Adnan (2006) '*Creating Waves, Literally*' *The New International*, 29 October, <http://www.internews.org/pubs/humanitarian/20061029_thenews_rehmat.shtm>

Rogers, WVH (ed) (2002) *Winfield and Jolowicz on Tort*. 16th ed, London: Sweet & Maxwell.

Ratanlal and Dhirajlal (2004) *The Law of Torts*. 24th ed, Nagpur: Wadhwa and Company.

Shaheen, Maqsood Ahmad (2007) *Academic Institutions and Libraries of Pakistani Administered Kashmir: A Pre and Post Earthquake Analysis*, World Library and Information Congress: 73rd IFLA General Conference and Council, Durban, South Africa, <http://www.ifla.org/IV/ifla73/papers/140-Shaheen-en.pdf>

Shah, Nasim Hasan (1993) *Public Interest Litigation as a Means of Social Justice*, PLD 31 (Pak).

Sheikh, Wajih Ahmad (2007) 'SC orders plaza owner to fill six extra basements' *The News International*, 3 August, <http://www.thenews.com.pk/daily_detail.asp?id=66770>

Siddique, Osama (2000) *Public Interest Litigation – Shehla Zia v WAPDA*. Sustainable Development Policy Institute (SDPI).

Skuy, David (1998) 'Macaulay and the Indian Penal Code of 1862: The Myth of the Inherent Superiority and Modernity of the English Legal System Compared to India's Legal System in the Nineteenth Century' 32(3) *Modern Asian Studies* 513.

US Team Report (2005) US National Academies Reconstruction Assistance Team Report (*Responding to the Pakistan Earthquake of October 8* (2005) US National Academies Reconstruction Assistance Team, <http://www7.nationalacademies.org/dsc/Quake_Report_2005.pdf>.

Wadham, John and Mountfield, Helen (2000) *Blackstone's Guide to the Human Rights Act*. 2nd ed, Oxford: Oxford University Press.

Zaidi, Sarah (2006) 'Accountability and Transparency, Anyone?' October, *The Herald*, <http://www.risepak.com/publications.htm>.

Law Reform Commission Reports

Law & Justice Commission of Pakistan, *Uniform Court Fee for Claims under Fatal Accidents Act, 1855*, Report Paper No 1.

Law & Justice Commission of Pakistan, *Recovery of Compensation under the Fatal Accidents Act, 1855*, Report No 2.

Other References

10 000 Families in Pakistan's Quake Regions get Radio Sets (2006) ReliefWeb <http://www.reliefweb.int/rw/rwb.nsf/db900sid/YAOI-6TL958>.

2005 Earthquake ADB/World Bank Report, *2005 Pakistan Earthquake: Preliminary Damage and Needs Assessment*, Asian Development Bank and World Bank <http://www.adb.org/Documents/Reports/pakistan-damage-needs-assessment.pdf>.

Muzaffarabad Earthquake (2005) *A Summary Report on Muzaffarabad Earthquake*. Earthquake Engineering Center, University of Engineering and Technology Peshawar, <http://www.reliefweb.int/ library/documents/2005/eeri-pak-07nov.pdf>.

EEFIT Mission (2005) *EEFIT Mission: October 8, 2005 Kashmir Earthquake*. Earthquake Engineering Field Investigation Team (EEFIT), Institution of Structural Engineers, London <http://www. istructe.org/eefit/files/EEFIT%20Mission%20Pakistan%20-%20prelim%20report.pdf>.

Environmental Emergency Response (2006) *Environmental Emergency Response to the South Asia Earthquake*, Consolidated Report on Activities undertaken through the Joint UNEP/OCHA Environment Unit, <http://www.reliefweb.int/rw/rwb.nsf/db900sid/HMYT-6MFMBY>.

Magnitude 7.6 – Pakistan (2005) National Earthquake Information Center, United States Geological Survey <http://www.earthquake.usgs.gov/eqcenter/eqinthenews/2005/usdyae/>.

National Commission (2001) 'Liability of the State in Tort' New Delhi: National Commission to Review the Working of the Constitution, Indian Ministry of Law and Justice, 8 January, <http://lawmin.nic.in/ncrwc/finalreport/v2b1-13.htm> (*Liability of the State in Tort*).

October 08 Earthquake (2006) Geological Survey of Pakistan <http://www.gsp.gov.pk/gsps_role.html>.

October Progress Report (2007) ERRA <http://www.erra.gov.pk/Reports/ProgressReport Oct07.pdf>.

Rebuild, Revive with Dignity and Hope (2006) Earthquake Reconstruction and Rehabilitation Authority, <http://www.erra.gov.pk>.

Responding to the Pakistan Earthquake of October 8 (2005) US National Academies Reconstruction Assistance Team, <http://www7.nationalacademies.org/dsc/Quake_Report_2005.pdf> (*US Team Report 2005*).

Seismic Hazard Analysis (2007) *Seismic Hazard Analysis and Zonation for Pakistan, Azad Jammu and Kashmir* Pakistan Meteorological Department and NORSAR Norway, <http://www.pakmet. com.pk/SeismicReport_PMD.pdf>.

Surviving the Pakistan Earthquake (2006) *Surviving the Pakistan Earthquake: Perceptions of the Affected One Year Later* Fritz Institute Report <http://www.fritzinstitute.org/PDFs/findings/PakistanEarthquake_Perceptions.pdf>.

UN Office for the Coordination of Humanitarian Affairs (2006) *Pakistan: The Role of the Military in the Pakistan Earthquake,* <http://www.irinnews.org/report.aspx?reportid=34370>.

Unicef (2006) *Unicef Pakistan Consolidated Emergency Thematic Report*, <http://www.unicef.org./pakistan/consolidated_report_to_march06.pdf>.

Cases

AMF International Ltd v Magnet Bowling Ltd [1968] 1 WLR 1028
AM Qureshi v Union of Soviet Socialist Republics, PLD 377 (1981) (Pak) (*Qureshi*)
Abbas Khaleeli v Saifuddin Valika, PLD 692 (1969) (Pak)
Abdul Majid Butt v United Chemicals Ltd, PLD 98 (1970) (Pak)
Abdul Rauf v Abdul Hamid Khan, PLD 671 (1965) (Pak)
Abdul Razzak v Karachi Building Control Authority, PLD 512 (1994) (Pak)
Abdul Wahab v Karachi Municipal Corporation, PLD 391 (1956) (Pak)
Adam Khan v Gulla Mir, PLD 120 (1982) (Pak) (*Adam Khan*)
Afsana v District Police Officer (Operation) Khairpur, YLR 1618 (2007) (Pak)
Aijaz v KTC, MLD 491 (2004) (Pak)
Ameer Bano v SE Highways, PLD 592 (1996) (Pak) (*Ameer Bano*)
Amna Bibi v KTC, MLD 195 (2007) (Pak)
Anjum Irfan v LDA, PLD 555 (2002) (Pak)
Aqeela Bano v Government of Sindh, MLD 1750 (2002) (Pak)
Ardeshir Cowasjee v Karachi Building Control Authority, SCMR 2883 (1999) (Pak)
Ashby v White (1703) 1 Smith's Leading Cases (13th ed) 253
Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223
Azad Government v Abdullah, PLD 30 (1969) (AJK)
BK Rakshite & Co v Federation of Pakistan, PLD 503 (1959) (Dacca)
Bakhtawar Shah v KTC, MLD 528 (2004) (Pak)
Barrett v Enfield [1999] 3 All ER 193
Bashir Ahmad v The State, P CrLJ, 662 (2006) (Pak)
Begum Nusrat Bhutto v Chief of Army Staff, PLD 657 (1977) (Pak) (*Begum Nusrat Bhutto*)
Begum Saida Qazi Isa v Quetta Municipal Corporation, PLD 1 (1997) (Pak)
Benazir Bhutto v Federation of Pakistan, PLD 416 (1988) (Pak) (*Benazir Bhutto*)
Benazir Bhutto v President of Pakistan, PLD 388 (1998) (Pak) *(Benazir Bhutto II)*
Board of Intermediate and Secondary Education v Ghias Gul Khan, YLR 729 (2001) (Pak)
Bourgion SA v Ministry of Agriculture, Fisheries and Food [1985] 3 All ER 585
Brown v Board of Education (1953) 98 Law Ed 873
Captain JA Cates Tug v Franklin Fire Insurance Co, AIR 1927 PC 188
Cassell v Broome [1972] 1 All ER 801
Ch Sabir Hussain v Mirza Mushtaq Ahmed, YLR 2454 (2001) (Pak)
Chaman Baig v KTC, CLC 1714 (1995) (Pak)
CIT Group/Capital Equipment Financing Inc v MT Eastern Navigator, MLD 1135 (2007) (Pak)
City of Kamloops v Nielsen (1984) 10 DLR (4th) 641
Commissioner for Railways v Quinlan [1964] AC 1054
Common Cause, A Registered Society v Union of India, AIR SC 3538 (1996)
Darshan Masih alias Rehmatay v The State, PLD 513 (1990) (Pak) (*Darshan Masih*)
Datari Construction v Razak Adamjee, CLC 846 (1995) (Pak)
Davis v Bromley Corporation [1908] 1 KB 170
Donoghue v Stevenson [1932] AC 562 (*Donoghue*)
Dorset Yacht v Home Office [1970] AC 1004
Dost Muhammad v WAPDA, 2005 YLR 2520 (*Dost Muhammad*)
Dunlop v Woollahra Municipal Council [1982] AC 158
Ehteshamuddin Qureshi v PSMC, MLD 361 (2004) (Pak)

Electric Supply Corporation v Mir Zaman, YLR 786 (2001) (Pak)

Employees of Pakistan Law Commission, Islamabad v Ministry of Works, SCMR 1548 (1994) (Pak) (*Employees of Pakistan Law Commission*)

Excell Builders v Ardeshir Cowasjee SCMR, 2089 (1999) (Pak)

Fareeda v Government of Sindh, YLR 362 (1999) (Pak) (*Fareeda*)

Farhat Jaleel v Province of Sindh, PLD 342 1990) (Pak)

Fazla v The State, P CrLJ 403 (2001) (Pak)

Federation of Pakistan v Ehsan Ellahi, PLD 303 (1955) (Pak)

Federation of Pakistan v Khatoon Begum, SCMR 406 (1996) (Pak) (*Khatoon Begum*)

Federation of Pakistan v Saeed Ahmad Khan, PLD 151 (1974) (Pak)

Fida Muhammad v All Residents of Rumboor Valley, SCMR 846 (1997) (Pak)

General Secretary, West Pakistan Salt Miners Labour Union (CBA) v Director, Industries and Mineral Development, SCMR 2061 (1994) (Pak) (*West Pakistan Salt Miners Labour Union*)

Ghayyur Hussain Shah v Gharib Alam, PLD 432 (1990) (Pak)

Ghulam Mustafa Khar v Pakistan, PLD 49 (1988) (Pak)

Government of NWFP v Saidur Rehman, CLC 1682 (2004) (Pak)

Government of Pakistan v Ishrat Begum, MLD 768 (1999) (Pak)

Government of Pakistan v Sardar Muhammad Ali, PLD 1 (1965) (West Pak)

Government of Punjab v Kamina, CLC 404 (1990) (Pak)

Hajee Peer Muhammad v Commercial Union Insurance Co, AIR 1952 Tra-Co 58

Hakim Khan v Government of Pakistan, PLD 595 (1992) (Pak)

Hardeo Kaur v Rajasthan State Transport Corporation, AIR 1992 Supreme Court 1261

Hashmat Ali v KTC, MLD 538 (1984) (Pak)

Hassan Nawaz Khan v Municipal Corporation, MLD 1495 (1994) (Pak)

Herrington v British Railway [1972] AC 877

Hill v Chief Constable of West Yorkshire [1989] AC 53

Human Rights case, In re (Environment Pollution in Balochistan), PLD 102 (1994) (Pak)

IA Sherwani v Government of Pakistan, SCMR 1041 (1991) (Pak) (*IA Sherwani*)

Imam Shah v Government of NWFP, PLC 1522 (2003) (Pak)

Invercargill City Council v Hamlin [1994] 3 NZLR 513

Iqbal Hussain Jaffery v KESC, CLC 1903 (1994) (Pak)

Iqbal Wasti v Collector of Customs, Karachi, PLC (CS) 758 (1987) (Pak)

Irfan Khan v Pakistan, MLD 1409 (2005) (Pak)

Javed Iqbal v Province of West Pakistan, CLC 2369 (1992) (Pak)

Jehangir Services v Bibi Rukhsana Begum, PLD 329 (1995) (Pak)

Karachi Building Control Authority v Hashwani Sales and Services Ltd, PLD 210 (1993) (Pak)

Karachi City Cricket Association v Mujeebur Rahman, PLD 721 (2003) (Pak)

Karachi Transport Corporation v Qaisar Jehan, CLC 196 (1995) (Pak)

Karim Buksh v KESC, CLC 507 (1997) (Pak) (*Karim*)

KESC v Mir Zaman, YLR 786 (2001) (Pak)

KESC v Saghir Ahmad Ansari, CLC 227 (2001) (Pak)

KTC v Begum Ayesha, MLD 1020 (1988) (Pak)

KTC v Mukhtar Begum, SCMR 807 (1998) (Pak)

KTC v Qaisar Jehan, CLC 196 (1995) (Pak)

Lahore Development Authority v Fayyaz Ahmad Butt, CLC 2119 (1986) (Pak)

Lucknow Development Authority v MK Gupta, 1 SCC 243 (1994)

Malik Asad Ali v Federation of Pakistan, PLD 161 (1998) (Pak) (*Malik Asad Ali*)

Malik Khanan v Malik Baz, PLD 30 (1983) (Pak)
Malik Ramiz Ahmad v Punjab Province, PLD 736 (1964) (West Pak) (*Malik Ramiz Ahmad*)
Manzoor Ahmad Wattoo v Federation of Pakistan, PLD 38 (1997) (Pak)
Manzoor Hussain v WAPDA, CLC 285 (2000) (Pak)
Marriage Halls Association v Karachi Buildings Control Authority, YLR 2317 (1999) (Pak)
Maulvi Zufran v Malik Nehmat, MLD 1576 (1996) (Pak)
Mazharuddin v The State, CrLJ 1035 (1998) (Pak) (*Mazharuddin*)
Metropolitan Corporation, Lahore v Imtiaz Hussain Kazmi, PLD 499 (1996) (Pak)
Moulvi Iqbal Haider v Capital Development Authority, PLD 394, (2006) (Pak)
Muhammad Ashraf Khan v Revenue AC, CLC 1504 (1980) (Pak)
Muhammad Bashir v Abdul Karim, PLD 271 (2004) (Pak)
Muhammad Bashir v The State, PLD 139 (1982) (Pak)
Muhammad Hussain v Walayat Shah, PLD 526 (1959) (West Pak)
Muhammad Ibrahim v Government of Pakistan, PLD 1073 (1960) (West Pak)
Muhammad Jaleel v KTC, CLC 1510 (1997) (Pak)
Muhammad Moosa v Karachi Water and Sewerage Board, CLC 925 (1997) (Pak)
Muhammad Nawaz Sharif v Federation of Pakistan, PLD 473 (1993) (Pak)
Muhammad Nawaz Sharif v President of Pakistan, 45 PLD 473 (1993) (Pak)
Muhammad Riaz Awan v Capital Development Authority, Islamabad, PLC (CS) 153 (2006) (Pak)
Muhammad Saeed v PSMC, YLR 883 (1999) (Pak)
Muhammad Suraj Mia v The Vessel ML Madina, PLD 21 (1970) (Dacca)
Muhammad Usman v PSMC, MLD 2763 (1997) (Pak)
Muhammad Yasin Khan v Secretary, Ministry of Education, PLC (CS) 66 (1986) (Pak) (*Muhammad Yasin Khan*)
Muhammad Yousaf v Pakistan, YLR 3241 (2003) (Pak)
Muhammad Yusuf Saleem v Muhammad Yasin, YLR 1684 (2002) (Pak)
Muhammad Zubair Qureshi v Munir Hussain Shirazi, YLR 955 (1999) (Pak)
Muhammadi Steamship v Federation of Pakistan, PLD 232 (1959) (West Pak) (*Muhammadi Steamship*)
Mukhtar Ahmed v The State, MLD 930 (2001) (Pak)
Mukhtiar Begum v KTC, MLD 1711 (1992) (Pak)
NWFP Road Transport Board v Gul Zarina, CLC 83 (1995) (Pak)
Najma Perveen v KTC, MLD 518 (2004) (Pak)
Naseem Rashid Mirza v Municipal Committee, MLD 167 (1998) (Pak)
Nathey Khan v Government of West Pakistan, SCMR 485 (1980) (Pak)
National Bank of Pakistan v Muhammad Mobin Siddiqui, PLD 107 (1973) (Pak) (*National Bank of Pakistan*)
Nazir Hussain v Government of Sindh, CLC 719 (2001) (Pak)
Nilabati Behera (smt) alias Lalita Behera v State of Orissa, SCC 746 (1993) (Ind)
Nizam Khan v Additional District Judge, Lyallpur, PLD 930 (1976) (Pak) (*Nizam Khan*)
Padma Behari Lal v Orissa State Electricity Board, AIR 1992 Orissa 68
Pakistan Railways v Abdul Haqique, MLD 1259 (1988) (Pak)
Pakistan Steel Mills Corporation Ltd v Malik Abdul Habib, SCMR 848 (1993) (Pak)
Pakistan Telecommunication Company Ltd v Rizwana Shaheen, YLR 999 (2004) (Pak)
Pakistan v Haji Abdul Razzaque, SCMR 587 (2005) (Pak)
Pakistan v Muhammad Yaqoob Butt, PLD 627 (1963) (Pak) (*Muhammad Yaqoob Butt*)
Pakistan v Rokhsana Perveen, MLD 335 (2005) (Pak)

Peninsular and Oriental Steam Navigation Company v Secretary of State for India, 5 Bom HCR APP 1 (1868-69)

Philips Electrical Industries v Pakistan, YLR 2724 (2000) (Pak) (*Phillips Electrical*)

Pir Sabir Shah v Federation of Pakistan, PLD 738 (1994) (Pak)

Pollution of Environment Caused by Smoke Emitting Vehicles, Traffic Muddle, *Re*, SCMR 543 (1996) (Pak)

Provincial Government, NWFP Province v Muhammad Afzal Khan, PLD 34 (1959) (West Pak)

PRTC v Gardner, CLC 199 (1998) (Pak)

PRTC v Muhammad Sadiq, CLC 933 (1987) (Pak)

Punjab Road Transport Corporation v Zahida Afzal, SCMR 207 (2006) (Pak)

Pushpa Thakur v Union of India, AIR 1986 SC 1199

Qadri Begum v Province of Sindh, CLC 2023 (1999) (Pak)

Queensland Insurance v British India Steam Navigation Co Ltd, PLD 389 (1958) (West Pak)

R v Saskatchewan Wheat Pool (1983) 143 DLR (3d) 9

Rafiqan v KESC, CLC 1812 (1994) (Pak)

Rangal Shah v Mula Jadal, PLD 512 (1960) (West Pak) (*Rangal Shah*)

Rimmer v Liverpool City Council [1984] 1 All ER 930

Robert Addie & Sons v Dumbreck [1929] AC 358

Rookes v Barnard [1964] AC 1129

Ruqiya Begum v WAPDA, MLD 942 (1985) (Pak)

Saad Mazhar v Capital Development Authority, SCMR 1973 (2005) (Pak) (*Saad Mazhar*)

Sadiq Masih v KTC, CLC 1985 (2002) (Pak)

Sadruddin Ansari v Haji Dost Ali, PLD 673 (1968) (Pak)

Sagar Chand v State of Jammu & Kashmir, AIR 1999 J & K 154

Saifuddin Muhammad Ibrahim v New India Insurance Co, AIR 1949 E Pb 185

Saira v Zonal Municipal Corporation, MLD 113 (1995) (Pak)

Sajida Bibi v Incharge, Chowki Bo 2 Police Station Sadar, Sahiwal, PLD 666 (1997) (Pak)

Sajjad Ali Mazumder v Province of East Pakistan, PLD 854 (1960) (Dacca)

Sardar Farooq Ahmed Khan Leghari v Federation of Pakistan, PLD 57 (1999) (Pak)

Sardar Muhammad Ali v Pakistan, PLD 88 (1961) (West Pak)

Shadman v KTC, CLC 986 (1995) (Pak)

Shah Bashir Alam v Arokey Chemical Industries Ltd, MLD 2308 (1997) (Pak)

Shahab Matloob v Government of Sindh, PLD 83 (1993) (Pak)

Shanti v KTC, MLD 2556 (1997) (Pak)

Sharaf Faridi v Federation of Pakistan, PLD 430 (1989) (Pak)

Shaukat Ali v District Council, Hyderabad, PLD 760 (1978) (Pak)

Shaukat Ali v KESC, MLD 1845 (2001) (Pak)

Shaukat Jan v Government of NWFP, PLD 123 (1982) (Pak),

Shehla Zia v WAPDA, PLD 693 (1994) (Pak) (*Shehla Zia*)

SHEHRI v Province of Sindh, YLR 1139 (2001) (Pak)

Shirin Munir v Government of Punjab, PLD 295 (1990) (Pak)

Southern Portland Cement Ltd v Cooper [1974] AC 623

State v MD WASA, CLC 471 (2000) (Pak)

Stovin v Wise [1996] 3 WLR 388

Taj Muhammad v KTC, MLD 182 (2007) (Pak)

Targett v Torfaen Borough Council [1992] 3 All ER 27

Taus Khan v The State, MLD 1775 (1995) (Pak)

Three Rivers District Council v Governor and Company of the Bank of England [2001] 2 All ER 513 (*Three Rivers*)

Trustees of Port of Karachi v Norwich Union Fire Insurance Society, CLC 2412 (1992) (Pak) (*Trustees of Port of Karachi*)

Trustees Port of Bombay v Premier Automobiles, AIR 1981 SC 1982

Union Carbide Corporation v Union of India (1988) MPLJ 540

WAPDA v Shamim Akhtar, MLD 518 (2006) (Pak)

Wazeer v The State, MLD, 935 (2007) (Pak)

West Punjab Government v Pindi-Jhelum Valley Transport Ltd, Rawalpindi, PLD 339 (1953) (Pak) (*Pindi-Jhelum Valley Transport*)

Wheat v Lacon [1966] 1 All ER 582 (*Wheat v Lacon*)

X v Bedfordshire County Council [1995] 2 AC 633

Yaqoob Shah v WAPDA, PLD 667 (2002) (Pak) (*Yaqoob Shah*)

Zaheeruddin v The State, SCMR 1718 (1993) (Pak)

Zahir Ansari v KDA, PLD 168 (2000) (Pak)

Zohra v Government of Sindh, PLD 1 (1996) (Pak)

Legislation

Azad Kashmir Adaptation of Laws Act, 1959

Azad Kashmir Adaptation of Laws Act, 1988

Building Code of Pakistan (Seismic Provisions – 2007), Government of Pakistan, Ministry of Housing and Works, Islamabad

Capital Development Authority Ordinance, 1960 (CDA Ordinance)

Code of Civil Procedure (V OF 1908) Order 1, Rule 8 (Pak) (CPC)

Code of Civil Procedure (V OF 1908) (Ganj Shakar, Press 2000) Order 1, Rule 8 (Ind)

Defective Premises Act 1972 (UK) (DPA)

General Clauses Act, 1897

Human Rights Act 1998 (UK) c 42

Indian Consumer Protection Act, 1986

Lahore Development Authority Act, 1975 (LDA Act)

Motor Vehicles Act, 1939

Occupier's Liability Act 1957 (UK) (OLA)

Pakistan Building Code, 1986

Pakistan Penal Code (XLV of 1860) in the Major Acts (Manzoor Law Book House, 2002) (PPC)

Pakistani Constitution

Qanun-e-Shahadat Order (X of 1984)

West Pakistan National Calamities (Prevention and Relief) Act, 1958