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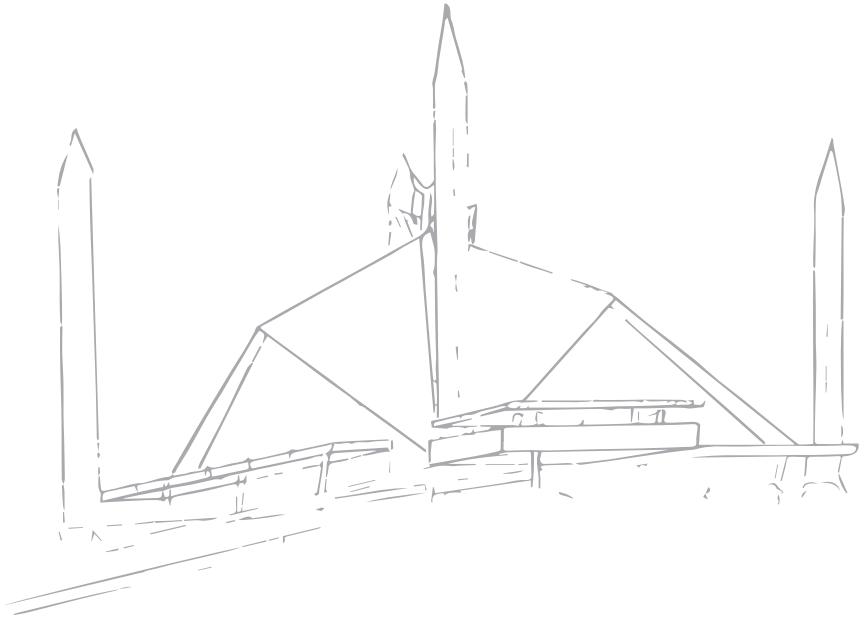

# ABOLITION OF THE DOCTRINES OF CHAMPERTY AND MAINTENANCE IN PAKISTAN

**Warda Yasin***

## ABSTRACT

*The doctrines of champerty and maintenance, along with the related concepts of conditional and contingent fee are still treated as sins in Pakistan and India, because, those who administer the law and manage the legal system consider themselves heirs of the ancient British empire. The doctrines are today working against the interests of the common man. These doctrines stand in the way of lawyers willing to support those persons who neither have the fee nor the awareness to stand up for the violation of their rights. The lawyers can help such people for a share of the damages to be awarded. To facilitate such support, these doctrines were first abolished in the United States followed by many other jurisdictions. More recently, the United Kingdom has also abolished these doctrines and has permitted lawyers to share damages in return for services rendered. In a country like Pakistan where the poor people silently and passively suffer injuries, the abolition of these doctrines can bring about a revolution in the law of torts and the protection of the rights of*

*those subjected to injuries. Lawyers and judges, however, act like silent spectators in this case, although they are the ones who stand to gain the most besides the poor and downtrodden people of Pakistan. This paper argues for the abolition of these ancient doctrines for removing the shackles from the legal system of Pakistan.*

**Key Words**: Champerty, maintenance, conditional fee, contingent fee, financing litigation, British India Pakistan, Independence Act, justice, equity, common law, civil wrongs, codification, torts, crimes, offences, defamation, libel, slander, damages, public figures, false light

## INTRODUCTION

The law of torts is the most important means for securing the rights of the people in most common law countries.[1] It will not be wrong to say that the words "sue" and "be sued" conjure up images of this branch of the law. This is also true for Europe where a comprehensive programme for securing rights through tort law is underway since the

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[1] The United Kingdom, the United States of America, Canada, Australia and New Zealand are the most important among the common law countries.

end of World War II.[2] Strange as it may sound, many professionals working in senior positions within the legal system of Pakistan can be heard saying that the law of torts does not exist in Pakistan. Is this true? Is Pakistan not a common law country? Does the common law have nothing to do with Pakistan anymore? Before these questions are answered it may be stated at the outset that incredibly the law of torts has a very limited role to play in Pakistan. As a result of this, the rights of many people are trampled upon with impunity and the legal machinery is unable to secure these rights. The rich may obtain relief through some mechanism, but it is the poor people who are the main losers and have nowhere to go. The situation calls for immediate redressal and rejuvenation of the law of torts. There are many causes of the neglect of the law of torts in Pakistan, but one of the major reasons for this neglect are the doctrines of champerty and maintenance, which need to be abolished forthwith in order to revive interest in this vital field and to secure the rights of the poor.

[2] "The European Group on Tort Law (formerly also called 'Tilburg Group') is a group of scholars in the area of tort law established in 1992. The group meets regularly to discuss fundamental issues of tort law liability as well as recent developments and the future directions of the law of tort. The Group has drafted a collection of Principles of European Tort Law (PETL) similar to the Principles of European Contract Law drafted by the European Contract Law Commission ("Lando Commission")." http://www.egtl.org/ (accessed 15.12.2014). The Group and its various centres have produced yearbooks on tort and insurance law. See, e.g., *Tort and Insurance Law Yearbook—European Tort Law 2007*, Helmut Koziol and Barbara C. Steininger eds. (Vienna: Springer-Verlag/Wien, 2008).

This paper is being written with the purpose of initiating tort law reform in Pakistan. The underlying idea of the paper is that the legal system cannot secure the rights of the common man just by criminalizing a few intentional torts against the person and property.[3] A comprehensive plan must be made and the serious civil wrongs identified must be presented in the form of a code so that it can be followed conveniently by the people. The present paper is, therefore, a small beginning. It argues that one of the major causes of the neglect of tort law in this country are the common law doctrines of champerty and maintenance. These doctrines have been abolished in many jurisdictions all over the common law world. The paper also shows that the benefits of these doctrines have been minimal as compared to the loss they have caused in terms of the development of the legal system.

The paper will begin with a historical overview of the law of torts in Pakistan, to show how it works in a country where common law and Islamic law reside side by side. The causes due to which the law of torts has failed to develop in Pakistan will then be identified. The major jurisdictions in the common law world that have abolished these

[3] See, in particular, the sections dealing with assault, trespass, and defamation in the Pakistan Penal Code, 1860.

doctrines will then be identified and the reasons for the abolition will be explained. The case for abolishing the doctrines of champerty and maintenance in Pakistan will be built up and the benefits to be attained will be identified and explained. The conclusion will build on the findings of the paper and make concrete proposals in terms of the practical steps that are to be taken for initiating a comprehensive tort law reform program.

## THE LAW OF TORTS AS APPLIED IN PAKISTAN

### Justice, Equity and Good Conscience

The application of English common law in India started in earnest in 1726, through the Parliamentary Charter of George I. Mayor's courts were established in Madras, Bombay and Calcutta. These courts were required to apply the English common law with "justice and right." The power and influence of the British increased gradually till a Supreme Court of Judicature was established in the Presidency towns, with the authority of King's Bench in England, applying the law of torts, among other laws, through "justice, equity and good conscience" with adjustments according to local conditions. A variety of courts existed till the Indian High Courts Act, 1861 was passed. The

jurisdiction of British courts and hence the application of the law of torts increased till the partition of India.

§ 18(3) of the Indian Independence Act, 1947[4] read as follows:

> (3) Save as otherwise expressly provided in this Act, the law of British India and of the several parts thereof existing immediately before the appointed day shall, as far as applicable and with the necessary adaptations, continue as the law of each of the new Dominions and the several parts thereof until other provision is made by laws of the Legislature of the Dominion in question or by any other Legislature or other authority having power in that behalf.

This section was adopted in the series of constitutions of Pakistan: 1956,[5] 1962,[6] 1972[7] (interim). Article 268 if the 1973 Constitution[8] now reads as follows: "268(1) Except as provided by this Article, all existing laws shall, subject to the Constitution, continue in force, so far

[4] Indian Independence Act, 1947. 10 & 11 Geo. 6. CH. 30.
[5] The Constitution of the Islamic Republic of Pakistan, 1956.
[6] The Constitution of the Islamic Republic of Pakistan, 1962.
[7] The Interim Constitution of the Islamic Republic of Pakistan, 1972.
[8] The Constitution of the Islamic Republic of Pakistan, 1973.

as applicable and with the necessary adaptations, until altered, repealed or amended by the appropriate Legislature."

The English common law thus applies directly in the Islamic Republic of Pakistan through the law of torts. The broad policy for applying this law is "justice, equity and good conscience," which really means "judicial discretion" according to the Positivists like Austin. The law of torts was not codified, except the effort by Fredrick Pollock noted below.

In some areas, the law has been codified. These are either torts or related systems of compensation. The Defamation Ordinance, 2002 is a good example. Defamation is a crime too under the Pakistan Penal Code. When codification takes place in some are, as in the case of defamation, the common law may be said to shrink to the extent of the provisions of such codified law, but the common law continues to apply to fill the gaps left in the law. The law of defamation has been codified in the United Kingdom (Defamation Act, 1996),[9] Australia (Queensland Defamation Act, 2005)[10] and New South Wales (Defamation Act, 2005)[11] as well as in Canada. The Australian

[9] Defamation Act, 1996.
[10] Defamation Act No. 55 of 2005.
[11] Defamation Act, 2005 No. 77.

codified law, for example, does not attempt to define defamation. This means that the definition of defamation in the common law will apply. The same method applies to Pakistan, that is, if the codified provisions have not altered a common law rule, it will continue to apply.

**Court-fee and the British**

The British were interested in preserving their revenue that they collected from India. This required minimum litigation. Accordingly, heavy court-fee was imposed. This discouraged tort claims, and made the protection of the law of torts unreachable for the poor masses. It is only in the last decade that this fee has been reduced to Rs. 25000 and less in Islamabad. The expensive process of litigation still prevents the poor from seeking relief under the law of torts.

**No Codification**

Sir Fredrick Pollock prepared a draft and presented it as a proposal to the Indian government for codification. This proposal was not accepted. The Bill is found as an appendix to his book: "A Bill to define and amend certain parts of the Law of Civil Wrongs." It consists of 9 chapters and 73 sections. Chapter VII deals with the tort

of nuisance, that is, damage arising out of public nuisance and the tort of private nuisance.[12] It was an excellent effort and worth reading. Perhaps, it can still be used to codify the law of tort.

## THE MEANING OF CHAMPERTY AND MAINTENANCE

Maintenance, in the context of torts and litigation in general, means the "stirring up of litigation by giving aid to one party to bring a claim without just cause or excuse."[13] The target of this doctrine, *inter alia*, is the lawyer. The purpose is to discourage frivolous litigation. It means that lawyers should not aid and encourage people to file cases where genuine causes of action do not exist. In Pakistan, there is abundant frivolous litigation despite the application of this doctrine, but the cause may not be lawyers; it is usually the litigants who seek personal satisfaction or are motivated by a desire to seek revenge.

"[C]hamperty is the particular form of maintenance which exists when the person maintaining the litigation is to be rewarded out of its proceeds."[14] This doctrine means that if a lawyer helps a person with

[12] Sir Frederick Pollock, *The Law of Torts: A Treatise on the Principles of Obligations arising from Civil Wrongs in the Common Law,* 4th ed. (London: Stevens and Sons, 1895), 527–83.
[13] W.V.H. Rogers, *Winfield and Jolowicz: Tort* (London: Sweet & Maxwell, 2006), 876.
[14] Ibid.

the understanding with his client that the damages awarded to the client will be shared by them, then this is unlawful.

The Ontario Court of Appeal in *McIntyre Estate v. Ontario (Attorney General)*,[15] described maintenance and champerty as follows:

> Maintenance is directed against those who, for an improper motive, often described as wanton or officious intermeddling, become involved with disputes (litigation) of others in which the maintainer has no interest whatsoever and where the assistance he or she renders to one or the other parties is without justification or excuse. Champerty is an egregious form of maintenance in which there is the added element that the maintainer shares in the profits of the litigation.[16]

These doctrines arose in medieval England, at a time when there was a general disregard for litigation and an understanding that lawsuits were an evil to be avoided whenever possible.[17] At common law, maintenance and champerty were both crimes and torts, as was

[15] [2002] 61 O.R. (3d) 257 (C.A.).
[16] Ibid. 265-266.
[17] Max Radin, "Maintenance by Champerty," *CALIF. L. REV.* 24 (1935): 48-78, 68 as cited in Jason Lyon, "Revolution in Progress: Third Party Funding of American Litigation," *UCLA L. Rev.* 58 (2010): 571-609, 575.

barratry.[18] But, since the passing of Criminal Law Act 1967 in the United Kingdom, these doctrines are no more considered as crimes and torts.[19]

**Abolition of Champerty and Maintenance in the USA**

In modern times these two doctrines were resisted. The defences advanced were so numerous and "imposing liability for" these acts "so outdated that the law ceased to serve any useful purpose."[20]

The principal practical importance of champerty has been "to invade contingency fee arrangements."[21]Contingency fee agreement should not be confused with conditional fee. Conditional fee means that the client can pay later, on completion of the court proceedings. There is no problem with this; the main problem is with "contingent fee," which is "an arrangement between a solicitor and client for the payment of fee only if the client wins the case." This is still considered against public policy in some jurisdictions including Pakistan.

[18] Barratry is bringing of vexatious litigation or litigation for the purpose of harassment or profit.

[19] Sections 13(1)(a) and 14(1) of the Criminal Law Act, 1967 as cited in W.V.H. Rogers, *Winfield and Jolowicz: Tort* (London: Sweet & Maxwell, 2006), 876.

[20] W.V.H. Rogers, *Winfield and Jolowicz: Tort* (London: Sweet & Maxwell, 2006), 876.

[21] Also called as 'Damages-based agreements' (DBAs). DBAs are a type of 'no win, no fee' agreement under which a lawyer can recover an agreed percentage of a client's damages if the case is won, but will receive nothing if the case is lost.

Maintenance and champerty[22] were introduced into American legal system through the common law, but debates about their continuing validity have existed nearly as long as the U.S. legal system itself.[23] Courts began to question the utility and effectiveness of these doctrines as early as the middle of the nineteenth century.[24] Scholars like Max Radin, who objected the doctrines of maintenance and champerty in his study in 1935, argued that these doctrines were almost dead in practice and absolutely out of step with American thinking regarding litigation at that time.[25]

In the United States, or in most states, the doctrines of maintenance and champerty stand abolished and even contingent fee is allowed. Contingency fees are permitted by all the courts in the USA to facilitate the plaintiffs without any financial means providing them with an opportunity to file a lawsuit.[26] Contingency fees have been permitted on the principle that allowing a plaintiff with a successful

[22] It includes legal financing, also known as litigation financing, third party funding, legal or litigation funding.
[23] Jason Lyon, "Revolution in Progress," 581.
[24] Ibid.
[25] Max Radin, "Maintenance by Champerty," 48.
[26] Susan Lorde Martin, "The Litigation Financing Industry: The Wild West of Finance Should Be Tamed, Not Outlawed," *FORDHAM J. CORP. & FIN. L.*10 (2004): 55-77, 55- 57 ; See also Paul H. Rubin, "Third Party Financing of Litigation," *Northern Kentucky Law Review* 38 (2011): 673-685, as cited in Nicolas Dietsch, "Litigation Financing in the U.S., the U.K., and Australia: How the Industry has Evolved in Three Countries." *Northern Kentucky Law Review* 38 (2011): 687-711, 689.

claim to pursue justice is more important than preventing champerty, which can effectively be eliminated through the supervision of the court.[27] In 1997, the Massachusetts Supreme Court in *Saladini v. Righellis*[28] ruled that the doctrines of maintenance and champerty "no longer shall be recognized in Massachusetts." The court reasoned that: "The champerty doctrine is [no longer] needed to protect against the evils once feared: speculation in lawsuits, the bringing of frivolous lawsuits, or financial overreaching by a party of superior bargaining position." The court explained that new tools such as fee regulations, sanctions rules and the doctrines of unconscionability, duress and good faith provide sufficient safeguards to protect against the "evils" the common law doctrines were originally intended to address.[29] The Supreme Court of South Carolina adopted the *Saladini* analysis in *Osprey v. Cabana Limited Partnership*[30] in 2000.

During the course of twentieth century, litigation has been viewed as "a noble tool that can lead to transformative social change."[31] And therefore, third party funding has become increasingly available to US

[27] Susan Lorde Martin, "The Litigation Financing Industry," 55 as cited in Nicolas Dietsch, "Litigation Financing in the U.S., the U.K., and Australia," 689.
[28] 687 N.E.2d 1224 (Mass. 1997).
[29] See, also *Bates v. State Bar of Ariz.*, 433 U.S. 350, 376 n.32 (1977). The Supreme court abandoned the notion that litigation should be "viewed as an evil in itself."
[30] 532 S.E.2d 269 (S.C. 2000).
[31] Jason Lyon, "Revolution in Progress," 588.

litigants in recent years.[32] At least three states –Maine, Ohio and Nebraska have enacted legislation to regulate third party legal funding, and these statutes primarily apply to loans in personal injury suits rather than commercial suits.[33]

**Abolition of Champerty and Maintenance in Jurisdictions other than the UK**

The common law principles of champerty and maintenance have been rejected by many legislatures throughout the world during the 1970's and 80's. Efforts were made in Canada, for example, to follow the United States in this field.[34] Courts of Ontario,[35] Alberta[36] and Nova Scotia[37] have not considered any such arrangements contrary to public policy and viewed them as being capable of promoting access to

[32] UK, Review of Civil Litigation Costs: Preliminary Report, Volume 2 by Lord Justice Rupert Jackson (London: Her Majesty's Stationery Office, 2010).
[33] Jason Lyon, "Revolution in Progress," 575. The statutes are: Maine Consumer Credit Code Legal Funding Practice, Me. Rev. Stat. tit. 9-A, §12 (2009); Nebraska Nonrecourse Civil Litigation Act, Neb. Stat. Ann., § 25-3303 (West 2010); and Non-Recourse Civil Litigation Advances, Ohio Rev. Code Ann. Tit. 13, § 1349.55 (West 2008).
[34] See, for example, Walter C. Williston, *Contingent Fee in Canada*, 6 *Alta. L. Rev.* 184 (1968).
[35] *Metzler Investment GMBH* v. *Gildan Activewear Inc.*, [2009] O.J. No. 3315.
[36] *Hobsbawn* v. *Atco Gas and Pipelines Ltd.*, (May 14, 2009) Calgary 0101-04999 (QB).
[37] *MacQueen* v. *Sydney Steel Corporation*, (October 19, 2010), Halifax 218010 (SC).

justice.[38] It has been maintained that today, contingent fees are now allowed in Australia, Brazil, Canada, the Dominican Republic, France, Greece, Ireland, Japan, New Zealand, the United Kingdom and the United States.[39]

In *Arkin v. Borchard Lines Ltd*,[40] the trial judge commented that, "[i]t is indeed highly desirable that impecunious claimants who have reasonably sustainable claims should be enabled to bring them to trial by means of non-party funding" and further that it is "highly desirable in the interests of providing access for such claimants to the courts that non-party funders … should be encouraged to provide funding, subject always to their being unable to interfere in the due administration of justice…"[41]. The court of Appeal while recognising the beneficial role of these arrangements drew a distiction between the litigation agreements made before court and the arrangements that give effective control in litigation to the funders, thus diminishing the purpose of abolishing champerty.[42]

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[38] Steve Tenai, Nicholas Saint-Martin, "Third Party Funding Of Class Actions," This paper was prepared for the 8th National Symposium on Class Actions, (Osgoode Hall: April 28-29, 2011), 10.
[39] Herbert M. Kritzer, *Risks, Reputations, and Rewards: Contingency Fee Legal Practice in the United States* (Stanford: Stanford University Press, 2004), 258-259.
[40] [2005] EWCA Civ 655.
[41] Ibid. at para. 16.
[42] Ibid. at paras 38-40.

The High Court of Australia has gone a step further and held in *Campbells Cash and Carry Pty Ltd. v. Fostif Pty Ltd.*[43] that it is not contrary to public policy for a commercial or non-party funder to not only finance but, also to control the litigation.[44] Similary, the Supreme Court of Appeal of South Africa decided in *Price Waterhouse Coopers Inc and Others v. National Potato Co-operative Ltd*,[45] that "an agreement in terms of which a person provides a litigant with funds to prosecute an action in return for a share of the proceeds of the action is not contrary to public policy or void."[46]

**Abolition of Champerty and Maintenance in the United Kingdom**

Abolition of maintenance and champerty in the United Kingdom has already been discussed in the previous paragraphs, in different contexts. Here we may mention some of the important provisions once again to recall what has been said above. Both as crimes and torts "maintenance and champerty" have been abolished in the United

[43] [2006] HCA 41.
[44] Steve Tenai, Nicholas Saint-Martin, "Third Party Funding Of Class Actions," This paper was prepared for the 8th National Symposium on Class Actions, (Osgoode Hall: April 28-29, 2011), 7.
[45] [2004] ZASCA 64.
[46] Ibid., at para. 52.

Kingdom.[47] Conditional fee is also allowed in the United Kingdom and § 58 of the UK Courts and Legal Services Act 1990 recognizes such an arrangement. However, contingency fee agreements were considered against public policy. But, since April 2013, under the Damages-Based Agreements Regulation of 2013,[48] contingency fee agreements are now permitted in the United Kingdom. This implies that lawyers can legally conduct litigation as well as arbitration in return of a share of any damages. Previously it was only allowed for employment and other tribunal work. The U.K. relaxed its laws regarding champerty in recent decades to increase access to justice for less priviledged and to lessen taxpayer's expenditures on the state's legal aid system.[49] The abolition of the champerty and the introduction of the conditional fee agreements resulted in the expansion of litigation financing in the UK.[50] In this regard, *Arkin v. Borchard Lines, Ltd.*,[51] has worked as a vehicle for the development and growth of this

[47] Sections 13(1)(a) and 14(1) of the Criminal Law Act, 1967 as cited in W.V.H. Rogers, *Winfield and Jolowicz: Tort* (London: Sweet & Maxwell, 2006), 876.
[48] This regulation came into force on 1st April 2013. Section 45 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) amends section 58AA of the Courts and Legal Services Act 1990 to permit damages-based agreements (DBAs). Certain requirements that DBAs must meet in order to be enforceable are set out in the Damages-Based Agreements Regulation 2013.
[49] Susan Lorde Martin, "The Litigation Financing Industry," 73.
[50] Ibid.
[51] [2005] EWCA Civ 655.

industry in the UK.[52] In addition to *Arkin*, the Civil Justice Council, through its report on improving the access to justice in the UK, has supported litigation financing.[53] It has noted that courts in the UK recognise litigation financing as permissible means of funding lawsuits and, that plaintiff's right of access to justice should be given preference over the doctrines of champerty and maintenance.[54] The Civil Justice Council concluded that, subject to the rules in *Arkin*, legal funding should be encouraged.[55] And recommended the implementation of regulation to protect the claimants and attorney-client relationship.[56]

All this has been adopted to provide an adequate solution to access to justice problems for poor indiviuals and similar steps need to be taken in Pakistan as well.

**The Discussions in India**

As recorded in an Indian case (*Dr. V.A. Babu v. State of Kerala*),[57] the law of maintenance and champerty was applied in a different way in India:

[52] Susan Lorde Martin, "The Litigation Financing Industry," 73.
[53] Nicolas Dietsch, "Litigation Financing in the U.S., the U.K., and Australia," 700.
[54] Ibid.
[55] Ibid.
[56] Ibid.
[57] 2010 (9) SCR 1039.

> Following the judgment of the Supreme Court in AIR 1954 S.C. 557 their Lordships held that if no Advocates are involved in the agreement, the agreement does not become illegal or enforceable in India for the only reason that the same is Champerty. The agreement which was considered by the Supreme Court in AIR 1954 S.C. 557 was an agreement between an Advocate and a litigating claimant under which it was agreed that the entire litigation will be financed and conducted by the Advocate without claiming any charges in advance but once the fruits of the litigation are realized, the Advocate will be given 50% of the same. The Supreme Court did not enforce the agreement noticing that an advocate was involved.

But the distinction between the law in England and the Indian law regarding Champerty agreements is that while in England Champerty agreements, whoever the parties to the same are, are per se illegal. [while] in India such agreements become per se illegal only if advocates are involved.

Contingency fee agreements are not permitted in India as well. The Indian Bar council prohibits lawyers from charging fees to their clients

contigent on the results of the litigation or claim a percentage or share in the damages awarded by the court.[58] In the landmark case of *Ganga Ram v. Devi Das*,[59] the court held such an agreement to be void and against public policy and also against professional ethics.

The law in Pakistan appears to be the same. Whatever the position in Pakistan, it is suggested that *contingent fee for a lawyer should be allowed in tort cases.* Failing this, the rights of the poor people, who do not have the resources to go to courts with their tort claims, will go waste. The law of torts will remain "the rich man's game." The power of the law must be unleashed for the sake of the poor and their rights. This will open the door for the development of tort law in Pakistan. So far, growth in this very important branch of the law stands arrested.

**Litigation financing or third-party funding**

In addition to conditional fee agreements and contigent fee arrangements, litigation financing industry also emerged during 1990s, first in the USA, then the UK followed by Australia.[60] These companies, through contractual arangements, provide money for

[58] Bar Council of India Rules, Part VI, Chapter II, Section II, Rule 20: "An advocate shall not stipulate for a fee contingent on the results of litigation or agree to share the proceeds thereof."
[59] 61 P.R. (1907).
[60] Nicolas Dietsch, "Litigation Financing in the U.S., the U.K., and Australia," 705.

different expenses including lawyer fees, court costs, expert witness fees, and plaintiff's living expenses while the litigation is pending.[61] In return, third party receives a percentage from the proceeds, if the litigant is successful. Litigation financing companies in the USA at present deal with all kinds of lawsuits including personal injury, patent litigation, copyright infringement, and employment discrimination.[62] In the UK, the abolition of champerty and maintenance and introduction of conditional fee agreements opened a way for third-party funding.[63] Consequently, contingent fee arrangements have also been allowed under the UK law.[64]

The litigation financing industry is still developing in the U.K.[65] However, in Australia, the funding industry has become widely accepted and more successful than the U.S. and the U.K. in incorporating financing agreements into the state's legal system.[66] Australia has been more receptive to litigation financing agreements

[61] Ibid., 688.
[62] Ibid., 693.
[63] Ibid., 699. See also *Arkin v. Borchard Lines Lt.* [2005] EWCA Civ 655.
[64] Damages-Based Agreements Regulation of 2013.
[65] Nicolas Dietsch, "Litigation Financing in the U.S., the U.K., and Australia," 702.
[66] See Standing Committee of Attorneys-General, Discussion Paper on Litigation Funding in Australia, 4 (May 2006) as cited in ibid.

than the U.S. or the U.K.[67] The Supreme Court of New South Wales in *Domson Pty. Ltd. v. Zhu,*[68] refused to terminate a financing agreement on the grounds that the financing firm had controlled too much of the litigation. The court argued that third-party funding agreements are not against publuc policy.[69] And even went so far as to point out the irony of suing a financing firm that has been hired to finance litigation, on the terms of the original agreement.[70]

The development of litigation finance industry in the U.S., the U.K. and Australia has provided access to justice to needy and poor plaintiffs. Pakistani legal system can also ensure better access to justice to impoverished by making rules and intiating legal financing industry in the country.

**Abolishing the doctrines in pakistan**

The purpose for which these doctrines were introduced has almost no practical importance and utility in the present times. The problems meant to be addressed by the doctrines can be more efficiently and

[67] Nicolas Dietsch, "Litigation Financing in the U.S., the U.K., and Australia," 703. See also, *Campbells Cash and Carry Pty Ltd. v. Fostif Pty Ltd.* [2006] HCA 41.

[68] [2005] N.S.W.S.C. 1070, 1070.

[69] Ibid., 1071.

[70] [2005] N.S.W.S.C. 1070, 1071. See also, *QPSX Commc'ns Pty. Ltd. v. Ericsson Austl. Pty. Ltd*., [2005] 219 A.L.R. 1.

effectively remedied by various modern rules of procedure.[71] Instead these doctrines have blocked the way of justice for the underprivileged. The doctrines of maintenance and champerty have long been given away by the United Kingdom, and by many other common law jurisdictions including the United States. And now contingency fee agreements have also been allowed in the United Kingdom. Pakistan is a common law country but still these doctrines have not been abolished from its legal system. This issue has not gained prominence in Pakistan and very rare case law is available on this point. The debate of litigation financing in the courts has revovled around section 23 of the Contract Act, 1872 which states that, "any consideration or object of an agreement is unlawful if it is opposed to public policy." The courts, relying upon the common law principles of champerty and maintenece, have declared third party funding agreements void under section 23 and thus considering them opposed to public policy.

Whereas now in many states, litigation funding agreements are not *per se* considered to be contrary to public policy. And the courts of all such jurisdictions have held that legal funding arrangements, though

[71] *Saladini v. Righellis*, 687 N.E.2d 1224, 1226–27 (Mass. 1997).

champertous, may still be enforceable if these are not unconscionable and exorbitant. Such arrangements, however, need to be carefully scrutinised by the courts and if they are found to be for improper purpose, unconscionable, inequitable, oppressive or one leading to vexatious litigation, the courts would refuse to enforce them.

Contingent fee agreements are also not allowed in Pakistan. Under Rule 149 of the Canons of Professional Conduct and Etiquettes of Advocates,[72] approved and adopted by the Pakistan Bar Council, an advocate cannot "accept the whole or part of the property in respect of which he has been engaged to conduct the case, in lieu of his remuneration, or as a reward or bounty."[73] These Canons need a thorough reexamination in any case, so that archaic and ancient cumbersome requirements are removed.

The issue of third-party funding can also be examined under Order 1, Rule 10 of Code of Civil Procedure, 1908 where court may strike out or add parties. Order 1 Rule 10(2) states that,

> The Court may at any stage of the proceedings either upon or without the application of either party and on such terms as may

[72] Canons of Professional Conduct and Etiquettes of Advocates, B- Conduct with regard to Clients, Rule 149, Chapter XII, Pakistan Legal Practitioners & Bar Council Rules, 1976.
[73] Ibid.

> appear to the Court to be just, order that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely, to adjudicate upon and settle all the questions involved in the suit, be added.

The courts have decided in several cases that only necessary or proper parties can be added and not any other parties.[74] Elaborating necessary or proper party, courts argued that persons indirectly or remotely interested are not necessary or proper parties[75] and the persons who have no interest should not be added.[76] Further, a person who has a champertous interest in litigation should not be added.[77] Courts have heavily relied upon these precedents to apply the ancient and obsolete common law principles of maintenance and champerty. It is now time for the legislature, courts and advocates to take a new course for promoting access to justice for a common man. Australian legislation for abolishing maintenance, champerty and barratry is one

[74] A 1951 M 665, A 1934 N 228.
[75] 1996 SCMR 781, 1996 CLC 678, P 1972 L 169, A 1941 FC 16, A 1943 A 289, 20 IC 658, 1996 CLC 456, P 1996 K 467, A 1918 PC 49.
[76] PLJ 1975 SC 345, 2004 CLC 1567, 1994 MLD 1489, A 1937 M 200, A 1929 B 353.
[77] 2004 MLD 1395, 1996 CLC 678, 1996 SCMR 781.

of the simplest legislation, consisting of only 6 sections.[78] Pakistani legislature may follow this Australian model for making a draft and introducing it in the parliament.

[78] Maintenance, Champerty and Barratry Abolition Act, 1993.

## CONCLUSIONS

In conclusion we may say that legislation be made to cure this chronic illness in our legal system. The law to be passed may appear something like the following:

### Maintenance and Champerty Abolition Act, 2015

**Preamble:** Whereas it is expedient to abolish the ancient and now obsolete doctrines of maintenance and champerty, and to streamline and facilitate the charging of contingency fee and provision of third-party funding of litigation;

And Whereas it is crucial for supporting the deprived and underprivileged through litigation funding to protect themselves against injuries caused and to secure their rights;

Now, Therefore, it is enacted as follows:

1. **Name of Act.**---This Act may be called the Maintenance and Champerty Abolition Act, 2015.
2. **Commencement.**---It shall come into force at once.
3. **Champerty and Maintenance no longer civil wrongs or offences.**---Notwithstanding anything in the law for the time

being in force, champerty and maintenance are neither offences nor civil wrongs, and no contract will be declared void or unenforceable merely on grounds that it is champertous or involves an element of maintenance.

4. **Advocates, Lawyers and Third-Parties permitted to support and fund litigation.**---Any person may seek support from a lawyer, advocate, attorney or a third-person, private individual or company/corporation, to fund and finance his litigation and legal actions, whether this is in lieu of some kind of fee arrangement or the sharing of damages or cost awarded as a result of such litigation or legal action.

5. **Contracts based on funding and financing for litigation to be valid.**---All contracts concluded under section 4 shall be valid and enforceable.